

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

ANDREW GREGORY TASHBAR,

Case No. 6:08-bk-11518-ABB

Chapter 7

Debtor.

_____/

MICHAEL INGRAM and
ELSPETH INGRAM

Plaintiffs,

Adv. Pro. No. 6:09-ap-00069-ABB

vs.

ANDREW GREGORY TASHBAR,

Defendant.

ORDER

This matter came before the Court on the Motion for Summary Final Judgment (Doc. No. 23) filed by the Plaintiffs Michael Ingram and Elspeth Ingram requesting the entry of a final judgment on their Complaint (Doc. No. 1) pursuant to 11 U.S.C. Section 523(a)(2)(A) and the Objection thereto (Doc. No. 26) filed by the Debtor/Defendant Andrew Gregory Tashbar. Plaintiffs' Motion is due to be denied for the reasons set forth herein.

State Court Judgments

Plaintiffs instituted a Florida State Court civil action against the Debtor and Richard Metheny in 2005 relating to Plaintiffs' purchase of real property from the Debtor

and Mr. Metheny. Plaintiffs alleged breach of contract (Count I) and fraud in the inducement (Count II) causes of action against the Debtor and Mr. Metheny.¹

The Florida State Court conducted a jury trial and the jury found in favor of Plaintiffs on Counts I and II of their Complaint. The jury's Verdict Form² sets forth regarding Count I:

1. Did the Plaintiff, the INGRAMS, prove by the greater weight of the evidence that the Defendants, METHENY and TASHBAR, materially breached the contract?

The jury answered yes.

2. What is the amount of money damages that the Plaintiffs, the INGRAMS, should be awarded for the Defendants['], METHANY and TASBAR's, breach of contract?

The jury awarded Plaintiffs \$25,000.00. The Verdict Form sets forth regarding Count II:

4. Did the Plaintiffs, the INGRAMS, prove by the greater weight of the evidence that the Defendant, TASHBAR, fraudulently induced them into this transaction?

The jury answered yes and awarded Plaintiffs \$60,000.00 for the Debtor's fraudulent inducement.

The State Court entered two judgments in favor of Plaintiffs and against the Debtor and Metheny:

- (i) the Final Judgment entered on June 5, 2008 pursuant to which Plaintiffs were awarded \$25,000.00 against the Debtor and Metheny jointly and severally, and Plaintiffs were awarded \$60,000.00 against the Debtor individually; and
- (ii) the Supplemental Final Judgment Awarding Attorney's Fees entered on October 7, 2008 pursuant to which Plaintiffs were awarded attorney's fees of \$85,027.00 against the Debtor individually.

¹ Doc. No. 23, Ex. 4.

² *Id.*, Ex. 5.

The State Court Judgments do not contain substantive findings of fact or conclusions of law. They award Plaintiffs monetary amounts without delineating the factual and legal grounds for such awards. The Supplemental Final Judgment does not delineate how the fee award relates to or should be apportioned between Counts I and II of Plaintiffs' State Court Complaint.

Adversary Proceeding

The Debtor filed a Chapter 7 case on December 3, 2008. Plaintiffs assert the Judgment debt totaling \$170,027.00 awarded to them in the State Court proceeding is nondischargeable pursuant to 11 U.S.C. Section 523(a)(2)(A). Plaintiffs contend they are entitled to summary judgment on their Complaint based upon the collateral estoppel effect of the State Court Judgments. Plaintiffs, in support of their Motion for Final Summary Judgment, presented their State Court Complaint, the jury Verdict Form, and the State Court Judgments.

The party objecting to the dischargeability of a debt carries the burden of proof and the standard of proof is preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). Exceptions to discharge “should be strictly construed against the creditor and liberally in favor of the debtor.” Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986).

Section 523(a)(2)(A) of the Bankruptcy Code provides a discharge pursuant to 11 U.S.C. Section 727 does not discharge an individual from any debt “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—”

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

11 U.S.C. § 523(a)(2)(A). Plaintiffs must establish the traditional elements of common law fraud to prevail in a Section 523(a)(2)(A) action: (1) Debtor made a false representation with the purpose and intent to deceive Plaintiffs; (2) Plaintiffs relied on the misrepresentation; (3) the reliance was justified; and (4) Plaintiffs sustained a loss as a result of the misrepresentation. SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998); Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 350 (11th Cir. 1996). Plaintiffs must establish each of the elements by a preponderance of the evidence. Grogan, 498 U.S. at 291; In re Wiggins, 250 B.R. 131, 134 (Bankr. M.D. Fla. 2000).

Analysis

Collateral estoppel principles apply to dischargeability proceedings. Grogan, 498 U.S. at 285. Collateral estoppel is applicable in a nondischargeability proceeding where: (i) the issue in the prior action and the issue in the bankruptcy action are identical; (ii) the bankruptcy issue was actually litigated in the prior action; (iii) the determination of the issue in the prior action was a critical and necessary part of the judgment in that litigation; and (iv) the burden of proof in the dischargeability proceeding must not be significantly heavier than the burden of proof in the prior action. Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush), 62 F.3d 1319, 1322 (11th Cir. 1995). Whether to apply the doctrine of collateral estoppel in a particular case “is a matter of trial court discretion.” Balbirer v. Austin, 790 F.2d 1524, 1526 (11th Cir. 1986).

Plaintiffs brought breach of contract and fraud in the inducement causes of action against the Debtor in the State Court proceeding. Plaintiffs, for their breach of contract cause of action, were required to establish pursuant to Florida State law: (i) the existence

of a contract; (ii) a material breach of that contract; and (iii) damages resulting from the breach. Rollins, Inc. v. Butland, 951 So. 2d 860, 876 (Fla. 2d DCA 2006).

The elements of a breach of contract cause of action do not correspond to the elements of a Section 523(a)(2)(A) nondischargeability cause of action. A breach of contract cause of action, without more, does not “give rise to a non-dischargeable debt.” In re Nunez, 400 B.R. 869, 876 (Bankr. S.D. Fla. 2008).

Plaintiffs, for their fraud in the inducement cause of action, were required to establish pursuant to Florida State law: (i) a false statement concerning a material fact; (ii) the statement maker’s knowledge that the representation is false; (iii) intent that the representation induces another’s reliance; and (iv) consequent injury by the party acting in reliance on the representation. Thompkins v. Lil’ Joe Records, Inc., 476 F.3d 1294, 1315 (11th Cir. 2007).

The elements of a fraud in the inducement cause of action are similar, but not identical to the elements of a Section 523(a)(2)(A) nondischargeability cause of action. Fraud in the inducement includes reliance as an element, but does not require the plaintiff to establish such reliance was reasonable or justifiable. *Justifiable* reliance is a fundamental element of a Section 523(a)(2)(A) cause of action. A plaintiff’s burden regarding the reliance element is heavier in a Section 523(a)(2)(A) cause of action than in a fraud in the inducement cause of action because the plaintiff must establish his reliance was justified rather than mere reliance.

Plaintiffs pled in their State Court Complaint they “reasonably relied upon the misrepresentations made by” the Debtor and Mr. Metheny.³ “Reasonable reliance” is a

³ Doc. No. 23, Ex. 3.

more stringent standard than “justifiable reliance,” which the United States Supreme Court defined as an intermediate level of reliance. Field v. Mans, 516 U.S. 59, 75 (1995).

“Justifiable reliance” is a higher level of reliance than “mere reliance.” Id.

Plaintiffs failed to establish what level of reliance—reasonable, justifiable, or mere reliance—was litigated in the Florida State Court proceeding. The Verdict Form and the Judgments do not set forth any findings regarding reliance. Plaintiffs did not present any jury instructions or other documents establishing what level of reliance was actually litigated in the State Court proceeding.

The State Court Judgments do not contain substantive findings of fact or conclusions of law. The State Court Judgments do not contain findings of fact or conclusions of law establishing any of the elements of a Section 523(a)(2)(A) nondischargeability cause of action. The State Court Judgments, standing alone, do not have collateral estoppel effect as to the Section 523(a)(2)(A) nondischargeability elements.

The exhibits presented by Plaintiffs taken as a whole do not establish the elements of a Section 523(a)(2)(A) nondischargeability cause of action. Plaintiffs have not established each of the elements of a Section 523(a)(2)(A) cause of action, namely the element of justifiable reliance, was actually litigated in the Florida State Court action. Plaintiffs have not established the material facts that would entitle them to summary judgment pursuant to 11 U.S.C. Section 523(a)(2)(A). They have not established they are entitled to judgment as a matter of law pursuant to 11 U.S.C. Section 523(a)(2)(A). Plaintiffs’ Motion for Summary Final Judgment is due to be denied pursuant to Federal Rule of Civil Procedure 56(c).

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Plaintiffs' Motion for Summary Final Judgment (Doc. No. 23) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that a status conference on Plaintiffs' Complaint shall be held on July 11, 2012 at 1:30 p.m.

Dated this 12th day of June, 2012.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge