UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re

RAYMOND F. BOHRER, JR., **CASE NO. 92-21223**

Debtor.

MARINE MIDLAND SERVICES CORPORATION, **A.P. No. 92-2094**

Plaintiff,

v. **DECISION & ORDER**

RAYMOND F. BOHRER, JR.,

Defendant.

BACKGROUND

On May 1, 1992, Raymond F. Bohrer, Jr. (the "Debtor") filed a petition initiating a Chapter 7 case. On his schedules the Debtor listed Marine Midland Bank as holding a 1987 claim for "[d]eficiency on boat and fraud" in the amount of $500,000. On August 4, 1992, Marine Midland Services Corporation ("Marine") commenced an adversary proceeding against the Debtor to have the Court determine the amounts due to it from the Debtor to be nondischargeable pursuant to Sections 523(a)(2) or 523(a)(6). The Complaint alleged that: (1) the Debtor was a principal of Pompano Blue Lagoon, Inc. ("Blue Lagoon"), a Florida corporation, and that Blue Lagoon, as seller, had entered into a February 17, 1988 retail installment contract (the "Contract") with Alan M. Stevens and Charles R. Mitchell (the "Buyers") for the purchase of a 43 foot 1988 Wellcraft San Remo (the "Boat"); (2) the Contract was thereafter assigned to Marine; (3) the Debtor had signed the Contract for Blue Lagoon and was responsible for the representation in the Contract that a certain downpayment had been made; (4) after the execution of the Contract, the Debtor represented to Marine that certain dealer options, including a video chart plotter, a custom teak table, four fishing

chairs and a Bimini top with four sides had been delivered and installed on the Boat but that this was not true, and that the Debtor knew or should have known that the options had not been delivered and installed on the Boat; (5) Marine did not know these representations were false when made but reasonably relied upon them and was induced to pay valuable consideration for the assignment of the Contract and to extend credit to the Buyers; (6) the Buyers had defaulted on the Contract by failing to pay Marine the installment due June 18, 1988 and subsequent installments; and (7) after deductions for all payments made and proceeds received on the disposition of the Boat, the amount due under the Contract was $263,373.36 plus interest.

The Answer filed by the Debtor on September 1, 1992 denied the allegations that the Debtor had made any false representations to Marine regarding the downpayment, alleged that the signature at the bottom of the contract was not genuine and stated that the Debtor had paid Marine a separate check in the amount of $49,000 for the items that were not delivered and installed on the Boat.

Prior to the Debtor filing his bankruptcy case, a Florida state court action, Case No. 90-35686, was commenced in this matter in the Seventeenth Judicial Circuit for Broward County, Florida against the Debtor, Blue Lagoon, Terri Bohrer, and Marsha Doersam (the "Florida Action"). At the time the Debtor filed his bankruptcy petition, the Florida Action had proceeded to the point where two depositions had been conducted, the Debtor had filed an answer, a motion to dismiss by the Debtor and other defendants had been denied and Marine had made a motion for partial summary judgment. An order granting the partial summary judgment had been entered on June 29, 1992 which fixed Marine's damages at $260,919.36, after deducting $175,000 received as the result of the sale of the Boat by Marine as a secured creditor.

The Court conducted a pretrial conference in this adversary proceeding on October 20, 1992 during which the status of the Florida Action and the fact that it involved other defendants were discussed. At the close of the conference, the Court issued a scheduling order which provided that

an adjourned pretrial conference would be held on November 24, 1992 and in the interim "[p]arties will discuss having issues resolved by completion of pending state court (Fla.) action." After the November 24, 1992 pretrial conference during which the attorneys for the parties indicated that they were discussing an agreement to have the stay modified so that the Florida Action could continue, the proceeding was adjourned to December 22, 1992 for a further pretrial conference. After the December 22, 1992 pretrial conference during which the attorneys for the parties indicated that they had agreed to have the stay lifted and the Florida Action proceed, a final scheduling order was issued which provided that the "stay will be lifted to allow pending Florida litigation to proceed. Stipulation will be filed by January 15, 1993. This Adversary Proceeding will remain pending until the determination of the State Court litigation."

Thereafter, a January 15, 1993 Stipulation and Order was filed with the Court and entered that same date (the "Florida Action Stipulation and Order"). The Stipulation and Order provided that: (1) the parties agreed that during the pendency of the Florida Action Marine and the Debtor had engaged in substantial discovery and the action was placed on the trial calendar for the period of July 13, 1992 through July 24, 1992; (2) the Florida Action had been stayed as a result of the Debtor's filing; (3) the gravamen of the Complaint against the Debtor in the Florida Action alleged that he defrauded Marine; (4) in the interest of an economical resolution of the issues raised in the adversary proceeding and the Florida Action all issues should be heard and determined by Florida state courts (except specifically relating to bankruptcy matters) and the automatic stay provided by Section 362 should be lifted to allow the Florida Action to continue; (5) any final determination by the Florida state courts that the Debtor did not defraud Marine in connection with the transaction would constitute a final determination that the debt was not nondischargeable pursuant to Sections 523(a)(2) and 523(a)(6) and the adversary proceeding would be dismissed on the merits; and (6) any final determination by the Florida state courts that the Debtor defrauded Marine would be submitted

to the Bankruptcy Court for a determination, based on the record, proceedings, and rulings in the Florida action, as to whether the debt shall be deemed nondischargeable pursuant to Sections 523(a)(2) and 523(a)(6) of the Code.

By motion (the "Marine Motion") dated August 20, 1993 and returnable September 8, 1993, Marine moved for the entry of an order determining that a May 14, 1993 judgment entered against the Debtor in the Florida Action (the "Florida Action Judgment") was nondischargeable.

From the Marine Motion papers, it appears that: (1) the Florida Action was set for trial during the one week period beginning May 3, 1993 before the Honorable Miette K. Burnstein; (2) the order setting the Florida Action for trial was dated March 30, 1993 and a copy was sent to the Debtor; (3) on April 22, 1993, Marine served the Debtor with its witness and exhibit lists in preparation for the trial which included James Meere, an employee of Marine, and Randy Waech d/b/a The Canvass Man; (4) a trial of the Florida Action convened on May 3, 1993; (5) the Debtor failed to appear; (6) Marine proceeded to present its case against the Debtor with the testimony of James Meere and the introduction of several exhibits; (7) the testimony of Mr. Waech, who was present to testify to a forged invoice for canvas work submitted to Marine, was also offered; (8) the only issues presented in the trial of the Florida Action were those in the Third Amended Complaint; and (9) the Third Amended Complaint contained three counts but only Count III detailed the allegations against the Debtor and they were in the nature of fraud. The allegations in Count III were in essence that the Debtor had represented in the Contract, which he signed, that a downpayment of $88,252.00 was given but only $10,000.00 was received on the date of the execution of the Contract; that he further represented that certain options were delivered and installed but were not; and that he knew that these representations were false and Marine relied on them.[1]

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[1] Count III of the Third Amended Complaint stated:

32. That said Retail Installment Contract was intentionally drawn up with the above referenced cash down payment designation executed by the Defendant, Raymond F. Bohrer, Jr.

Although no transcript was produced at the trial and the Court did not set forth detailed conclusions of fact or law, at the close of the trial Judge Burnstein indicated that a judgment would be entered in favor of Marine against the Debtor and Blue Lagoon in the amount of $260,919.36. The Florida Action Judgment stated:

> This action was tried before the Court. On the evidence presented and in accord with the Court's Order for Entry of Judgment and Findings of Fact,
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> IT IS ADJUDGED:
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> The Plaintiff, Marine Midland Services Corporation, recovers from

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33. That said cash down payment designation in said Retail Installment Contract, that is, that there was an $88,252.00 down payment was false, and known to be false at the time that Defendant, Raymond F. Bohrer, Jr., executed said contract in that Raymond F. Bohrer, Jr., signed said contract with the figure of $88,252.00 as a down payment, testified that only $10,000.00 was received as of February 17, 1988, the date of execution of said contract.

34. That Defendant, Raymond F. Bohrer, Jr., never informed Plaintiff that the cash figure of $88,252.00 was not received. Defendant, Raymond F. Bohrer, Jr.'s only representation to Plaintiff as to the cash down payment was the amount set forth in the Retail Installment Contract.

35. That Defendant, Raymond F. Bohrer, Jr., never related to Plaintiff that the down payment in the amount of $88,252.00 was not forthcoming.

36. Subsequent to the execution of the Retail Installment Contract, said contract was assigned to the Plaintiff and the Plaintiff paid valuable consideration therefore.

37. Plaintiff relied upon the representation contained in said Retail Installment Contract that there was an $88,252.00 cash down payment in its decision to purchase the Retail Installment Contract from the Defendant, Blue Lagoon.

38. The Plaintiff would not have purchased said Retail Installment Contract but for the representation contained therein regarding the amount of the cash down payment.

39. That Defendant, Raymond F. Bohrer, Jr., signed a second Assignment to Plaintiff further knowing that the amount of down payment represented in the Retail Installment Contract in the amount of $88,252.00 had not been made.

40. In addition to the representations regarding the cash down payment, the Defendant, Raymond F. Bohrer, Jr.'s representation regarding certain options which were allegedly delivered to the purchaser, including but not limited to, a video chart plotter, custom Teak table, and four fishing chairs. A copy of the addendum to invoice and memorandum from Defendant, Raymond F. Bohrer, Jr., to the Plaintiff is attached hereto and made a part hereof as Plaintiff's Exhibit "C".

41. That the Defendant, Raymond F. Bohrer, Jr., represented to the Plaintiff that the above described accessories were to his knowledge on the boat when in fact, never verified that accessories were on the boat and further knew that the accessories were indeed not installed.

42. That these representations of the Defendant, Raymond F. Bohrer, Jr., were false and known to be false at the time they were made to the Plaintiff.

58. As a direct and proximate result of Defendants' fraudulent inducement of the Plaintiff to purchase said Retail Installment Contract, the Plaintiff has suffered substantial damages within the jurisdictional limits of this Court.

59. That Defendants, Raymond F. Bohrer, Jr., Terri Bohrer, and Marsha Doersam at all times material hereto were individual officers and/or agents of the Defendant corporation, Blue Lagoon.

60. The Defendants, Raymond F. Bohrer, Jr., Terri Bohrer and Marsha Doersam performed the fraudulent conduct described in Paragraphs 31-53 in the scope of their employment as corporate officers and/or agents of Blue Lagoon.

61. The Defendants, Raymond F. Bohrer, Jr., Terri Bohrer and Marsha Doersam have engaged in intentional fraudulent misrepresentations constituting tortuous activity subjecting them to personal liability even though such acts were performed within the scope of their employment as corporate officers and/or agents.

> Defendants, Pompano Marine-Blue Lagoon, Inc., and Raymond F. Bohrer, Jr., the sum of $260,919.36 that shall bear interest at the rate of 12% per year for which sums let execution issue.

The Debtor's time to appeal the Florida Action Judgment has expired pursuant to Florida law, and the Judgment is therefore final.

Among the papers filed on behalf of the Debtor in opposition to the Marine Motion were the affidavits of the Debtor (the "Bohrer Affidavit") and the attorney who represented the Debtor at the time of the execution of the Florida Action Stipulation and Order (the "Former Attorney Affidavit"). The thirteen page Bohrer Affidavit consisted of twelve and one-half pages setting forth additional background, defenses and arguments regarding the transactions surrounding Blue Lagoon and the sale, financing and resale of the Boat, and only one short paragraph concerning the Florida Action Stipulation and Order and his failure to appear and participate in the Florida Action.[2]

The Former Attorney Affidavit asserted that notwithstanding the advice of the attorney to the Court at the pretrial conferences conducted in the adversary proceeding that the Debtor did not have the means to defend the Florida Action, the Court directed that the parties enter into a stipulation to have the stay lifted so that the Florida Action could continue, and that the Court's direction was the only reason that the Florida Action Stipulation and Order was negotiated and entered into on behalf

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[2] Paragraph 20 of the Bohrer Affidavit reads:

> Deponent believes that nothing that occurred in the Florida State courts is binding or should be binding on this court. Prior to the matter being relegated to the Florida State courts, deponent's then counsel H. Ronald Buttarazzi, Esq. advised the court that deponent did not have the means to defend the litigation in Florida. Deponent defaulted in the Florida litigation. Deponent has no idea what occurred in the Florida litigation. Marine's motion papers disclose nothing as to findings of fact or conclusion of law, if any, entered by the Florida court.
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> (Bohrer Aff. at 12.)

of the Debtor.

Various additional submissions were made on behalf of Marine and the Debtor, including an affidavit of the attorney for Marine who handled all aspects of the pending adversary proceeding on its behalf which clearly refuted the allegations in the Former Attorney Affidavit that the Florida Action Stipulation and Order was negotiated and entered into because of the mandatory direction of the Court.

DISCUSSION

Under Section 523(a)(2)(A), a debt will be excepted from discharge when it is obtained by "false pretenses, a false representation, or actual fraud." In order for a creditor to prevail on a dischargeability count under this section, four elements must be proven by a preponderance of the evidence: (1) that the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) that the creditor relied on the representation; (3) that the creditor's reliance was reasonably founded; and (4) that the creditor sustained the alleged damages and loss as a result of those misrepresentations. *In re Arguez*, 134 B.R. 55, 58 (Bankr. S.D.Fla. 1991).

The issue of nondischargeability of a debt is exclusively a matter of federal bankruptcy law. *Grogan v. Gardner*, 498 U.S. 279, 284 (1991). However a bankruptcy court must give collateral estoppel effect to those elements of a non-bankruptcy claim that are identical to the elements required for discharge and which were actually litigated and determined by a prior action. *Gardner*, 498 U.S. at 284, 285 n.11. Collateral estoppel or issue preclusion forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit. *In re Greene*, 150 B.R. 282, 285 (Bankr. S.D.Fla. 1993). The principals of collateral estoppel may be applied to foreclose the relitigation of facts in a dischargeability proceeding. *Id.* In considering the preclusive effect of a prior state court judgment, the court must apply the collateral estoppel law of that state. *In re Keene*,

135 B.R. 162, 165 (Bankr. S.D.Fla. 1991). Therefore, this Court must look to the collateral estoppel law of Florida.[3] The three elements required to give preclusive effect to a Florida state court judgment are: (1) whether the issues are identical; (2) whether the parties are identical; and (3) whether the matter has been fully litigated in a court of competent jurisdiction. *Greene*, 150 B.R. at 285. The issues the court considered in *In re Greene* were the same as need to be resolved here: "First, in entering the judgment, did the state court necessarily resolve issues identical to the issues which must be decided to sustain a §523(a)(2) or §523(a)(6) claim? Second, were the issues 'actually litigated' since the judgment was entered after a default?" *Greene*, 150 B.R. at 285.

Under Florida law, even a default judgment is to be given full preclusive effect if the defendant had an adequate opportunity to litigate. *Greene*, 150 B.R. at 287 (citing several Florida cases). In Florida, a default judgment conclusively establishes between the parties, so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action and every fact necessary to uphold the default judgment, but the judgment is not conclusive as to any defense which is not raised and is not necessary to uphold the default. *In re Arguez*, 134 B.R. 55, 58 (Bankr. S.D.Fla. 1991). Under Florida law, a default judgment rendered by a court of competent jurisdiction is not amenable to collateral attack. *Id.* Therefore, the fact that a default was entered against the debtor in a state court action will not preclude a court from applying collateral estoppel to that state court judgment. *Id.* As the Bankruptcy Court of the Middle District of Florida has stated:

> Debtor/defendant could have reasonably foreseen the consequences of not defending an action based in part on fraud. It would be undeserved to give debtor/defendant a second bite at the apple when he knowingly chose not to defend himself in the first instance.

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[3] Nothing in the Florida action Stipulation and Order precluded the application of Florida Collateral Estoppel Law to the Florida Action Judgment.

In re Wilson, 72 B.R. 956, 959 (Bankr. M.D.Fla. 1987)[4].

The standard of proof, preponderance of the evidence, is the same for the Florida state courts as bankruptcy courts and the elements of common law fraud in Florida "closely mirror" the requirements of Section 523(a)(2) and therefore are "sufficiently identical . . . to meet the first prong of the test for collateral estoppel." *In re Powell*, 95 B.R. 236, 239 (Bankr. S.D.Fla. 1989), *aff'd,* 108 B.R. 343 (S.D.Fla. 1989), *aff'd without opinion*, 914 F.2d 268 (11th Cir. 1990). In this case, the only cause of action presented to Judge Burnstein was for fraud both in the misrepresentation of the downpayment in the Retail Installment Contract and the installation of the Boat options. Therefore, the issues in this Section 523(a)(2) nondischargeability adversary proceeding are identical to those in the Florida Action for fraud. However, there were no facts alleged nor punitive damages granted in the Florida Action on which this Court could find the debt to Marine nondischargeable as willful and malicious injury under Section 523(a)(6).

The parties are clearly the same in this adversary proceeding as the Florida Action. Marine was the plaintiff and the Debtor was a defendant in both so that the second prong of the test for collateral estoppel has been met.

As to the third prong, whether the matter has been fully litigated in a court of competent jurisdiction, even though as argued on behalf of the Debtor the Florida Action Judgment may technically have been a default judgment, in that the Debtor did not appear and participate in the trial, the Debtor: (1) had appeared and participated in other phases of the litigation; (2) knew in January, 1993 that Marine had agreed, and Marine and the Bankruptcy Court expected, that the fraud issues would be fully litigated in the Florida Action; (3) had received adequate notice of the May 5,

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[4] This reasoning is especially true when, as in this case, an adversary proceeding for nondischargeability based on fraud was pending, by stipulation and order the issues of fraud were to be fully litigated in a state court trial and the Debtor chose not to appear and fully litigate the fraud issues.

1993 trial in the Florida Action; and (4) had the opportunity to fully participate in the trial in the Florida Action, but chose not to. Furthermore, the only cause of action at the trial in the Florida Action before Judge Burnstein regarding the Debtor was Count III of the Third Amended Complaint which alleged fraud -- that the Debtor signed the Retail Installment Contract with the representations that the downpayment of $88,252.00 had been paid and the options had been installed; that the Debtor knew these representations were false; that Marine relied on the representations in its decision to purchase the Retail Installment Contract from Blue Lagoon; that Marine would not have purchased the Retail Installment Contract but for the representations; and Marine has suffered substantial damages as a direct and proximate result of the fraudulent inducement. Therefore, in granting the Florida Action Judgment, Judge Burnstein necessarily determined each of the required elements of Marine's cause of action under Section 523(a)(2).

Therefore, the three-prong test for collateral estoppel in this case has been met, and the Debtor is collaterally estopped from arguing the dischargeability of the damages awarded. *See Greene*, 150 B.R. at 286 (the bankruptcy court made a similar determination on a default judgment and dischargeability under Section 523(a)(2)).

It is important to emphasize that in this adversary proceeding the parties entered into the Florida Action Stipulation and Order which specifically provided that:

> 10. The parties hereby agree that in the interest of an economical resolution of the issues raised in the Proceeding and the Florida Action, all such issues (excepting only issues pertaining specifically to bankruptcy matters), should be heard and determined by the Florida State courts, and that the automatic stay provided by Section 362 of the Code shall be lifted to allow the Florida Action to continue.
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> 11. The parties hereby further agree that any final determination by the Florida state courts that the Debtor did not defraud Marine in connection with the transaction shall constitute a final determination that the Debt is not nondischargeable pursuant to Sections 523(a)(2)

> or (a)(6) of the Code, and in that event the Proceeding shall be dismissed with prejudice and on the merits, with each party to bear its own costs and attorney's fees.
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> 12. The parties hereby further agree that any final determination by the Florida State courts that the Debtor did defraud Marine in connection with the Transaction shall be submitted to the Bankruptcy Court for a determination, based upon the record, proceedings and rulings in the Florida Action, as to whether the Debt shall be deemed nondischargeable pursuant to Sections 523(a)(2) or (a)(6) of the Code.

Notwithstanding the clear provisions and intent of the Florida Action Stipulation and Order, the Debtor not only failed to appear and participate at the trial of the Florida Action after adequate notice, but he failed to move either in this Court or the Florida court for any postponement of the trial or relief from the provisions, spirit and intent of the Florida Action Stipulation and Order. After not appearing and participating in the Florida Action or otherwise seeking alternative relief before the trial, the Debtor now attempts to present evidence and arguments on the issues of fraud, the very issues which Marine and the Debtor had agreed, and Marine and the Bankruptcy Court expected, would be fully litigated in a trial in the Florida Action.

If the Debtor can now litigate the fraud issues as he asserts he should be allowed to, why was the Florida Action Stipulation and Order negotiated, executed and approved by the Court? Certainly the expressed interest of the parties in achieving an economical resolution of the issues by having the fraud issues litigated in the Florida Action could never be realized if the Debtor can now litigate the fraud issues after he defaulted and allowed an adverse judgment to be entered against him in the Florida Action at a substantial expense to Marine.

As fully analyzed above, on the facts and circumstances of this case and based on Florida collateral estoppel law, this Court believes that the three-prong test for collateral estoppel as to the Florida Action Judgment and a resulting finding of nondischargeability pursuant to Section 523(a)(2) has been met. Notwithstanding that analysis, however, any argument that the Debtor has that the

third prong of the test (that the matter be fully litigated before a Court of competent jurisdiction) has not been satisfied in this case, because he did not actually appear and participate in the trial in the Florida Action must be deemed to be waived by his conduct, and the Debtor is estopped from making such an argument. That prong of the test for collateral estoppel is satisfied in this case by the Debtor having entered into the Florida Action Stipulation and Order and having had an opportunity to present his case and fully litigate the issues. An actual trial was not necessary.[5] To allow the Debtor to benefit by his own deliberate failure to comply with the provisions, spirit and intent of the Florida Action Stipulation and Order would be unwarranted on the facts and circumstances of this case.

Furthermore, in this adversary proceeding, the Debtor is bound by the provisions of the Florida Action Stipulation and Order. By the expressed terms of that Stipulation and Order, the Court can only look to the record, proceedings and rulings in the Florida Action when determining the question of the dischargeability of the Florida Action Judgment pursuant to Section 523(a)(2). The pleadings against the Debtor in the Florida Action were exclusively grounded in fraud, and the Court entered judgment against the Debtor after considering all of the pleadings and proceedings in the case, including the Debtor's Answer, the Motion to Dismiss and the testimony before it at the trial which the Debtor chose not to participate in. The Court cannot say that based on the record and proceedings in the Florida Action, which it has reviewed, that the ruling of Judge Burnstein was incorrect. Therefore, based on the record, proceedings and rulings in the Florida Action, the Court determines that the obligation due from the Debtor to Marine, as evidenced by the Florida Action Judgment, is nondischargeable pursuant to Section 523(a)(2).

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[5] *See In re Austin,* 93 B.R. 723 (Bankr. D.Colo. 1988) (where a debtor deliberately failed to participate in state court trials after the stay had been lifted).

CONCLUSION

The Court finds the debt to Marine of $260,919.36, as evidenced by the Florida Action Judgment, to be nondischargeable under Section 523(a)(2) of the Bankruptcy Code.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: February 8, 1994