

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 7
OLA MAE MISTER,)
) No. BK 93-30109
Debtor(s).)

OPINION

The American Bank of Bond County (hereafter, "bank") obtained a default judgment in the amount of \$113,977.74 plus court costs against Ola Mae Mister (hereafter, "debtor") on May 5, 1989, in the Circuit Court for the Third Judicial Circuit, Bond County, Illinois after the debtor failed to answer the complaint or to otherwise appear in the action. The judgment entered by the Circuit Court and the Circuit Court's Record Sheet entry for May 5, 1989, reflect that the Circuit Court considered the verified complaint filed by the bank and the affidavit of Karl D. Tauber, the president of the bank, in entering default judgment against debtor.¹ The affidavit of Mr. Tauber recites all amounts due the bank for principal, interest through April 30, 1989, and attorney fees on the several

¹The default judgment, the verified complaint and the affidavit of Karl D. Tauber have been submitted as part of the record in the instant case. Additionally, included in the record is a letter dated October 12, 1993, from J. Jill Hays, Official Court Reporter at the Circuit Court, addressed to counsel for the debtor and for the bank, explaining that no transcript of report of proceedings is available for May 5, 1989, because "there were no proceedings held on the record that date in this particular cause, but only a Default Order entered ex-parte at that time."

promissory notes executed by the debtor in favor of the bank.² The verified complaint makes a consistent recitation.

After the entry of the default judgment, debtor appeared before the Circuit Court on a number of occasions, either pro se or through counsel, Pearson Bush, in defense of efforts by the bank to collect on the judgment. However, at no time after the judgment was entered did the debtor appeal it, or move to have it amended or vacated by the Circuit Court. The judgment has been recorded as a lien against all real estate owned by the debtor in St. Clair County, Illinois.

On January 29, 1993, the debtor filed a case under Chapter 13 of the Bankruptcy Code. On schedule F, the debtor listed as disputed and unliquidated an unsecured debt of \$80,000 owed to the bank. Debtor's bankruptcy case was converted to a case under chapter 7 on June 23, 1993. Thereafter, the bank filed a proof of claim in the amount of \$113,977.74 plus court costs. The debtor objected to the amount of the claim, and that objection is now before the Court.

The crux of the debtor's objection appears to be that the state court judgment, on which the bank's claim is based, was obtained either fraudulently or in error because the president of the bank, on whose affidavit and verified complaint the Circuit Court relied, did not have personal knowledge of the facts to which he attested. Debtor contends that this is reflected in the emphasized language found in the president's verification of the complaint, which states:

²Certain of the notes were executed by the debtor and her former husband, Robert E. Mister. However, Mr. Mister's joint obligation on these notes is not germane to the matter before the Court.

Karl D. Tauber, being first duly sworn, deposes and says that he is the President of American Bank of Bond County, f/k/a Bond County State Bank, the Plaintiff in the above-entitled cause of action; that he has read the above and foregoing complaint; that he has personal knowledge of the facts upon which the foregoing Complaint is based; that the matters stated in said Complaint are true; **the affiant further states that he is informed and believes that the present balance due the Plaintiff is as stated in said Complaint.**

(Emphasis added). According to the debtor, the emphasized language shows that Mr. Tauber based his averments on information supplied by another and his belief as to the accuracy of that information, without personally verifying, in the bank's records and through canceled checks, the accuracy of the amounts he claimed were due. In response, the bank argues that the Bankruptcy Court must give res judicata effect to the judgment entered by the Circuit Court.

The doctrine of "[r]es judicata ensures the finality of decisions." Brown v. Felsen, 442 U.S. 127, 131 (1979). Under the doctrine, "'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.'" Id. (quoting Montana v. United States, 440 U.S. 147, 153 (1979)). Accord Housing Auth. for La Salle County v. YMCA of Ottawa, 461 N.E.2d 959, 961-62 (Ill. 1984).³ It also "prevents litigation of all grounds for,

³In Heiser v. Woodruff, 327 U.S. 726, 731-32 (1946), the Supreme Court held that bankruptcy courts, in ruling on the allowance or rejection of claims based on judgments, apply federal, rather than state, law to determine what judgments are provable, what objections may be made to their proof, and the extent to which the inequitable conduct of a creditor in acquiring or asserting a claim in bankruptcy requires the claim's rejection. However, the Court need not decide the question of whether federal or state law controls the issues raised in the instant case because the result obtained under either

or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen, 442 U.S. at 131 (citing Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378 (1940)). Accord Housing Auth. for La Salle County v. YMCA of Ottawa, 461 N.E.2d at 962.

In order for res judicata to apply, three requirements must be met. These are: "(1) an identity of the parties or their privies; (2) an identity of the causes of actions (sic); and (3) a final judgment on the merits." In re Energy Co-op., Inc., 814 F.2d 1226, 1230 (7th Cir.), cert. denied, 484 U.S. 928 (1987). Accord Housing Auth. for La Salle County v. YMCA of Ottawa, 461 N.E.2d at 961-62.

In this case, there is no dispute that the parties to the Circuit Court cause of action are the same ones now locked in controversy over the validity of the bank's claim against the bankruptcy estate. Moreover, it is clear that both proceedings stem from the same transaction and that the proof that was required of the bank in the Circuit Court to establish the debtor's liability on the promissory notes and to liquidate the sums owed under the notes is identical to the proof which would be required before this Court were the judgment reopened and questions of liability and damages relitigated. See, e.g., In re Energy Co-op., Inc., 814 F.2d at 1230-31; Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1986) (quoting Alexander v. Chicago Park Dist., 773 F.2d 850, 854 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986)) (under the Seventh Circuit's "same

is the same.

transaction" test, a cause of action consists of a "'a single core of operative facts' which give rise to a remedy"). Simply changing the legal theory does not create a new cause of action. Car Carriers, Inc. v. Ford Motor Co., 789 F.2d at 593 (citing Alexander v. Chicago Park Dist., 773 F.2d at 854).⁴ And, there can be no doubt that the judgment entered by the Circuit Court is a final judgment since the debtor never appealed the judgment nor moved to have it vacated or amended.

Thus, the only disputed res judicata element is whether the judgment entered by the Circuit Court was decided on the merits. The debtor contends that it was not decided on the merits because the Circuit Court did not hear testimony nor receive into evidence the canceled checks and other bank records to prove the amounts loaned to debtor and the payments made by her.

The Court is not persuaded by debtor's argument. Once a default has been entered against a defendant, the factual allegations of the complaint, except those relating to the amount of damages, are taken as

⁴In Rodgers v. St. Mary's Hospital, 597 N.E.2d 616, 621 (Ill. 1992), the Illinois Supreme Court, without expressing its own preference, outlined the two tests which the Illinois appellate courts have adopted to define "cause of action" for purposes of res judicata analysis. The narrower test is called the "same evidence" test. "Under that test, res judicata bars a second suit if the evidence needed to sustain the second suit would have sustained the first, or if the same facts were essential to maintain both actions." Id. The second test is the "transactional" approach. This test examines "whether both suits arise from the same transaction, incident, or factual situation," id., and holds that "'the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.'" Id. (quoting Pfeiffer v. William Wrigley Jr. Co., 484 N.E. 2d 1187, 1189-90 (Ill. App. Ct. 1985)).

Regardless of the test applied, the suit in the Circuit Court and the proceeding before the Court today are one and the same cause of action.

true. E.g., Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc., 722 F. 2d 1319, 1323 (7th Cir. 1983); 10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2688, at 444 (1983). Accord Colonial Penn Ins. Co. v. Tachibana, 369 N.E.2d 177, 178 (Ill. App. Ct. 1977); 612 N. Michigan Ave. Bldg. Coro. v. Factsystem, Inc., 370 N.E.2d 236, 240 (Ill. App. Ct. 1977); Walgreen Co. v. American Nat'l Bank & Trust Co., 281 N.E.2d 462, 468 (Ill. App. Ct. 1972); Liddell v. Smith, 213 N.E.2d 599, 602 (Ill. App. Ct. 1965). If the defendant does not contest the amount prayed for in the complaint, and the amount is a sum certain or a sum that can be made certain by computation, judgment may, and generally will, be entered for that amount without any further hearing. E.g., Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc., 722 F.2d at 1323 (judgment by default may be entered without hearing on damages when "the amount claimed is liquidated or capable of ascertainment from definite figures contained in the documentary evidence or in detailed affidavits"); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2688, at 448. See Elfman v. Evanston Bus Co., 190 N.E.2d 348, 351 (Ill. 1963); Greer v. Ludwick, 241 N.E.2d 4, 10-11 (Ill. App. Ct. 1968). Here, the Circuit Court considered both the verified complaint and the affidavit of Mr. Tauber before entering judgment. In the affidavit, the bank set forth the amounts due in principal, interest to date and attorney fees on the several promissory notes executed by the debtor. Clearly, this was sufficient proof of damages, see, e.g., Ward v. Rosenfeld, 562 N.E.2d 674, 676 (Ill. App. Ct. 1990), appeal denied, 571 N.E.2d 156 (Ill. 1991), and constituted a determination on the merits.

Since a valid default judgment is entitled to the same preclusive effect under the doctrine of res judicata as is a judgment rendered upon a trial of the issues, e.g., Morris v. Jones, 329 U.S. 545, 550-51 (1947); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4442, at 373 (1981); Housing Auth. for La Salle County v. YMCA of Ottawa, 461 N.E.2d at 963; In re Marriage of Donnellan, 414 N.E.2d 167, 171 (Ill. App. Ct. 1980), the only question remaining for the Court's consideration is whether the default judgment entered by the Circuit Court is a valid judgment. This Court is free to reexamine a judgment when it is challenged on the basis that the rendering court lacked jurisdiction over the parties or the subject matter, or that the judgment was procured by fraud of a party. E.g. Heiser v. Woodruff, 327 U.S. at 736; Kapp v. Naturelle, Inc., 611 F.2d 703, 708 (8th Cir. 1979); In re Bocker, 123 B.R. 164, 165 (E.D. N.Y. 1991); In re Bloomer, 32 B.R. 25, 26-27 (Bankr. W.D. Mich. 1983).

Here, the debtor alleges that the default judgment was obtained either fraudulently or in error because it was based on evidence offered by the bank's president unsupported by his personal knowledge of the facts. However, the sole evidence offered by the debtor to support this contention is the language noted previously which is found in the verification of the complaint. The debtor has failed to persuade the Court by this evidence that the bank procured the judgment through fraud. The Court notes initially that the debtor's interpretation of the language in question is belied by other language in the same verification which states that Mr. Tauber had personal knowledge of the facts upon which the complaint was based.

Additionally, the Circuit Court considered Mr. Tauber's affidavit, along with the verified complaint, in entering judgment against the debtor. Assuming arguendo that the complaint was tainted by Mr. Tauber's lack of personal knowledge, there is no evidence before the Court that the affidavit executed two months later was similarly tainted. Nor is there any evidence before the Court that the amount of the judgment is, in fact, incorrect.

Secondly, despite the presence of this language in the verification, the debtor had every opportunity to defend the law suit in the Circuit Court and to challenge the weight and sufficiency of the evidence offered by the bank and the credibility of its witness. The debtor chose not to do so. This is clearly not a case in which extrinsic fraud⁵ on the part of the bank prevented the debtor from having a full and fair opportunity to litigate all issues pertaining to the amount of the debt. See, e.g., In re A-1 24 Hour Towing, Inc., 33

⁵Extrinsic fraud is defined as:

[f]raud which is collateral to the issues tried in the case where the judgment is rendered. Type of deceit which may form basis for setting aside a judgment as for example a divorce granted ex parte because the plaintiff-spouse falsely tells the court he or she is ignorant of the whereabouts of the defendant-spouse.

Black's Law Dictionary 661 (6th ed. 1990) (citation omitted). In contrast, intrinsic fraud is defined as:

[t]hat which pertains to issue involved in original action or where acts constituting fraud were, or could have been, litigated therein. Perjury is an example of intrinsic fraud.

Id.

B.R. 281, 283 (Bankr. D. Nev. 1983). Accord Wood v. First Nat'l Bank of Woodlawn, 50 N.E.2d 830, 834 (Ill. 1943), cert. denied, 321 U.S. 765 (1944) (a judgment is invalidated by fraud which prevented the court from acquiring jurisdiction, but not by "fraud which occurred in the proceedings of the court after jurisdiction had been obtained, such as perjury, concealment, and other chicanery"); Terra-Nova Invs. v. Rosewell, 601 N.E.2d 1109, 1113 (Ill. App. Ct. 1992); In re Luer's Estate, 108 N.E.2d 792, 793-94 (Ill. App. Ct. 1952) (collateral attack on judgment cannot succeed on the ground that the judgment was obtained by false testimony, concealment or the like). The Court will not "reexamine the issues determined by the judgment itself," Heiser v. Woodruff, 327 U.S. at 735, since "[t]he bankruptcy courts are available to give the honest debtor a fresh start . . . [but] [t]hey should not be available to provide an unhappy litigant a second forum to relitigate lost issues." In re Hall, 31 B.R. 148, 150 (Bankr. W.D. Okla. 1983).

For the reasons stated, the Court finds that the debtor's objection to the amount of the bank's claim should be overruled. See Order entered this date.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: December 29, 1993