

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

TERRANCE THOMAS MOUNGEY,

Debtor.

CASE NO. 01-13229-WSS

Chapter 7

TONY AUTRY,

Plaintiff,

v.

ADV. PROC. NO. 01-1203

TERRANCE THOMAS MOUNGEY,

Defendant/Debtor.

**ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Gregory B. McAtee, Attorney for the Plaintiff
Richard L. Watters, Attorney for the Defendant/Debtor
Brenda Hetrick, Chapter 7 Trustee

This matter came on for hearing on the Plaintiff's motion for summary judgment and the Defendant's motion for summary judgment. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2). After consideration of the pleadings, evidence, briefs and arguments of counsel, the Court makes following findings of fact and conclusions of law:

FINDINGS OF FACT

In 1998, the Plaintiff, Tony Autry ("Autry"), entered into a contract for the construction of a home with the Debtor, Terrance Thomas Moungey ("Moungey") and his business partner,

Mike Kennedy (“Kennedy”), doing business as Lincoln Log Homes of the South (“Lincoln”). Lincoln began construction on the home, but Autry directed them to stop and leave the property. Moungey and Kennedy filed an action against Autry in the Circuit Court of Clarke County, Alabama, (hereinafter “the state court”) Case Number CV-98-165C (hereinafter “the state court action”). The complaint contained counts for a materialman’s lien against the home and for breach of contract. Autry counterclaimed with counts alleging breach of contract, fraud, breach of implied warranty of fitness and habitability and negligent construction. The fraud count requested an award compensatory and punitive damages.

The case was tried to a jury, and the judge instructed the jury on the law to be applied in the case. The judge told the jury that the counter-defendants were guilty of legal fraud if they willfully misrepresented a material fact to Autry with the intent to induce him to act thereon. The judge also instructed the jury that if the counter-defendants committed fraud, Autry was entitled to actual damages and punitive damages. The judge explained that punitive damages must be proven by clear and convincing evidence, which is evidence that produces in the mind of the jury a firm conviction as to each element of the claim, and a high probability as to the correctness of the conclusion. The clear and convincing standard requires a greater level of proof than a preponderance of the evidence or the substantial weight of evidence, but is less than beyond a reasonable doubt.

Following the judge’s instructions, the jury deliberated and reached a verdict. The jury verdict form states in pertinent part:

We, the Jury, find for the Plaintiff, Tony Autry, and against the Counter Defendants, Mike Kennedy and Terrence T. Moungey d/b/a Lincoln Log Homes of the South, . . . for Breach

on [sic] Contract and Negligence and assess damages at \$505,000.00.¹

We, the Jury, find for the Plaintiff, Tony Autry, and against the Counter Defendants, Mike Kennedy and Terrance T. Moungey, d/b/a Lincoln Log Homes of the South, . . . for Fraud and assess damages at \$600,000.00.²

The state court entered an order on the jury's verdict on August 21, 1998, which stated in pertinent part:

. . . Thereupon came a jury of good and lawful men and women, to-wit: . . . who being first duly empaneled according to the law upon their oaths say:
"We, the Jury, find the Defendant/Counter Plaintiff, Tony Autry, and against the Plaintiff/Counter Defendants, Mike Kennedy and Terrence T. Moungey, d/b/a Lincoln Log Homes of the South . . . for Breach of Contract and Negligence, and assess damages at \$505,000."

AND

"We, the Jury, find for the Defendant/Counter Plaintiff, Tony Autry, and against the Plaintiffs/Counter Defendants, Mike Kennedy, Terrance T. Moungey d/b/a Lincoln Log Homes of the South . . . for Fraud, and assess Punitive Damages at \$600,000."

Although the language regarding the jury's verdict in the state court's order is in quotes, the order does not match the wording of the jury verdict form. The word "Punitive" was not in the jury verdict form. Moungey filed a motion to reconsider the order, but the state court denied the motion. This Court is unaware of any appeal of the state court's order on the jury verdict.

Moungey filed the present chapter 7 petition on June 27, 2001. Autry filed this adversary proceeding alleging nondischargeability under 11 U.S.C. §523(a)(2), (4) and (6) on October 4, 2001. Both Autry and Moungey have filed motions for summary judgment.

CONCLUSIONS OF LAW

¹The number "\$505,000.00" is handwritten in the original.

²The number "\$600,000.00" is handwritten in the original.

The parties filed cross motions for summary judgment. Autry asserts that the state court order determined all issues of fraud under 11 U.S.C. §523(a)(2), (4) and (6)³ there are no genuine issues of fact, and that he is entitled to judgment as a matter of law under principles of collateral estoppel. Moungey's argument is unique. The U.S. Supreme Court in *Cohen v. De La Cruz*, 523 U.S. 213 (1998) found punitive damages to be nondischargeable under 11 U.S.C. §523(a)(2)(A), noting:

[T]he phrase 'to the extent obtained by' in Section 523(a)(2)(A) . . . does not impose any limitation on the extent to which 'any debt' arising from fraud is excepted from discharge. '[T]o the extent obtained by' modifies 'money, property, services, or . . . credit' – not 'any debt' – so that the exception encompasses 'any debt' . . . for money, property, services, or . . . credit, to the extent [that the money, property, services, or . . . credit is] obtained by fraud. The phrase thereby makes clear that the share of money, property, etc., that is obtained by fraud gives rise to a nondischargeable debt. Once it is established that specific money or property has been obtained by fraud, however, 'any debt' arising therefrom is excepted from discharge.

Cohen, 523 U.S. at 218. Moungey asserts that *Cohen* requires a finding that compensatory damages are nondischargeable before punitive damages can be held to be nondischargeable. Therefore, in the present case, since the state court order did not make an award of compensatory damages on the fraud count, there is no "debt" within the meaning of §523(a)(2)(A), and therefore the punitive damage award should be dischargeable.

The issue before the Supreme Court in *Cohen* was whether §523(a)(2)(A) prevents the discharge of treble damages awarded due to the debtor's fraudulent receipt of money, property or services, or whether §523(a)(2)(A) only applies to the "value" of money, property or services obtained by fraud. *Cohen*, 523 U.S. at 215. Compensatory damages were awarded in *Cohen*

³The Court finds that §523(a)(4) and (6) are not applicable to the present fact situation and therefore will not address these provisions.

case, and therefore there was no issue of punitive damages being award without compensatory damages being awarded. In finding that the language of §523(a)(2)(A) included punitive damages, the Supreme court examined “the text of §523(a)(2)(A), the meaning of parallel provisions of the statute, the historical pedigree of the fraud exception, and the general policy underlying the exceptions to discharge.” *Cohen*, 523 U.S. at 223. The *Cohen* court noted that the language of precursors to §523(a)(2)(A) was interpreted to include punitive damages. *Id.* at 221. This Court does not agree that the text quoted by Moungey from the *Cohen* opinion can be read to require an award of compensatory damages for fraud before an award of punitive damages can be held to be nondischargeable, and therefore will deny Autry’s motion for summary judgment on this ground.

Moungey also asserts that this Court should not apply collateral estoppel principles because the state court judgment is defective under state law. Under Alabama law, a punitive damage award cannot be supported unless at least nominal damages are awarded for compensatory damages. *Life Insurance Company of Georgia v. Smith*, 719 So.2d 797, 803-807 (Ala. 1998). In the present case, there was an award of punitive damages for fraud without an award of compensatory damages.

This Court cannot reach this issue under the Rooker-Feldman Doctrine, which holds that a lower federal court cannot review the decisions of state court. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under the Rooker-Feldman Doctrine, “a party losing in a state court is barred from seeking what in substance would be appellate review of the state court judgment in a United States [trial] court.” *In re Abboud*, 237 B.R. 777, 780 (10th Cir. BAP 1999) (quoting *Johnson v.*

DeGrandy, 512 U.S. 997, 1005-1006 (1994)). Only the superior state courts and the U.S. Supreme Court may review a valid state court judgment. *Abboud*, 237 B.R. at 780; *In re Singleton*, 230 B.R. 533, 536 (6th Cir. BAP 1999). The doctrine applies even when a state court judgment is wrong. *In re Mannie*, 258 B.R. 440, 444 (Bankr. N.D. Cal. 2001). However, the doctrine does not apply when a judgment is void. *Id.*

Moungey asserts that the state court order is not valid due to the lack of an award of compensatory damages. Under Alabama law, a judgment is void “only is the court that rendered it lacked jurisdiction over the subject matter or one or more of the parties, or otherwise acted in a manner inconsistent with due process.” *Ex parte Tampling Tile Company, Inc.*, 551 So.2d 1072, 1074 (Ala. Civ. App. 1989), citing *Steelman v. Steelman*, 512 So.2d 776 (Ala. Civ. App. 1987) and *Smith v. Clark*, 468 So.2d 138 (Ala. 1985). There is no evidence that the state court lacked subject matter or personal jurisdiction, or that due process was violated in the proceeding. Therefore, the state court order is valid order under Alabama law. The order may have been voidable if Moungey had appealed it to a higher state court. However, under the Rooker-Feldman Doctrine, this Court cannot question the state court order’s validity.

Having found that the state court order is valid, the Court must now determine whether principles of collateral estoppel apply to the present case. Collateral estoppel bars relitigation of issues adjudicated in a prior proceeding. The theory applies to discharge exception proceedings in bankruptcy courts. *Grogan v. Garner*, 498 U.S. 279, 285 n. 11 (1991). When the prior judgment at issue in a dischargeability proceeding comes from a state court action, the bankruptcy court is obliged to look at the state court’s definition of collateral estoppel. *In re St. Laurent*, 991 F.2d 672, 675-676 (11th Cir. 1993). In the present case, Alabama law would apply

because an Alabama state court issued the prior judgment.

Under Alabama law, a party must fulfill the following elements for collateral estoppel to apply:

1. The issue in the prior action must be identical;
2. The issue must have been actually litigated in the prior action;
3. The determination of the issue in the prior action must have been a necessary part of the judgment in that litigation; and
4. The parties must have been the same in both actions.

Smith v. Union Bank & Trust Co., 653 So.2d 933, 934 (Ala. 1995); *Benetton S.p.A v. Benedot, Inc.*, 642 So.3d 394, 400 (Ala. 1994); *Dairyland Ins. Co. v. Jackson*, 566 So.2d 723, 726 (Ala. 1990).

Autry maintains that the state court order for fraud constitutes “actual fraud” under 11 U.S.C. §523(a)(2)(A). Under §523(a)(2)(A), the creditor must prove: 1) the debtor made a false representation with intent to deceive; 2) the creditor relied on the representation; and 3) the creditor sustained a loss as a result of the representation. *In re Bilzerian*, 100 F.3d 886, 892 (11th Cir. 1996). In addition, the reliance must be justifiable. *Field v. Mans*, 516 U.S. 73-75 (1995), 116 S.Ct. 437, 445-46. Under Alabama law, a plaintiff alleging fraud must prove: 1) a misrepresentation; 2) of material fact; 3) upon which the plaintiff relied, and 4) which proximately caused injury or damage to the plaintiff. *Johnson v. Green Mountain, Inc.*, 623 So.2d 116, 1121 (Ala. 1993). At the time that Autry filed his complaint, a plaintiff’s reliance under Alabama law must have been reasonable, which is a higher standard of proof than justifiable reliance required by §523(a)(2). See *Foremost Insurance Company v. Parham*, 693

So.2d 409, 421 (Ala. 1997). Comparing the elements of fraud under Alabama state law and the element of § 523(a)(2)(A), the elements appear to be sufficiently similar to meet the first requirement of collateral estoppel.⁴

As for the remaining elements of collateral estoppel, the parties' briefs indicate that there is no dispute. The state court action was tried to a jury, a verdict was reached and an order entered. Clearly, the issues were actually litigated. Similarly, the allegations of fraud were a necessary part of the state court order. Finally, the parties to the state court action and the present proceeding are identical.

Autry asserts that the order entered by the state court does not state under which count the compensatory and punitive damages were awarded; however, only the count for fraud requests both compensatory and punitive damages. Autry therefore maintains that the Court can conclude that the jury intended to make the award for both compensatory and punitive damages under the fraud count of the complaint, and that the entire order of \$1,105,000.00 was for fraud. The Court does not agree with Autry's analysis. The order entered by the state court plainly states that the \$505,000.00 was awarded for breach of contract and negligence and that \$600,000.00 was awarded as punitive damages for fraud. The Court is aware that the order is different from the jury verdict form; however, under the Rooker-Feldman Doctrine, this Court cannot review the state court order.

⁴In giving preclusive effect to a state court judgment, the bankruptcy court must also determine whether the burden of proof in the prior action is the same or higher than the burden required for dischargeability proceedings in the bankruptcy court. *In re Bush*, 62 F.3d 1319, 1322 (11th Cir. 1995). This factor is not an issue in the present case as the burden of persuasion for the state court action and the dischargeability action are the same. *See Ex parte Gradford*, 699 So.2d 149, 152 (Ala. 1997); (burden of proof under Alabama law) and *Grogan v. Garner*, 498 U.S. 279, 291 (1991) (burden of proof in bankruptcy dischargeability proceeding).

Based on the foregoing, the Court finds that Autry's motion for summary judgment is due to be granted in part as to the state court order for \$600,000.00. In addition, Moungey's motion for summary judgment granted in part as to the state court order for \$505,000.00. It is hereby

ORDERED that the Plaintiff's motion for summary judgment is **GRANTED** in part as to the state court judgment for \$600,000.00 and **DENIED** in part as to the \$505,000.00; and it is further

ORDERED that the state court judgment owed to the Plaintiff, Tony Autry, in the amount of SIX HUNDRED THOUSAND AND NO/100 (\$600,000.00) by the Debtor be, and it hereby is, **NONDISCHARGEABLE** in this bankruptcy proceeding; and it is further

ORDERED that the Defendant's motion for summary judgment is **GRANTED** in part as to the state court judgment for \$505,000.00 and **DENIED** in part as to the \$600,000.00; and it is further

ORDERED that the state court judgment owed to the Plaintiff, Tony Autry, in the amount of FIVE HUNDRED AND FIVE THOUSAND AND NO/100 (\$505,000.00) by the Debtor be, and it hereby is, **DISCHARGEABLE** in this bankruptcy proceeding.

Dated: May 16, 2002

William S. Shulman

U.S. Bankruptcy Judge