

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

HUMA ROSHAN,

Debtor.

Case No. 02-16716

BAKSHO SINGH,

Plaintiff,

-against-

Adversary No. 02-90350

HUMA ROSHAN,

Defendant.

APPEARANCES:

Bakhsho K. Singh
Pro Se Plaintiff
Stratford Apartments 14-7
Old Bridge, NJ 08857

EHRlich, HANFT, BAIRD & ARCODIA
Attorneys for Defendant
64 Second St.
Troy, NY 12180

Marc S. Ehrlich, Esq.

Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Currently before the court is the request of Bakhsho Singh (“Plaintiff”) to deny the discharge of Huma Roshan (“Debtor”) pursuant to 11 U.S.C. § § 727(a)(3) and/or (a)(4) or, alternatively, to hold nondischargeable a certain debt owed to her by the Debtor pursuant to 11 U.S.C. § § 523(a)(2) and/or (a)(3). The court has jurisdiction over this core proceeding pursuant to 28 U.S. C. § § 157(a), (b)(1), (b)(2), (b)(2)(I) and 1334(b).

FACTS

Based on the pleadings filed, the court makes the following findings of fact:

- 1) The Plaintiff sued the Debtor in New Jersey Superior Court for the County of Middlesex, Special Civil Part to recover the cost of certain telephone bills and credit card bills alleged to have been incurred by the Debtor while she was living in the Plaintiff's home, as well as \$700 the Plaintiff claimed the Debtor borrowed from her (the "New Jersey Action").
- 2) The Honorable David C. Rosenberg rendered a decision in the New Jersey Action on September 10, 2002 wherein he awarded the Plaintiff a judgment against the Debtor in the amount of \$4,750, together with costs of \$55.00.
- 3) The Debtor filed a voluntary Chapter 7 petition on October 18, 2002 (the "Petition").
- 4) The Plaintiff is listed on the Debtor's Schedule F as a creditor holding an unsecured non-priority claim.
- 5) On December 9, 2002, the Plaintiff filed an adversary complaint pursuant to 11 U.S.C. § § 523(a)(2) and/or (a)(3) seeking to except a debt from discharge in the amount of \$4,805 owed to her by the Debtor pursuant to the judgment awarded by Judge Rosenberg in the New Jersey Action (the "Debt"). The adversary proceeding was assigned number 02-90350.
- 6) On January 7, 2003, the Plaintiff filed a second complaint, in substance but not captioned, amending the complaint filed December 9, 2002 (the "Amended § 523 Complaint").
- 7) The Plaintiff filed a third complaint in adversary proceeding number 02-90350 on January 7, 2003, seeking a denial of the Debtor's discharge pursuant to 11 U.S.C. § § 727(a)(3) and/or (a)(4) (the "§ 727 Complaint").
- 8) The Debtor filed answers to the Amended § 523 Complaint and to the § 727 Complaint.¹
- 9) The court issued a Scheduling Order on June 13, 2003, setting the following: (1) trial on December 16, 2003; (2) completion of discovery by August 14, 2003; (3) filing of a joint stipulation of facts on or before December 5, 2003; and (4) filing of pretrial statements and exhibits on or before December 5, 2003.

¹The court believes the Plaintiff meant to add a second cause of action with the § 727 Complaint. Although the Plaintiff should have filed an amended complaint setting forth both causes of action, given her *pro se* status, the court will consider the Amended § 523 Complaint and the § 727 Complaint and the corresponding answers as one matter.

10) As of the date of trial, neither party had filed pretrial submissions pursuant to the Scheduling Order.

ARGUMENT

The Plaintiff contends that the Debt should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2) and/or (a)(3)² because the Debt was incurred through false pretenses in that the Debtor, without permission, used the Plaintiff's credit cards, cellular telephone, and home telephone. (Amended § 523 Complaint ¶ 5.) The Plaintiff also claims that the Debtor failed to schedule certain personalty as assets and that the Petition fails to include certain financial records. (§ 727 Complaint ¶ 4.) ;As such, she opines, the Debtor should be denied a discharge pursuant to § 727(a)(3) and/or (a)(4). The Debtor's answers to the complaints contain general denials.

DISCUSSION

I. VIOLATION OF THE AMENDED SCHEDULING ORDER

Fed. R. Civ. P. 16, made applicable to this proceeding by Fed. R. Bankr. P. 7016, provides in part:

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order or if a party or party's attorney is substantially unprepared to participate in the conference the judge, upon motion or the judge's own initiative, may make

²11 U.S.C. § 523(a)(3) relates to unsecured debts. The Debtor, however, lists the Plaintiff on Schedule F (Creditors Holding Unsecured Nonpriority Claims) of the Petition with an address of 1407 Stratford Apartments, Old Bridge, New Jersey 08857. The court assumes that the *pro se* Plaintiff mistakenly referenced this subsection. In any event, the court will focus only on the § 523(a)(2) allegations of the Amended § 523 Complaint.

such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C), (D).

Accordingly, the court must turn its attention to Fed. R. Civ. P. 37, which provides in part:

(b) Failure to Comply with Order.

....

(2) Sanctions by Court in Which Action is Pending. If a party...fails to obey an order entered under Rule 26(f) [Conference of Parties; Planning for Discovery], the court in which the action is pending may take such orders in regard to the failure as are just, and among others the following:

....

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence[.]

Pursuant to this subsection, the Scheduling Order contained the following notice: “Failure to comply with any of the terms of this Order may result in dismissal or the appropriate sanctions, preclusion, the striking of pleadings, and the entry of an order of judgment accordingly.” Such was the fate of the Plaintiff in this matter. Because the Plaintiff failed to file a stipulation of facts, pretrial statement and exhibits, she was not in a position to present evidence in support of her claim. So as not to preclude the Plaintiff entirely, and in lieu of dismissing the complaint, the court, with the Debtor’s consent, agreed to review the pleadings, the Plaintiff’s civil complaint from the New Jersey Action, and a partial transcript from the New Jersey Action and treat this matter as submitted.

II. SECTION 523

Section 523 is entitled “Exceptions to discharge” and states in relevant part:

(a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt ...

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by -

(A) false pretenses, a false representation, or actual fraud, other than a

statement respecting the debtor's or an insider's financial condition...

Courts interpreting section 523(a)(2)(A) have concluded that a successful plaintiff needs to demonstrate, by a preponderance of the evidence, that (1) the debtor made a representation; (2) he knew the representation was false; (3) he intended to deceive the creditor; (4) the creditor relied on the representation; and (5) the creditor's reliance was the proximate cause of his damage. *In re Luthra*, 192 B.R. 88 (E.D.N.Y. 1995) (citing *In re Schwartz & Meyers*, 130 B.R. 416 (Bankr. S.D.N.Y. 1991)).

After reviewing the pleadings, the civil complaint, and the partial transcript, the court concludes that it has no independent basis to make findings that would allow the Plaintiff to prevail. The only possible avenue of success for the Plaintiff would be if this court is able to adopt specific findings from the New Jersey Action pursuant to the doctrine of collateral estoppel. It is well established that the doctrine of collateral estoppel or issue preclusion applies to dischargeability proceedings under § 523(a). *Grogan v. Garner*, 489 U.S. at 284 (bankruptcy court may give preclusive effect to those elements of the prior claim that are identical to the elements required for discharge and that were actually litigated and determined in the prior action). However, when a court cannot ascertain what was litigated and decided, issue preclusion cannot operate. *Mitchell v. Humana Hospital, Shoals*, 942 F.2d 1581, 1583-84 (11th Cir. 1991). The burden of persuasion to establish the prerequisites of issue preclusion is on the party seeking preclusion. *Lundberg v. Phoenix Leasing, Inc.*, 91 F.3d 265, 272 (1st Cir. 1996). Hence, if the party seeking preclusion cannot produce evidence that an issue was actually litigated and decided in a prior litigation, that party will not have met its burden and issue preclusion should be denied.

18 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 132.03.

The decision from Judge Rosenberg does not contain specific findings regarding the intent of the Debtor. Judge Rosenberg states in his decision, "I find that the Plaintiff is the more credible of the witnesses. There were just too many inconsistencies in the testimony of the Defendants." (New Jersey Superior Court Partial Transcript p. 3.) Inconsistencies and being less credible, however, do not necessarily equate to false pretenses and an intent to deceive.

Although this court is sympathetic to the plight of the Plaintiff, there is simply no basis for carving out an exception to discharge to insulate the Debt.

SECTION 727

The Plaintiff's request to deny the Debtor's discharge is similarly denied. The New Jersey Action was not concerned with the Debtor's conduct in this court, and thus, there are no findings for this court to adopt with respect to the Plaintiff's § 727 cause of action.

As the Plaintiff has not carried her burden under either § 523(a)(2) or 727, the adversary proceeding is dismissed.

It is so ORDERED.

Dated:

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge