

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re
PETER BUBAN and
LOLITA BUBAN,

Debtors.

LUZ C. GREENWOOD

Plaintiffs,

v.
PETER BUBAN nd
LOLITA BUBAN,

Defendants.

Chapter 7
Case No. 04-13850-SSC
Adv. No. 04-1068
MEMORANDUM
DECISION
(Opinion to Post)

I. Introduction

This matter comes before the Court on the Plaintiff's April 12, 2005 Motion for Summary Judgment. The Defendants, Peter & Lolita Buban, filed a Response to the Motion on May 21, 2005. The Plaintiff subsequently filed a Reply to the Response on June 2, 2005. On July 7, 2005, the Court held oral arguments on the motions. At the conclusion of the hearing, the Court orally granted the Motion for Summary Judgment. The Court found that the Defendants, the Debtors, were collaterally estopped from discharging their debt to the Plaintiff.

In this Memorandum Decision, the Court has now amplified this oral decision and has set forth more detailed findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The issues addressed herein constitute a core proceeding over

1 which this Court has jurisdiction. 28 U.S.C. §§ 1334(b) and 157(b) (West 2004).

2 **II. Factual Background**

3 The Plaintiff filed suit against the Debtors on September 26,2003 in the Superior
4 Court for the State of Arizona, Maricopa County, Case No. CV2003-018437, alleging breach of
5 contract and fraud arising out of money loaned to the Debtors from the Plaintiff. The Complaint
6 specifically alleged that the Debtor, Peter Buban, had no intention of ever repaying the loan
7 made by the Plaintiff. The Complaint also specifically stated that the Debtor, Lolita Buban, was
8 aware of and participated in the fraud committed by Peter Buban. Pursuant to the Arizona
9 Mandatory Arbitration Rules, the matter was referred to an arbitrator. The arbitrator ruled in
10 favor of the Plaintiff on all counts. The Judgment was entered on May 25, 2004. The
11 arbitrator's award was not appealed and became final pursuant to Arizona Law. During the
12 arbitration, the Debtors were represented by counsel, witnesses were examined, and the matters
13 set forth in the Complaint were actually litigated. Mr. Buban does not deny that he committed
14 the fraud. It is only Ms. Buban who requests that a judgment not be entered against her as to her
15 interest in the Debtors' community property and as to any sole and separate property that she
16 may have.

17
18
19 **III. DISCUSSION**

20 **A. THE STANDARD FOR SUMMARY JUDGEMENT**

21 A motion for summary judgment should be granted if the movant has shown that
22 there are no genuine issues of material fact and the movant is entitled to judgment as a matter of
23 law. Fed.R.Bankr.P. 7056(c). Ruling on a motion for summary judgment necessarily implicates
24 that substantive evidentiary standard of proof which would apply at trial. Anderson v. Liberty
25 Lobby, Inc., 477 U.S. 242 at 252 (1986). A material fact is genuine if the evidence is such that a
26 reasonable jury could return a verdict in favor of the non-moving party. Id. Procedurally, "the
27 proponent of a summary judgment motion bears a heavy burden to show that there are no
28 disputed facts warranting disposition of the case on the law without trial." In re Aquaslide 'N'

1 Dive Corp., 85 B.R. 545, 547 (9th Cir. BAP 1987). Once that burden has been met, "the
2 opponent must affirmatively show that a material issue of fact remains in dispute." Frederick S.
3 Wyle P.C. v. Texaco, Inc., 764 F.2d 604, 608 (9th Cir. 1985). The opponent may not assert the
4 existence of some alleged factual dispute between the parties. Liberty Lobby, 477 U.S. 242 at
5 252, 106 S.Ct. 2505 at 2512, 91 L.Ed.2d 202. Instead, to demonstrate that a genuine factual
6 issue exists, the objector must produce affidavits which are based on personal knowledge, and
7 the facts set forth therein must be admissible in evidence. Aquaslide, at 547. In addition,
8 summary judgment must be used with care and restraint, Hutchinson v. United States, 677 F.2d
9 1322, 1325 (9th Cir. 1982), and is reviewed in the light most favorable to the non-moving party.
10 Hifai v. Shell Oil Co., 704 F.2d 1425, 1428 (9th Cir. 1983).

11
12
13 **B. PRECLUSIVE EFFECT OF ARIZONA COURT DECISION**

14 The principles of collateral estoppel apply to proceedings seeking exceptions
15 from discharge brought under 11 U.S.C. § 523(a). See Grogan v. Garner, 498 U.S. 279, 284-85
16 (1991). As long as the creditor invokes collateral estoppel and demonstrates that its elements are
17 satisfied, the bankruptcy court must apply collateral estoppel on an issue fully and fairly litigated
18 in another court. In re Bugna, 33 F.3d 1054, 1057-58 (9th Cir. 1994). In determining the
19 collateral estoppel effect of a state court judgment, federal courts must, as a matter of full faith
20 and credit, apply that state's substantive law of collateral estoppel. Id. at 1057. Under Arizona
21 law, the doctrine of collateral estoppel applies "[w]hen the issue or fact question was actually
22 litigated and finally decided in a previous suit, a final judgment was entered, the party bound had
23 a full and fair opportunity to litigate the issue, and the issue of fact was essential to the prior
24 judgment." 4501 North Point LP v. Maricopa County, 209 Ariz. 569, 574, 105 P.3d 1188, 1193
25 (App. 2005).

26 In this matter, as in Bugna and 4501 North Point LP, the elements of collateral
27 estoppel have been met. In reviewing the State Court Complaint, this Court finds that the
28 Plaintiff alleged that Mr. Buban borrowed money from the Plaintiff to purchase a vehicle and

1 move to California with the Plaintiff. After the loan was made, Mr. Buban informed the Plaintiff
2 that he would not be purchasing a vehicle or moving to California.¹ Mr. Buban did not repay the
3 money borrowed from the Plaintiff. The Complaint specifically stated that the “marital
4 community benefitted from the fraudulent acts of [Mr. Buban],” and that, “[Ms. Buban] was
5 aware of and participated in the fraud committed by [Mr. Buban].”² The arbitrator ruled in favor
6 of the Plaintiff on all counts.³ The Debtors were represented by Counsel at the arbitration
7 hearing, witnesses were called, and the Debtors had a full and fair opportunity to litigate the
8 matter. The ruling of the arbitrator was never appealed. The finding of fraud by the arbitrator as
9 to Mr. and Ms. Buban is final. *See* Ariz.R.Civ.P. Rule 75(c).

10 Counsel for Ms. Buban raised the issue at oral argument that the different
11 evidentiary standard employed by the arbitrator somehow vitiated this Court’s ability to utilize
12 the doctrine of collateral estoppel and rule in favor of the Plaintiff. In order to prove fraud under
13 §523, a plaintiff must only meet the preponderance of the evidence standard. *See Grogan*, at
14 286-88. Accepting the Debtors’ argument that fraud in Arizona must be shown by a clear and
15 convincing evidence standard, pursuant to *Schwalbach v. Jones*, 27 Ariz. 260 (1925), only
16 strengthens the Plaintiff’s claim for judgment as a matter of law. According to the Debtors’
17 theory, the arbitrator had to find by clear and convincing evidence that Mr. Buban committed
18 fraud, and Ms. Buban knew of and participated in the fraud. Clear and convincing evidence is a
19 higher standard of proof than preponderance of the evidence. Since the arbitrator found that the
20 Debtors had participated in fraudulent conduct at the higher standard of proof, this Court must
21 conclude that the Plaintiff has also met her burden at the standard which has been subsumed
22 therein - a preponderance of the evidence. Accordingly, the Plaintiff has met her burden of
23 proof as to Mr. and Ms. Buban.

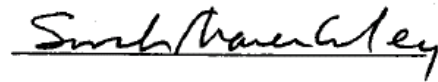
24
25
26 1. *See* Docket Entry No. 1, Exhibit 1, p. 3.

27 2. *See* Docket Entry No. 1, Exhibit 1, p. 4.

28 3. *See* Docket Entry No. 2, Exhibit 1, p. 1.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED this 15th day of August, 2005.



Honorable Sarah Sharer Curley
U. S. Bankruptcy Judge

BNC TO NOTICE