

SO ORDERED: July 14, 2017.



*Robyn L. Moberly*  
Robyn L. Moberly  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
MICHAEL DODD	)	CASE NO. 16-3349-RLM-7A
MELANIE D. DODD	)	
	)	
Debtors	)	
_____	)	
	)	
BRIAN J. SAVINO	)	
	)	
Plaintiff	)	Adversary Proceeding
	)	No. 16-50261
Vs.	)	
	)	
MICHAEL DODD	)	
	)	
Defendant	)	
_____	)	

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The plaintiff, Brian Savino ("Savino"), filed his motion for summary judgment, asking this court to find that certain findings made by Texas trial and

appellate courts collaterally estop the defendant, Michael Dodd (“Dodd”) from litigating elements of Savino’s complaint seeking nondischargeability under §§523(a)(2)(A), (4) and (6). Both parties have filed their briefs and designations of record.<sup>1</sup> For the reasons stated below, the court denies Savino’s motion.

### **Background**

Dodd was president and sole shareholder of 3-D Global Solutions (“3D”). 3D sought to expand into the fuel distribution business and procure U.S. Department of Defense contracts to obtain fuel supplies and deliver them to military posts. Savino is an oil trader. Savino and another entity, Augusta, agreed to invest up to \$5 million in exchange for a 35% equity stake in 3D. Savino tendered \$150,000 in earnest money deposit and he and Dodd agreed that the earnest money deposit would be returned to Savino within 10 business days if the deal did not close. Dodd allegedly also agreed to reimburse Savino for the cost of Savino’s business trips to New York to meet with Dodd. Finally, Dodd agreed to pay up to \$20,000 in accounting fees incurred by Savino to conduct due diligence. In the course of performing the due diligence, Savino’s accountants discovered what they considered “red flags” and inconsistencies regarding 3D’s financial information and were unable to verify the value of 3D. Savino chose not to go forward with the investment. Dodd failed to return the earnest money and failed to reimburse Savino for the accountants’ fees and travel expenses.

Savino sued Dodd in Texas. Dodd is not a Texas resident. The causes of action stated in the “Original Petition and Request for Disclosure” (the “State Court Complaint”) were (1) Breach of contract re: (a) return the earnest money within 10

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<sup>1</sup> Both parties have designated the following materials in support of their respective positions: (1) the Certified Petition and Request for Disclosure filed by Savino in the Texas trial court (Plaintiff’s Exh. A; Defendant’s Exh A); (2) the Final (default) judgment issued by the Texas trial court (Plaintiff’s Exh B; Defendant’s Exh B); (3) the Motion to Vacate Order, Motion for New Trial, and Alternative Motion to Modify Judgment filed by Dodd in the Texas trial court (Plaintiff’s Exh C; Defendant’s Exh D); (4) the Texas trial court’s findings of facts and conclusions of law (Plaintiff’s Exh D, Defendant’s Exh C); and (5) the substitute opinion issued by the Texas Court of Appeals (Plaintiff’s Exh G; Defendant’s Exh F). The Plaintiff also designated Dodd’s brief and reply brief filed in the Texas Court of Appeals (Plaintiff’s Exh. E and F). The Defendant also designated the affidavit of defendant Michael Dodd (Defendant’s Exh E).

days if the deal did not close, (b) return the earnest money by November 3<sup>rd</sup>, (c) payment of accountants' fees, and (d) reimbursement of travel expenses; (2) quantum meruit; and (3) "money had and received". The State Court Complaint did not state fraud or alter ego liability as separate causes of action. Under "relief sought", Savino asked for damages and attorney fees. Savino also asked for exemplary damages "because [Dodd and 3D] acted with malice in refusing to return funds to which [Savino] was plainly entitled" [State Court Complaint ¶73].

Dodd's counsel was not admitted to practice in Texas. Default judgment was entered before Dodd's counsel found local counsel to file an answer. The Texas trial court's default judgment states "[Dodd and 3D] are liable to [Savino] on his causes of action for Breach of Contract, Quantum Meruit, and Money Had and Received". [Default Judgment, page 1]. The court awarded \$174,986.87 in actual damages and \$12,400 in attorney fees. No exemplary damages were awarded.

Dodd challenged the Texas trial court's personal jurisdiction over him by filing a "special appearance".<sup>2</sup> Dodd's counsel also filed a "Motion to Vacate Orders, Motion for New Trial and Alternative Motion to Modify Judgment Filed Subject to Their Special Appearance" (the "Motion to Vacate"). The Motion to Vacate addressed the *Craddock*<sup>3</sup> factors used to set aside a default judgment entered by a Texas state court. Hearing was held on the special appearance and the Motion to Vacate on May 2, 2012. Plaintiff's affidavits were admitted into evidence but there

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<sup>2</sup> The Texas rules of civil procedure allow both a "general" and a "special" appearance and the entry of a special appearance is the vehicle by which a non-resident defendant contests a Texas court's personal jurisdiction over him. See, Tex. R. Civ. P. 120a; *Boyd v. Kobierowski*, 283 S.W.3d 19 (Tex. Ct. App. 2009). The purpose of such an appearance is to allow a defendant to make a special appearance in the case for the sole purpose of contesting jurisdiction without subjecting himself to the court's general jurisdiction. *C.W. Brown Mach. Shop, Inc. v. Stanley Machinery Corp.*, 670 S.W.2d 791 (Tex. Ct. App. 1984). A hearing on a party's special appearance is required and the court considers the pleadings, any stipulations between the parties, affidavits and attachments provided by the parties, results of discovery and any oral testimony. Tex. R. Civ. P. 120a3. The standard of review in a special appearance motion and hearing is that of factual sufficiency where the trial court, as trier of fact, may draw reasonable inferences from the evidence. *General Refractories Co. v. Martin*, 8 S.W.3d 818 (Tex. Ct. App. 2000).

<sup>3</sup> To set aside a default judgment and have a new trial ordered, the movant must show (1) the failure to answer was not intentional or the result of conscious indifference; (2) the movant has a meritorious defense; and (3) the granting of a new trial will not operate to cause delay or injury to the party that obtained the default judgment. *Craddock v. Sunshine Bus. Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939).

is no indication that witnesses were sworn or that cross-examination was held or permitted. The Texas trial court issued its findings of fact and conclusions of law (“Findings and Conclusions”) as to the special appearance on May 25, 2012. Among the findings made by the Texas trial court were:

“[Dodd and 3D] purposely availed themselves of Texas law when they deliberately caused foreseeable harm to Texas residents Mr. Savino ... by intentionally failing to make required contractual payments. [Findings and Conclusions, ¶31]

“Mr. Dodd and 3D deliberately caused foreseeable harm to Texas resident Mr. Savino when it intentionally failed to return \$150,000 that in equity and good conscience belonged to Mr. Savino. [Findings and Conclusions, ¶32]

“This was not a case of “mere untargeted negligence”...[r]ather, [Dodd’s and 3D’s] actions directed at Texas were purposeful and intentional...” [Findings and Conclusions, ¶33]

The Texas trial court failed to timely rule on the Motion to Vacate and it was overruled by operation of law. [Dodd’s appellate brief, page xv]. Dodd appealed the May, 2012 ruling on the special appearance and requested oral argument. The Texas Court of Appeals for the 14<sup>th</sup> District affirmed the trial court on the special appearance issue, and Dodd moved for rehearing. The Texas Court of Appeals withdrew its earlier opinion and issued a substitute opinion (the “Substitute Opinion”) on January 16, 2014 wherein it reaffirmed the denial of the special appearance motion, but also addressed the Motion to Vacate.

As to the first *Craddock* factor, the Texas Court of Appeals concluded that the failure to file an answer was intentional, or due to conscious indifference. As to the second *Craddock* factor of meritorious defense, Dodd argued that that he should not have been held personally liable for 3D’s debt because nothing in the State Court Complaint supported a theory of alter ego liability or fraud. The Court of Appeals found that Dodd had failed to preserve this issue on appeal because nowhere in his motion for rehearing did he complain that the State Court Complaint failed to allege actual fraud. The court went on to say that Dodd would not have succeeded

on this point even if he had preserved it for appeal and referred to paragraphs 20, 29, 30 and 31 of the State Court Complaint which alleged commingling of funds, diversion of company profits, and inadequate capitalization and the “parties” section wherein there was specific reference to “alter ego”. The Texas Court of Appeals affirmed the Texas trial court. Dodd filed his chapter 7 case on May 2, 2016. Savino filed his nondischargeability complaint on August 19, 2016.

## **Discussion**

### Summary Judgment Standard

Summary judgment is proper if the pleadings and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056.

### Collateral Estoppel

Collateral estoppel applies in bankruptcy nondischargeability actions. *Grogan v. Garner*, 111 S.Ct. 654, 655-656 (1991). A federal court must give a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered. *Migra v. Warren City School Dist. Bd. Of Educ.*, 104 S. Ct. 892, 896 (1984). The judgment and findings at issue here were issued by Texas courts and therefore Texas law applies. Under Texas law, a litigant is collaterally estopped from relitigating an issue if (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) the facts were essential to the judgment in the first action and (3) the parties were cast as adversaries in the first action. *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990). An issue is “fully and fairly” litigated if the party against whom estoppel is sought had an incentive to litigate the issue in the first action and was “fully heard” on that issue. *Mann v. Old Republic Nat. Title Ins. Co.*, 975 S.W.2d 347, 350 (Tex. Ct. App. 1998); *BP Automotive LP v. RML Waxahachie Dodge, LLC*, 517 S.W.3d 186, 200 (Tex. Ct. App. 2017).

Dodd’s motion for special appearance was heard on May 2, 2012. That hearing was to determine if the Texas trial court had personal jurisdiction over Dodd and was limited to evidence with respect to the Dodd’s contacts with the state.

There is no indication of an opportunity for testimony or cross examination, although affidavits were accepted by the court. Such a hearing could not possibly have included evidence of the underlying fraud allegations of the State Court Complaint or include findings as to those underlying allegations because the Texas trial court's personal jurisdiction over Dodd had not even been determined at that point. Rule 120a2 of the Texas Rules of Civil Procedure recognizes this fact as it provides that

Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. *No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.*

(emphasis added). The Texas trial court's use of the words "deliberate", "intentional" and "purposeful" in its Findings and Conclusions all refer to the purposeful nature of Dodd's contacts with Texas. Dodd did not have the incentive or ability to litigate the issue of fraud at that juncture because the only issue considered was the nature and extent of Dodd's contacts with the state of Texas, not whether he committed fraud.

The findings by the Texas Court of Appeals, adopted from the trial court's Findings of Fact, do not help Savino, either. Savino points to a passage on pages 21-22 of the Substitute Opinion which reads:

Actual fraud, a component of alter ego liability, involves "dishonesty of purpose or intent to deceive". The intent to deceive can be inferred because Savino's actual allegations, when taken as true, support a finding that Dodd solicited an investment in 3D Global after misrepresenting its net present value.

(Citations omitted). This finding addressed Dodd's meritorious defense argument and was made in the context of whether the State Court Complaint stated a claim for alter ego liability so as to put Dodd on fair notice that he was being sued under that theory. See, Tex. R. Civ. P. 47(a) ("an original pleading which sets forth a

claim for relief ...shall contain a short statement of the cause of action sufficient to give fair notice of the claim involved.”). In determining whether a complaint gives sufficient notice of the claim involved, a Texas court examines whether an opposing attorney of reasonable competence can ascertain the nature and the basic issues of the controversy, and the court construes the pleadings and all factual inferences therefrom liberally in favor of the pleader. *Bundren v. Holly Oaks Townhomes Ass’n, Inc.*, 347 S.W.3d 421, 430-431 (Tex. Ct. App. 2011); *Montgomery v. Silva*, No. 2-03-385-CV, 2005 WL 555153 at \*2, (Tex. Ct. App. March 10, 2005). Indeed, the sentence immediately following the portion of the Substitute Opinion quoted above reads “[B]ased on the pleadings here, we conclude that an opposing attorney of reasonable competence could have ascertained Dodd’s alter ego liability theory.” The standard under which the Texas Court of Appeals made this finding was one akin to a Rule 12(b)(6) inquiry into the sufficiency of the allegations of the complaint, where a court takes all well pled allegations as true and draws all reasonable inferences from them in favor of the pleader. This standard is much less stringent than the preponderance of the evidence standard employed in nondischargeability actions and collateral estoppel does not apply. See, *Young & Co. v. Shea*, 397 F.2d 185, 188 (5<sup>th</sup> Cir. 1968) (longshoreman could litigate issue of injury in administrative proceeding even though jury in civil proceeding found no injury, because of the “substantial variance in the standard of proof” between the jury trial and the less stringent standard of proof for administrative proceeding); *Newport News Shipbuilding & Dry Dock Co. v. Office of Workers’ Compensation Programs, et. al*, 583 F.2d 1273, 1279 (4<sup>th</sup> Cir. 1978) (“[r]elitigation of an issue is not precluded by the doctrine of collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first”.)

Dodd also challenged the sufficiency of the evidence on the alter ego theory. The judgment was a “no answer” default, where “the defendant admits all facts properly pleaded in the plaintiff’s petition, except for the amount of liquidated

damages. If the facts set forth in the petition allege a cause of action, the default judgment conclusively establishes the defendant's liability" (citations omitted) [Substitute Opinion, page 22]. No presentation of evidence occurred. Again, this Rule 12(b)(6)-like standard is not the more stringent preponderance of the evidence standard and thus this finding does not preclude Dodd from litigating the fraud issues raised in the nondischargeability complaint.

Even if one could conclude that the issue was "fully and fairly" litigated, the Texas trial court's findings do not meet all of the elements of §§523(a)(2)(A)(4) and (6). All prongs of §523(a)(2)(A) require scienter, or intent to deceive. *In re Glenn*, 502 B.R. 516, 532 (Bankr. N. D. Ill. 2013). "Intent to deceive" is also a necessary element under the "embezzlement" and "larceny" prongs of §523(a)(4). *In re Arvanitis* 523 B.R. 633 (Bankr. N. D. Ill. 2015). Paragraphs 31, 32 and 33 of the Findings and Conclusions, which were based upon the no answer default, collectively recite that Dodd's intentional failure to make the required contractual payments and to return the escrow deposit caused foreseeable harm to Savino. However, they say nothing about whether Dodd's intentional failure to make payments were accompanied by his intent to deceive or defraud Savino at the time the earnest money was deposited with Dodd. Virtually every contractual breach or default occurs knowingly and/or intentionally.

Section §523(a)(6) requires both "willful and malicious" conduct which requires a deliberate or intentional *injury*, not just a deliberate or intentional act that leads to injury. *Gerard v. Gerard*, 780 F.3d 806 (7<sup>th</sup> Cir. 2015). The Texas trial court findings do not establish that Dodd acted with the specific intent to injure Savino. The injury may have been foreseeable, as the findings suggest, but they do not establish that Dodd intended the resulting injury to occur. There also remains a genuine issue of material fact as to whether Dodd's acts were "malicious". Conduct is "malicious" if the debtor acted in conscious disregard of his duties or without just cause or excuse but it does not require ill-will or specific intent to do harm. *First Weber Group, Inc. v. Horsfall*, 738 F.3d 767 (7<sup>th</sup> Cir. 2013). The State Court Complaint asked for exemplary damages because Savino alleged that Dodd

acted with malice. The judgment awarded actual damages of \$174,986.87 (escrow of \$150,000, travel expenses of \$4986.87 and Dodd's share (\$20,000) of accounting fees). It also awarded attorney fees of \$12,400. It did not award exemplary damages that allegedly would have been appropriate had Dodd acted with malice.

The issue of Dodd's fraud was not "fairly and fully litigated" in the Texas courts. A determination of nondischargeability has graver consequences than a determination of personal jurisdiction or even of liability. Dodd did not have the incentive to litigate the issue of fraud in the Texas trial court which determined the court's jurisdiction over him and any findings with respect to the jurisdictional issue were not a determination of the merits of the underlying case. The findings of the Texas Court of Appeals were based on a less stringent standard of proof than that required in nondischargeability actions. Dodd is not precluded from litigating the dischargeability of the judgment debt owed to Savino. Savino's motion for summary judgment is DENIED.

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