UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

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March 12, 1997

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I certify that this is a true copy
Charles L. Nail, Jr., Clerk, U.S. Bankruptcy Court
District of South Dakota
Attest: Deputy Clerk

Subjects: ***Western Surety Company v. Lamphere (In re Fritz R. Lamphere)***,
Adversary No. 96-5015;
Chapter 7; Bankr. No. 96-50074

Lamphere v. Western Surety Company (In re Fritz R. Lamphere),
Adversary No. 96-5016;
Chapter 7; Bankr. No. 96-50074

Dear Counsel:

The matters before the Court are Western Surety Company's Motions for Summary Judgment in the above-named adversary proceedings. These adversary proceedings are mirrors. Both seek a determination of whether Western Surety's claim against Debtor Fritz R. Lamphere is non dischargeable. Only the parties are reversed. These Motions are core proceedings under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, Western Surety's Motions shall be granted.

SUMMARY OF FACTS. The facts are not substantially in dispute. In 1983, Fritz Lamphere was appointed the guardian of his minor daughter, Michelle Lamphere, and her estate. He posted a bond obtained from Western Surety. He was removed as guardian in 1988. In 1991, his daughter brought a civil suit against him and Western Surety on the grounds that he had converted her assets for his personal gain. A default judgment was entered against Fritz Lamphere on July 31, 1992 for $143,852.46 ($89,658.49 loss plus prejudgment interest of $54,193.97). The state civil court received evidence at the default hearing to establish the amount of the judgment. Western Surety settled with Michelle Lamphere for $120,000.00 and took an assignment of her claim against her father.

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In connection with this guardianship, Fritz Lamphere also pled guilty to felony embezzlement and received a suspended imposition of sentence on September 3, 1993. He was placed on probation for two years and was ordered to pay $2,000.00 in restitution to his daughter. He complied with those terms.

On March 4, 1996, Fritz Lamphere (Debtor) filed a Chapter 7 petition. On June 3, 1996, Western Surety filed a complaint against Debtor seeking a determination that its assigned claim against Debtor was non dischargeable under 11 U.S.C. § 523(a)(4). Debtor filed a complaint against Western Surety on June 6, 1996 seeking a determination that Western Surety's claim was dischargeable. Western Surety moved for summary judgment in both adversary proceedings on the grounds that collateral estoppel arising from the state civil judgment and the state criminal conviction govern all issues under § 523(a)(4). Debtor has countered that the state civil judgment and criminal conviction do not collaterally estop litigation of the nondischargeability adversaries because he was coerced into pleading guilty in the criminal action and remaining silent in the civil action under a threat of a long prison term and that he was not represented in the civil action. Debtor's allegation, in part, hinges on his premise that the prosecuting states attorney also handled the civil matter. Specifically, Debtor argues he has not yet had his day in Court.

APPLICABLE LAW. *Collateral Estoppel.* The principles of collateral estoppel apply in bankruptcy court to bar the relitigation of issues that were determined in a prior state court action. *Grogan v. Garner*, 111 S.Ct. 654, 658 n.11 (1991). This Court must give the same preclusive effect to the state court's decision as would another court of that state. 28 U.S.C. § 1738; *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1066-67 (8th Cir. 1997). For collateral estoppel to apply in a South Dakota court, a four-part test must be considered: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the judgment is asserted a party or in privity with a party to the prior adjudication? (4) Did the party against whom the judgment is asserted have a full and fair opportunity to litigate the issue in the prior adjudication? *SDDS, Inc. v. South Dakota*, 994 F.2d 486, (8th Cir. 1993)(citing *Estes v. Millea*, 464 N.W.2d 616, 618 (S.D. 1990), and *Staab v. Cameron*, 351 N.W.2d 463, 465 (S.D. 1984)). A default judgment can satisfy the fourth element if it was entered by a court that had both subject matter and personal jurisdiction and if there was no fraud or collusion. *Kapp v. Naturelle, Inc. (In re Kapp)*, 611 F.2d 703, 707 (8th Cir. 1979).

The principle of collateral estoppel is "rooted in concerns of judicial economy." *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996).

> By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, issue preclusion acts to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication."

Id.(quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)(cites therein)).

Summary Judgment. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein). Although inferences may be drawn from the underlying facts, the matter must be viewed in the light most favorable to the party opposing the motion. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Further,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Amerinet, 972 F.2d at 1490 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (cite therein).

Discussion. For the purpose of Western Surety's Motions for Summary Judgment, the Court will consider only whether the default judgment against Debtor in the state civil action collaterally estops relitigation of this non dischargeability complaint under § 523(a)(4). It is not necessary to consider the criminal conviction because the fraud established therein is based on the same allegations in the civil action and, most important, it was the civil action that created the debt that Western Surety wants declared non dischargeable.

The state court action established Debtor's fiduciary status, defalcation was shown, and the amount of damages was determined. The parties in both actions are the same; the only change is that Western Surety has stepped, by assignment, into the state court plaintiff's shoes. The state court civil judgment is final; it has not been modified or vacated and is not, to this Court's knowledge, subject to any appeal. Accordingly, all issues necessary to render the debt non dischargeable under § 523(a)(4) were adjudicated with finality by the state court. The only shadow cast on the state court civil judgment is Debtor's present allegation that the default judgment was the product of fraud or collusion.

Whether the party against whom collateral estoppel is to be applied had a full and fair opportunity to litigate the issue in the prior adjudication can be answered only in part by whether the application of collateral estoppel would work an injustice on that party. *Estes*, 464 N.W.2d at 620. The concept of collateral estoppel goes beyond the interests of the parties to the litigation. *Id.*

> The underlying rationale . . . is that public policy, judicial orderliness, economy of judicial time, and the interests of the litigants as well as the peace and order of society all require that stability should be accorded judgments. Controversies once decided on their merits should remain in repose, and inconsistent judicial decisions should not be made on the same set of facts. There must be an end to litigation, which without such doctrines [as collateral estoppel], would be endless.

Id. (citing *Adam v. Adam*, 254 N.W.2d 123 (S.D. 1977)). In this case, Debtor will not suffer an injustice if collateral estoppel is applied. First, Debtor's allegations of fraud are vague and are supported only by his own affidavits. Further, there has been no evidence proffered that Debtor was precluded by distance, accident, or mistake from appearing in the state civil action. *Spartz v. Cornell (In re Cornell)*, 178 B.R. 45, 49 (Bankr. D. Conn. 1995). Most important, Debtor earlier could have and now may still seek equitable relief from the state court for any fraud or coercion that resulted in the default civil judgment against him. That is the appropriate court to address these allegations, especially where his grievance lies with the state court plaintiff and her counsel and the prosecuting attorney and where Debtor has not challenged the actions of the state court itself or the state court's jurisdiction.

> "A party receives a fair opportunity to present the claims allegedly precluded if the party could have brought the claims in a proceeding that would satisfy the

minimal procedural requirements of the due process clause."

Bechtold, 104 F.3d at 1068(quoting *Gahr v. Trammel*, 794 F.2d 1063, 1069 (8th Cir. 1986)). Therefore, for the purpose of this dischargeability action, the state court's civil judgment must be recognized as final and the issues decided therein applied here. *See Allen v. McCurry*, 101 S.Ct. 411, 415 (1980)(comity between state and federal courts is a bulwark of the federal system)(cite therein); *see also Tatge v. Chandler (In re Judiciary Tower Associates)*, 175 B.R. 796, 805 n.8 (Bankr. D.D.C. 1994)(neither pending motion to vacate a judgment nor pending appeal deprives an order of preclusive effect); and *Fairway Golfview Homes, Inc. v. Kecskes (In re Kecskes)*, 136 B.R. 578, 581 (Bankr. S.D. Fla. 1992)(filing of new lawsuit to set aside a judgment does not affect the finality of the prior judgment).

As stated in everyday language by the Court of Appeals for this Circuit, the state court civil judgment is final and this Court can find "no really good reason for permitting it to be litigated again." *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 564 (8th Cir. 1990)(quoting *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961)(Friendly, J.)). If Debtor is successful in overturning the state court judgment, then further remedy may lie with this Court to vacate the summary judgments in these adversary proceedings. *See, e.g., New York v. Kelly (In re Kelly)*, 155 B.R. 75, 78 (Bankr. S.D. N.Y. 1993); and *Worrell v. Grim (In re Grim)*, 104 B.R. 486, 488 (Bankr. S.D. Fla. 1989).

An order granting Western Surety summary judgment shall be entered in each adversary proceeding. Western Surety may propose separate judgments for docketing pursuant to F.R.Bankr.P. 9021.

Sincerely,

Irvin N. Hoyt
Chief Bankruptcy Judge

CERTIFICATE OF SERVICE
hereby certify that a copy of this
ocument was mailed, hand delivered,
r faxed this date to those creditors
nd other parties in interest identified
n the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By: M. Kay Kiner
Date: 03-12-97

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
MAR 12 1997
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

INH:sh

CC: adversary files (docket original in each; copies to parties in interest)

Case: 96-05015 Form id: 122 Ntc Date: 03/12/97 Off: 3 Page : 1
Total notices mailed: 5

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