UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

May 3, 2000

Brian L. Utzman, Esq.
Co-counsel for Plaintiff
2902 W. Main, Suite 3
Rapid City, South Dakota 57702

Rick Johnson, Esq.
Co-counsel for Plaintiff
P.O. Box 149
Gregory, South Dakota 57533

Robert M. Nash, Esq.
Counsel for Debtors-Defendants
P.O. Box 1552
Rapid City, South Dakota 57709

Subject: ***Drew v. Stanton***
(In re Thomas W. and Mary Stanton)
Adversary No. 99-5022
Chapter 7; Bankr. No. 99-50465

Dear Counsel:

The matter before the Court is Debtors-Defendants Thomas W. Stanton's and Mary Stanton's motion for summary judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). This letter decision and subsequent order and judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the debt owed by Debtors-Defendants Thomas W. Stanton and Mary Stanton to Plaintiff Connie Drew is dischargeable. Summary judgment shall therefore be entered for Debtors-Defendants Thomas W. Stanton and Mary Stanton.

Summary of facts. Over a 20-month period beginning in June 1991, Thomas W. Stanton and Mary Stanton borrowed some $500,000.00 from Connie Drew ("Drew"). When the Stantons failed to repay her, Drew commenced an action against them in Pennington County Circuit Court.[1]

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[1] *Connie Drew v. Tom Stanton, Mary Stanton, and Costello, Porter, Hill, Heisterkamp & Bushnell*, Civ. No. 96-125.

21.

In Count IV of her amended state court Complaint, Drew alleged that Thomas W. Stanton "exercised deceit and fraud . . . to secure the [loans]" and that Mary Stanton "worked jointly with [Thomas W.] Stanton to accomplish said fraud and deceit." In particular, Drew alleged that Thomas W. Stanton failed to "fully disclose the circumstances and disposition of the funds . . .; the likelihood of repayment . . .; the responsibility of others for repayment . . .; and [the] Stantons' financial condition."[2]

On September 11, 1997, a Judgment of Dismissal was entered in the state court proceeding, dismissing Count IV of Drew's amended state court complaint "on the merits, and with prejudice," pursuant to the Honorable Lee Anderson's August 11, 1997 letter opinion and September 9, 1997 Findings of Fact and Conclusions of Law. In his Findings of Fact and Conclusions of Law, Judge Anderson specifically found that Drew had failed to comply with the Stantons' discovery requests; had failed to adequately explain her inability to comply with such discovery requests; had "intentionally disregarded, obstructed, and delayed the Court's discovery Orders . . ."; had "destroyed documents after [the Stantons] sought discovery of such documents"; and had "deceived the Court as to the existence and possible availability of the subject documents . . ." Judge Anderson then concluded that Drew's "actions and statements in regards [*sic*] to production of the subject documents constitute bad faith, fault and an intentional destruction of discoverable evidence" and that dismissal of Count IV of Drew's amended state court complaint, with prejudice, was both necessary and appropriate. Drew did not appeal the Judgment of Dismissal.

The Stantons ("Debtors") filed a petition for relief under chapter 7 on September 20, 1999. On December 20, 1999, Drew filed an adversary complaint to determine the dischargeability of the debt owed to her. In her adversary complaint, Drew alleged that Debtor Thomas W. Stanton made certain representations to her regarding the use to which the funds he borrowed from her would be

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[2] Drew's amended state court complaint included three additional counts. In Count I, Drew sought recovery on the four notes evidencing the loans. Drew prevailed against the Stantons on this count. In Count II, Drew sought recovery from Thomas W. Stanton's law firm for its alleged negligence in, among other things, failing to supervise him. Drew did not prevail on this count. Finally, in Count III, Drew sought recovery from Thomas W. Stanton's law firm for its alleged negligence in failing to protect her interests in unrelated litigation. The Court cannot discern from the record before it whether Drew prevailed on this count.

put[3] that those representations were false, and that the debt owed to her should therefore be excepted from Debtors' discharge pursuant to 11 U.S.C. § 523(a)(2)(A).[4]

On January 20, 2000, Debtors filed their answer, in which they admitted borrowing money from Drew, but generally denied the balance of Drew's adversary complaint. On that same date, Debtors filed a motion for summary judgment, supported by Debtor Thomas W. Stanton's affidavit. On March 31, 2000, Debtors filed a supplemental memorandum in support of their motion. On April 3, 2000, Drew filed a response to Debtors' motion. Finally, on April 4, 2000, Debtors filed a letter supplement to their motion. The matter was taken under advisement.

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).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Circ. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and citations therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

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[3] In particular, Drew alleged that Debtor Thomas W. Stanton represented to her that the money "was being used for an investment into [*sic*] the Cripple Creek Colorado Casino" and "was needed to cure construction costs and expenses in excess of what was anticipated."

[4] Section 523(a)(2)(A) provides:

> A discharge under section 727 . . . 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 . . .

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997 (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273, (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (citation therein); *Handeen*, 112 F.3d at 1346.

If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt. He must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995).

Res judicata. In their motion for summary judgment, Debtors argue that Drew's complaint is barred by *res judicata*. The term *res judicata* is often used loosely to refer to both "claim preclusion" and "issue preclusion." *See W.A. Lang Co. v. Anderberg-Lund Printing Co.* (*In re Anderberg-Lund Printing Co.*), 109 F.3d 1343, 1346 (8th Cir. 1997). Claim preclusion (or *res judicata*, in its truest sense) "bars relitigation of the same claim between parties or their privies where a final judgment has been rendered upon the merits by a court of competent jurisdiction." *Plough v. West Des Moines Community School District*, 70 F.3d 512, 517 (8th Cir. 1995) (quoting *Smith v. Updegraff*, 744 F.2d 1354, 1362 (8th Cir. 1984)). Issue preclusion (or "collateral estoppel") "applies to legal or factual issues 'actually and necessarily determined,' with such a determination becoming 'conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'" *W.A. Lang Co.*, 109 F.3d at 1346 (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)). The principles of both *res judicata* and collateral estoppel are generally applicable in federal bankruptcy proceedings. *Id.* (citing *Katchen v. Landy*, 382 U.S. 323, 334, (1966)). In determining the preclusive effect of a particular judgment, the bankruptcy court must look to the law of the state in which the judgment was entered. *Harmon Industries v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999).

Under South Dakota law, the Court must consider the following

four factors to determine whether *res judicata*[5] will apply: four factors to determine whether *res judicata*[6] will apply:

> (1) [w]hether the issue decided in the former adjudication is identical to the present issue;
>
> (2) whether there was a final judgment on the merits;
>
> (3) whether the parties in the two actions are the same or in privity; and
>
> (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication.

Frigaard v. Seffens, 599 N.W. 2d 646, 648 (S.D. 1999) (citing *Springer v. Black*, 520 N.W.2d 77, 79 (S.D. 1994) (citations omitted)).

In this case, the first factor is dispositive. The state court did not, and indeed could not, address the dischargeability of the debt owed to Drew. While the validity of a creditor's claim is determined by state law, *see Grogan v. Garner*, 498 U.S. 279, 283 (1991) (citing *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946)), the dischargeability of the debt giving rise to that creditor's claim is determined by federal law. *Id.* at 284 (citing *Brown v. Felsen*, 442 U.S. 127, 129-130, 136 (1979)). Only the bankruptcy court has jurisdiction to determine the dischargeability of a debt allegedly incurred through fraud. *Id.* (citing *Brown*, 442 U.S. at 135-136). Thus, *res judicata* does not bar Drew's nondischargeability complaint.

Collateral estoppel. That is not to say, however, that the state court's decision to dismiss Count IV of Drew's complaint "on the merits, and with prejudice," is not entitled to deference. Under South Dakota law, a party may be collaterally estopped from

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[5] The South Dakota Supreme Court draws the same distinction between *res judicata* and collateral estoppel as outlined above. *See Merchants State Bank v. C.E. Light*, 458 N.W. 2d 792, 794 (S.D. 1990)("It is perhaps easier to visualize the distinction by conceptualizing *res judicata* as 'claim preclusion' and collateral estoppel as 'issue preclusion.'") (citation omitted).

[6] The South Dakota Supreme Court draws the same distinction between *res judicata* and collateral estoppel as outlined above. *See Merchants State Bank v. C.E. Light*, 458 N.W. 2d 792, 794 (S.D. 1990)("It is perhaps easier to visualize the distinction by conceptualizing *res judicata* as 'claim preclusion' and collateral estoppel as 'issue preclusion.'") (citation omitted).

relitigating an issue if:

> (1) [t]he issue decided in the prior adjudication was identical with the one presented in the action in question;
>
> (2) [t]here was a final judgment on the merits;
>
> (3) [t]he party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and
>
> (4) [t]he party against whom the plea is asserted had a full and fair opportunity to litigate the issue in the prior litigation.

SDDS, Inc. v. State of South Dakota, 569 N.W.2d 289, 294 (S.D. 1997) (citing *Grand State Property, Inc. v. Woods, Fuller, et al.*, 556 N.W.2d 84, 87 (S.D. 1996) (citation omitted)).

Debtors have clearly established the first and third elements. To prevail in this adversary proceeding, Drew must prove that Debtor Thomas W. Stanton made certain misrepresentations to induce Drew to lend him money. That is precisely the issue framed by Count IV of Drew's amended state court complaint, and Drew was necessarily a party to the state court proceeding.

The second and fourth elements are a bit more problematic. While the Judgment of Dismissal in the state court proceeding recites that it was "on the merits, and with prejudice," it was in fact entered as a sanction for Drew's failure to comply with Debtors' discovery requests. The merits of Drew's allegations were never heard, considered, or ruled upon. Similarly, while it could be said that Drew had a full and fair *opportunity* to litigate the issue of Debtor Thomas W. Stanton's alleged misrepresentations in the state court proceeding, the fact remains that the issue was never actually litigated.

In her brief, Drew points out that Debtors failed to cite any authority for giving *res judicata* effect to a judgment entered as a discovery sanction. Indeed, no such authority appears to exist in South Dakota. The South Dakota Supreme Court has been equally silent on the issue of the collateral estoppel effect of such a judgment. In the absence of any such authority, the Court is left to determine how it thinks the South Dakota Supreme Court *would* decide if presented with the question. *See Jurrens v. Hartford Life Insurance Co.*, 190 F.3d 919, 922 (8th Cir. 1999). In making its determination, the Court "may consider relevant state precedent, analogous decisions, considered dicta, . . . and any other reliable data." *Lindsay Manufacturing Co. v. Hartford*

Accident & Indemnity Co., 118 F.3d 1263, 1268 (8th Cir. 1997) (quoting *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 729 (8th Cir. 1995), *cert. denied*, 516 U.S. 1174 (1996)).

There are several good reasons to give collateral estoppel effect to a judgment entered as a discovery sanction. First, refusing to do so would effectively render nugatory S.D.C.L. § 15-6-37(b)(2)(C), as any party "sanctioned" by having her case dismissed could simply refile her complaint. Second, the Court should not in essence condone and excuse the behavior of litigants who abuse the processes and dignity of the court, much less reward them with an undeserved second bite of the apple. Third, in cases such as this one, in which a litigant has been found to have intentionally destroyed relevant and material evidence, it would be completely unfair to ask the other party to proceed without such evidence. Finally, it would not be equitable to permit a litigant, who by her own actions has prevented a matter from being fully and fairly litigated, to complain that the matter was not actually litigated.

Other courts have found such reasons persuasive. *See, e.g., Wolstein v. Docteroff* (*In re Docteroff*), 133 F.3d 210, 215 (3rd Cir. 1997) ("We do not hesitate in holding that a party . . . who deliberately prevents resolution of a lawsuit should be deemed to have actually litigated an issue for purposes of collateral estoppel application."); *Bush v. Balfour Beatty Bahamas, Limited* (*In re Bush*), 62 F.3d 1319, 1324 (11th Cir. 1995) ("Such abuse of the judicial process must not be rewarded by a blind application of the general rule denying collateral estoppel effect to a default judgment."); *Federal Deposit Insurance Corp. v. Daily*, (*In re Daily*), 47 F.3d 365, 368 (9th Cir. 1995) ("A party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication. In such a case the 'actual litigation' requirement may be satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so.").

Conclusion. The Court finds that the South Dakota Supreme Court would give collateral estoppel effect to a judgment entered as a discovery sanction, for the reasons and based on the authority cited above. Drew is therefore collaterally estopped from raising allegations that Debtor Thomas W. Stanton fraudulently induced her to lend him money. That being so, she cannot prevail under 11 U.S.C. § 523(a)(2)(A). Debtors are entitled to judgment as a matter of law.

Debtors' Motion for Summary Judgment is granted, and judgment shall be entered for Debtors. The parties shall bear their own costs and attorney fees. Counsel for Debtors shall prepare an appropriate order.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: adversary file (docket original in adversary; serve copies on counsel for each party and U.S. Trustee)

UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

MAY 03 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

MAY 03 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By_____

Case: 99-05022 Form id: 122 Ntc Date: 05/03/2000 Off: 3 Page : 1
Total notices mailed: 7

Defendant Stanton, Thomas W. 4051 Carriage Hills Drive, Rapid City, SD 57702
Defendant Stanton, Mary 4051 Carriage Hills Drive, Rapid City, SD 57702
Aty Nash, Robert M. PO Box 1552, Rapid City, SD 57709
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty Johnson, Rick PO Box 149, Gregory, SD 57533
Aty Utzman, Brian L. 2902 W Main St, #3, Rapid City, SD 57702-8174
Intereste Whetzal, Dennis PO Box 8285, Rapid City, SD 57709