UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

RONALD DENNIS KOTT and
REBECCA LISS KOTT,

Debtors.
_____/

Case No. ST 98-08243
Chapter 7

JESSALYN VANDER MEY,

Plaintiff,

v.

RONALD DENNIS KOTT,

Defendant.
_____/

Adversary Proceeding
No. 98-88621

NOT FOR PUBLICATION

OPINION

This matter comes before the court upon a Motion for Summary Judgment filed by the Plaintiff, Jessalyn Vander Mey (Plaintiff). This court has jurisdiction pursuant to 28 U.S.C. §1334(b); this is a core proceeding under 28 U.S.C. §157(b)(2)(I). Accordingly, we enter a final order subject to appellate review under 28 U.S.C. §158 and Fed. R. Bank. P. 8001 et. seq.

Facts

From November 1993 to May 1994, the Plaintiff worked for Signal Technical Products Corp.(STPC). During her tenure at STPC the Plaintiff was sexually harassed by the Defendant, Ronald D. Kott (Defendant), President and C.E.O. of the company.

On May 24, 1994, Plaintiff's attorney discussed the Plaintiff's allegations against the Defendant in a telephone call to Tom Wright, owner of STPC. One week later the Defendant was fired.

The Plaintiff filed a complaint against STPC[1] and the Defendant in state court on September 28, 1994 alleging violations of the Elliot-Larsen Civil Rights Act, specifically sexual harassment, discrimination and retaliation. A process server was hired and began the first attempt of many at serving the Defendant.

In the course of the next 14 months the Plaintiff repeatedly tried to serve the Defendant with the complaint and summons.[2] She ultimately served him with the Notice of Default, Default and supporting documents by certified mail. The package was returned by the postal service marked "unclaimed."

The Plaintiff filed a Motion for Entry of Default Judgment and a hearing was held January 12, 1996. The state court judge heard testimony and granted the Motion for Default awarding the

---

[1]STPC eventually settled with the Plaintiff.

[2]She attempted personal service six times, service by mail four times and posted it on his house twice. (Transcript, Kott Motion to Set Aside Default, 5/3/96 at 4, Line 21 through 7, Line 4.) The court ruled: "Over and over again are attempts at service. There is legally sufficient substituted service. I think this is a matter in equity, as well as under the Court Rule, and I think in fairness to the Plaintiff your Motion is denied." (Transcript, Kott Motion to Set Aside Default, 5/3/96 at 8, Lines 12-16.

Plaintiff $250,000. The Defendant was served with a copy of the Default Judgment on January 25, 1996.

On March 6, 1996, the sheriff, executing the judgment, seized some personal property from the Defendant's residence. In response, the Defendant unsuccessfully sought to have the Default Judgment set aside. He appealed that ruling to no avail. On September 16, 1998, the Defendant and his wife filed bankruptcy under Chapter 7. The Plaintiff countered by filing an adversary proceeding asking that the debt be determined nondischargeable pursuant to 11 U.S.C. §523(a)(6).

The Plaintiff filed a Motion for Summary Judgment arguing that sexual harassment meets the standards for willful and malicious injury under 11 U.S.C. §523(a)(6) and the state court default judgment should be given collateral estoppel effect. The Defendant contends that the elements of §523(a)(6) were not actually litigated between the parties in state court and therefore summary judgment based on collateral estoppel would be improper.

Standard for Summary Judgment

Summary judgment is appropriate if 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. The summary judgment rule requires that the disputed facts be material, that is, facts which are defined by substantive law and are necessary to apply the law. The rule also requires that the dispute be genuine. A dispute is genuine if a reasonable jury could return a judgment for the nonmoving party. First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 88 S.Ct. 1575 (1968). "Only disputes over the facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The court must draw all inferences in a light most favorable to the nonmoving party (in this case the Defendant), but the court may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Agristor Financial Corp. v. Van Sickle, 967 F.2d 233, 236 (6th Cir. 1992) (quoting Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986)).

Collateral Estoppel

We turn next to whether the Plaintiff may rely on collateral estoppel to bar the Defendant from litigating in this court issues raised and decided during the prior state court proceedings. As stated in Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414 (1980), "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Collateral estoppel, judiciously applied, saves litigants from relitigating issues, promotes judicial economy, and prevents inconsistent decisions. See also Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 649 (1979). The doctrine applies in dischargeability actions. Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 11 (1991).

Sexual Harassment and 11 U.S.C. §523(a)(6)

11 U.S.C. §523(a)(6) states:

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

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

In Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974 (1998), the Supreme Court held that willful means voluntary, intentional or deliberate and therefore only acts done with the intent to cause harm, not merely acts done intentionally, can cause willful and malicious injury. In other words, the Defendant must have intended to cause the actual injuries, not just the act that led to the injuries. Therefore, we must determine whether the Defendant intended to injure the Plaintiff and whether his intentional actions caused the Plaintiff to suffer injury.

"[T]he (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts' as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend 'the consequences of the act not simply the act itself.'" Id. at 61-62 (quoting Restatement (Second) of Torts §8A, comment a, p. 15 (1964)

Sexual harassment has long been considered an intentional tort. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998) ("Sexual harassment under Title VII presupposes intentional conduct"); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (Sexual harassment always represents an intentional assault.); Johnson v. Miera (In re Miera), 104 B.R. 150 (Bankr. D. Minn. 1989) (The act may, by its very nature, bespeak the intent to cause harm.); Thompson v. Kelly (In re Kelly), 238 B.R. 156 (Bankr. E.D. Mo. 1999) (Sexual harassment and sexual battery are intentional torts).

Due to the nature of sexual harassment, we find that the consequences of the act and the act itself are one and the same. For example, a person can extend his foot and trip another, but not intend to knock out the victim's teeth when she hits the floor. In sexual harassment, the act itself

instantaneously shows a deliberate lack of concern for the victim's rights. The moment the act is committed whether verbally or physically, the consequence is demeaning, degrading and/or coercive. The continuation of the act is often contingent on the harasser's economic control over the victim. It violates basic human rights of privacy, freedom, sexual integrity and personal security.

Consequently, we find that the act of sexual harassment meets the elements of §523(a)(6) as well as the criteria set forth in Geiger.

The Collateral Estoppel Effect of the Default Judgment

Collateral estoppel precludes the relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated; and (2) necessarily determined. People v. Gates, 434 Mich. 146, 154, 452 N.W.2d 627, 630 (1990).

The Sixth Circuit in Bay Area Factors v. Calvert (In re Calvert), 105 F.3d 315 (6th Cir. 1997) has held that there is no federal policy exception to application of collateral estoppel to a prior state court judgment, even if the underlying judgment was obtained by default, so long as the applicable state law would give collateral estoppel effect to a default judgment. In analyzing whether an issue was "actually litigated" in the prior proceeding, the Court must look at more than what has been plead and argued. We must also consider whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue. Gates, 434 Mich. at 156-57, 452 N.W.2d at 627.

Consequently, under both state and federal law we can give collateral estoppel effect to a default judgment so long as it was "actually litigated " and "necessarily determined" and the Defendant had an opportunity to litigate the issue.

Actually Litigated

An issue is "actually litigated" if it is put into issue by the pleadings, submitted to the trier of fact, and determined by the trier of fact. Latimer v. Mueller & Son, Inc., 149 Mich. App. 620, 640, 386 N.W.2d. 618, 627 (1986). For collateral estoppel purposes, an issue may be "actually litigated" without a trial. Id.

The default judgment at issue here satisfies the "actually litigated" requirement because it was put into issue by Plaintiff's pleadings, submitted to the state court judge who took testimony and granted the Motion for Default. This was more than a "true default" in that the judge heard testimony and then made her determination. Therefore we find the "actually litigated" element has been met.

In his Response to the Plaintiff's Motion for Summary Judgment, the Defendant stated that he knew of the pending action against him but chose not to defend. Only when property was being seized from his home did he feel the need to participate. He filed a Motion to Reconsider which was rejected by the state court. He then appealed the ruling which was also unsuccessful. He is now asking the Bankruptcy Court to undo an order that has had its rectitude determined three times. We are loathe to do this.

Necessarily Determined

An issue is "necessarily determined" if it is essential to the judgment. Gates 434 Mich. at 158, 452 N.W.2d at 631. The Michigan Court of Appeals has stated that a default judgment is considered a determination on the merits of matters essential to support the judgment. City of Detroit v. Nortown Theatre, Inc., 116 Mich. App. 386, 392, 323 N.W.2d 411, 413-14 (1982). Even so, we must determine whether a finding of sexual harassment necessarily entails a finding of the elements required to prove a claim under §523(a)(6).

As stated previously, §523(a)(6) prohibits the discharge of a debt incurred while committing an intentional tort. Thus a state court judgment based on an intentional tort, necessarily encompasses a finding of the elements of §523(a)(6) and is entitled to collateral estoppel effect in a subsequent bankruptcy action.

Opportunity to Litigate

Lastly, the Defendant was given a full and fair opportunity to litigate and defend himself against the sexual harassment allegations. The Defendant made a tactical decision to not defend. The Michigan Court of Appeals has refused to allow parties to relitigate issues which were determined against them in previous proceedings which they chose not to attend. See Talbot v. Talbot, 99 Mich. App. 247, 297 N.W.2d 896 (1980); Van Pembrook v. Zero Manufacturing Co., 146 Mich. App. 87, 380 N.W.2d 60 (1985); Harvey Cadillac Co. v. Rahain, 204 Mich. App. 355, 514 N.W.2d 257 (1994); Park v. American Casualty Insurance Co., 219 Mich. App. 62, 555 N.W.2d 720 (1996).

Consequently, we find that the Defendant had a full and fair opportunity to defend but made a conscious decision to bury his head in the sand. We will not allow him to bypass the state court and

his own faulty decisions in order to do here what he should have done previously, especially when the intentional tort of sexual harassment falls well within the requirements of 11 U.S.C. §523(a)(6).

Dated: May 22, 2000

Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

RONALD DENNIS KOTT and
REBECCA LISS KOTT,

Debtors.
_____/

Case No. ST 98-08243
Chapter 7

JESSALYN VANDER MEY,

Plaintiff,

v.

RONALD DENNIS KOTT,

Defendant.
_____/

Adversary Proceeding
No. 98-88621

ORDER

At a session of said Court, held in and for said District, at the United States Bankruptcy Court, Federal Building, Grand Rapids, Michigan this 22 day of May, 2000.

PRESENT: HONORABLE JO ANN C. STEVENSON
United States Bankruptcy Judge

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that this Opinion and Order shall be served by first-class United States mail, postage prepaid upon Kathleen L. Bogas, Esq., Jessalyn Vander Mey, Gordon D. Boydston, Esq. and Ronald Dennis Kott.

Dated: May 22, 2000

Honorable Jo Ann C. Stevenson
United States Bankruptcy Court

Served as ordered: