UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

MICHAEL STROCK

Debtor

No. 02-13533
Chapter 7

McGLOTHLIN FAMILY CEMETERY COMPANY

Plaintiff

v.

MICHAEL STROCK

Defendant

Adversary Proceeding
No. 02-1176

MEMORANDUM OPINION

Appearances: K. Stephen Powers and Cynthia D. Hall, Shumacker, Witt, Gaither & Whitaker, P.C., Chattanooga, Tennessee, Attorneys for Plaintiff

Thomas E. Ray, Samples, Jennings, Pineda & Ray, Chattanooga, Tennessee, Attorney for Debtor/Defendant

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The cemetery company's complaint against the debtor in bankruptcy, Mr. Strock, alleges that he owes the company a debt that can not be discharged in his bankruptcy case. The cemetery company has filed a motion for summary judgment based on a default order it obtained against the debtor in a state court lawsuit.

The cemetery company's motion for summary judgment relies on "collateral estoppel" as a result of the state court's default order. In other words, the motion asserts: (1) the facts necessarily decided by the default order are sufficient to prove that the debtor's debt to the cemetery company is within one or more of the statutory exceptions to discharge; (2) the default order collaterally estops the debtor from proving the facts to be otherwise. 11 U.S.C.§ 523(a)(2), (4), or (6).

Tennessee law applies to determine the collateral estoppel effect of the default order. 28 U.S.C. § 1738; *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315 (6th Cir. 1997).

The debtor was a shareholder in a masonry company, Architectural Stone, Inc., that entered into a contract with the cemetery company. The cemetery company filed suit in state court against the masonry company, one of its employees, the debtor, and another shareholder, Mr. Farrar. Mr. Farrar is also in bankruptcy. The state court complaint alleged not only a breach of contract by the masonry company but also personal wrongdoing by the debtor and the other individual defendants. The state court entered the default order against the debtor less than thirty days before he filed bankruptcy.

The default order found the debtor to be liable to the cemetery company and set a hearing to determine the damages. Before the hearing on damages, the debtor filed his bankruptcy case, and the automatic stay prevented the state court from holding the hearing on damages. 11 U.S.C. § 362(a)(1), (2), (6). These facts raise the question of whether the default order as to liability was a final judgment. Only a final judgment has collateral estoppel effect. *Beaty v. McGraw*, 15 S.W.3d 819 (Tenn. Ct. App. 1998).

A default order that finds the defendant liable, but leaves damages to be decided later, binds the defendant on the question of liability during the continuation of the lawsuit in the trial court. *Adkisson v. Huffman*, 225 Tenn. 362, 469 S.W.2d 368 (1971); *Nickas v. Capadalis*, 954 S.W.2d 735 (Tenn. Ct. App. 1997). As a general rule, an order by the trial court that decides a particular claim or issue binds the affected parties during the continued proceedings in the trial court. *See also Harrogate Corp. v. Systems Sales Corp.*, 915 S.W.2d 812 (Tenn. Ct. App. 1995). Of course, this rule is subject to an unstated but obvious limit. If the trial court sets aside or vacates the order, it will no longer be binding on the parties during the trial court proceedings.

A default order as to liability only – without setting the amount of damages – is binding on the parties during the trial court proceedings, but this does not make it final in the sense of being final and appealable. By “final and appealable”

the court means appealable (1) without a ruling by the trial court that expressly makes the order final and appealable, when it would otherwise be non-final, and (2) without an order allowing an interlocutory appeal. Tenn. R. Civ. P. 54.02; Tenn. R. App. P. 3, 9 & 10.

This kind of finality for the purpose of appeal appears to be the standard for determining whether a judgment is final for the purpose of collateral estoppel. *Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995); *Humphreys v. BIC Corp.*, 923 F.2d 854, 1991 WL 4705 (6th Cir. 1991) (Table).

The court has not found a decision by the Tennessee appellate courts that is directly on point. Nevertheless, several decisions suggest that a default order as to liability is not final and appealable when the trial court must still determine the amount of damages. *Gammon v. Robbins*, 165 Tenn. 129, 53 S.W.2d 223 (1932); *Hunter v. Sheppard*, 187 Tenn. 99, 213 S.W.2d 19 (1948); *Allen v. Elliott Reynols Motor Co.*, 33 Tenn.App. 179, 230 S.W.2d 418 (1950); *Robinson v. L-Cart, Inc.*, 54 Tenn.App. 298, 390 S.W.2d 689 (Tenn. Ct. App. 1965); *Stidham v. Fickle Heirs*, 643 S.W.2d 324 (Tenn. 1982); *Spence v. Moody*, 1987 WL 20039 (Tenn. Ct. App. Nov. 18, 1987).

Cases from other jurisdictions support this conclusion. *Dimmit & Owens Financial, Inc. v. United States*, 787 F.2d 1186 (7th Cir. 1986); *Bache & Co. v. Taylor*, 458 F.2d 395 (5th Cir. 1972); *Tri-State Delta Chemicals, Inc. v. Crow*, 61

S.W.3d 172 (Ark. 2001); *Sheepscot Land Corp. v. Gregory*, 327 A.2d 854 (Me. 1974); *but see Wolstein v. Docteroff (In re Docteroff)*, 133 F.3d 210 (3d Cir. 1997).

This result apparently does not flow from the provision in Rule 54 as to finality. Rule 54 provides that when there are several claims against a single party, an order that disposes of some of the claims, but not all, is not final and appealable. It will be final and appealable only if the court makes a finding that there is no just cause for delay and declares the order to be final. Tenn. R. Civ. P. 54.02. One can argue that this rule applies to a default order that establishes liability but not damages. The court disagrees. Liability and the amount of damages are not separate claims. *Cryomedics, Inc. v. Smith*, 180 Ga.App. 336, 349 S.E.2d 223 (1986), *but see Bache & Co. v. Taylor*, 458 F.2d 395 (5th Cir. 1972).

The order as to liability is not final and appealable for other reasons. It does not dispose of the entire matter and leave nothing else for the trial court to do. *Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995). Furthermore, allowing an appeal would usually be wasteful for the parties and the courts. It would create the possibility of two appeals where there should be one that deals with both liability and damages.

Thus, the default order is not final and appealable, and therefore, it is not final for the purpose of collateral estoppel. Of course, the cemetery company disagrees with this reasoning. The cemetery company argues that the default order

is essentially a final decision on the debtor's liability even if it is not final and appealable. For the purpose of argument, the court assumes that finality for the purpose of collateral estoppel may not require finality for the purpose of appeal. *C. O. Christian & Sons Co. v. Nashville P.S. Hotel, Ltd.*, 765 S.W.2d 754 (Tenn. Ct. App. 1988). This assumption means the court must consider the trial court's degree of control over the default order. In particular, what was the extent of the trial court's authority to set aside the default order? According to the cemetery company, the trial court could not or would not set aside the default order.

Tennessee's version of Rule 55 does not provide for entry of default. It requires an application for a default judgment to be served on the defaulting party. Tenn. R. Civ. P. 55.01. Likewise, the rule provides for setting aside a default judgment only as provided in Rule 60. Tenn. R. Civ. P. 55.02. This seems to mean that any default order, including one that is not final and appealable, can be set aside only as allowed by Rule 60. Rule 60, however, deals with judgments and orders that are final, and "final" in this context means final and appealable. *Watts v. Kroger Co.*, 102 S.W.3d 645 (Tenn. Ct. App. 2002); *Montgomery County v. Nichols*, 10 S.W.3d 258 (Tenn. Ct. App. 1999). Thus, Rule 55.02 should be interpreted as applying to default orders that are final and appealable and can be set aside only under Rule 60. It does not deal with a default order that is not final and appealable. *Couillard v. Couillard*, 2002 WL 1446669 (Tenn. Ct. App. Jul. 3, 2002). It follows that a non-final default order may be set aside on grounds other than those provided in Rule 60.

The rules on setting aside a non-final default order may parallel the rules on setting aside a default, instead of a default judgment, under a version of Rule 55 that provides for entry of a default. *See* Fed. R. Civ. P. 55(c); *Thompson v. American Home Assurance Co.*, 95 F.3d 429 (6th Cir. 1996); *Sansonetti v. Arhcer Laundry, Inc.*, 358 N.E.2d 1142 (Ill. Ct. App. 1976).

The non-final default order is also similar to an order that is not final under Rule 54. When there are multiple claims and multiple parties, Rule 54 may also prevent a default order as to liability from being final. Tenn. R. Civ. P. 54.02. In that situation, Rule 54 provides that the non-final order is subject to revision at any time before entry of a judgment that adjudicates all the rights, claims, and liabilities of all the parties. Tenn. R. Civ. P. 54.02. The result should be similar whan an order is not final for another reason, such as the need for a future decision on damages. A default order that finds the defendant liable, but leaves open the question of damages, should be subject to revision at least until there is a final and appealable order on the claim.

In summary, Tennessee law does not lead to the result sought by the cemetery company. The limits of Rule 60 do not apply. Tenn. R. Civ. P. 60.02. When the debtor filed bankruptcy, the trial court still had broad control over the default order, and it still has broad control over the default order. The cemetery company has not attempted to prove that the debtor could not possibly present evidence to the

trial court that would justify setting aside the default order. Even if finality for the purpose of collateral estoppel does not mean final and appealable, the default order still is not final for the purpose of collateral estoppel.

The cemetery company complains that the debtor should not be able to avoid collateral estoppel on the question of liability by filing bankruptcy after the default order was entered but before the state court could enter a final judgment that set damages. The court disagrees. A debtor's desire to stop pending lawsuits against him is a legitimate reason for filing bankruptcy. *In re Landes*, 195 B.R. 855 (Bankr. E. D. Pa. 1996). A debtor should be able to file bankruptcy to stop a pending lawsuit so that collateral estoppel will not apply. Of course, this may frustrate the creditor to some extent. The bankruptcy court, however, will apply state law on collateral estoppel. This imposes on the debtor the risk of mis-timing the bankruptcy filing and being collaterally estopped. Furthermore, the bankruptcy court may lift the automatic stay so that the state court lawsuit can continue and then give the collateral estoppel effect to the final judgment for the purpose of deciding whether the judgment is non-dischargeable. *Schneiderman v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104 (2d Cir. 2002); *Nestorio v. Associates Commercial Corp.*, 250 B.R. 50 (D. Md. 2000); *In re Cummings*, 221 B.R. 814 (Bankr. N. D. Ala. 1998). The debtor's ability to avoid the effect of a lawsuit by filing bankruptcy does not mean the bankruptcy court should treat a non-final order in the lawsuit as final for the purpose of collateral estoppel.

Other rules of Tennessee law support the conclusion that the default order was not final for purposes of collateral estoppel. When the debtor filed bankruptcy, the state court lawsuit was still pending without a final and appealable decision, and enforcement of the default order was stayed by the debtor's bankruptcy filing. *McBurney v. Aldrich*, 816 S.W.2d 30 (Tenn. Ct. App. 1991).

Finally, the default order in question may not be final for another reason. The evidence before the court does not reveal that before the debtor's bankruptcy the state court entered an order or orders that disposed of all the claims against all the defendants. Tenn. R. Civ. P. 54.02; *Wayne-Built & Son, Inc. v. Houpt*, 797 So.2d 1046 (Miss. Ct. App. 2001); *Barker Brothers, Inc. v. Barker-Taylor*, 823 P.2d 1204 (Wyo. 1992); *RLI Insurance Co. v. Coe*, 813 S.W.2d 783 (Ark. 1991); *Davis v. Interstate Motor Carriers Agency*, 178 N.W.2d 204 (S. D. 1970).

The cemetery company's motion for summary judgment should also be denied for practical reasons. The law raises substantial doubt as to whether the default order is final for the purposes of collateral estoppel. If the court grants summary judgment, it may accomplish nothing more than delaying a trial. A trial will better serve the interests of the parties and the court. The trial date is about two months away. In this situation, the court can deny summary judgment in favor of conducting a trial. *Lisle Mills, Inc. v. Arkay Infants Wear*, 90 F.Supp. 676 (E. D. N. Y. 1950); *Niagara Mohawk Power Corp. v. Megan Racine Associates, Inc. (In re*

Megan-Racine Associates, Inc.), 180 B.R. 375 (Bankr. N. D. N. Y. 1995); *In re Kidwell*, 158 B.R. 203 (Bankr. E. D. Cal. 1993).

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

(Entered 12/31/03)