IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re ROBERT L. EATON, Debtor.	No. 02-22063 Chapter 7
SAMUEL S. TAYLOR and ISABEL S. TAYLOR, Plaintiffs, vs. ROBERT L. EATON, Defendant.	Adv. Pro. No. 02-2064

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This dischargeability proceeding is before the court on the parties' cross motions for summary judgment. The court having concluded as discussed below that the plaintiffs' state court judgment against the debtor is entitled to preclusive effect, notwithstanding the debtor's allegation of mistake, an order will be entered granting the plaintiffs' motion for summary judgment, denying the debtor's summary judgment motion, and finding the judgment debt nondischargeable under 11 U.S.C. § 523(a)(2)(A). This is a core proceeding. See 28 U.S.C. § 157(b)(2)(I).

I.

The debtor Robert L. Eaton filed for chapter 7 relief on June 21, 2002, and the plaintiffs Samuel and Isabel Taylor commenced this adversary proceeding on September 20, 2002. In their complaint as amended, the plaintiffs allege that on September 2, 1997, they obtained a judgment against the debtor in the Circuit Court for Washington County, Tennessee and that this judgment debt is nondischargeable under 11 U.S.C. § 523(a)(2),(4), and (19). Copies of the judgment and of the complaint filed in the state court action are attached as exhibits to the original complaint in this adversary proceeding.

The debtor filed an answer to the complaint in which he

denies the nondischargeability of any debt owed to plaintiffs, notes that the judgment entered against him was a default judgment, and states that "he was not properly served with the [state court] Complaint or with a Motion for Default Judgment." The debtor also observes that an exhibit to the state court complaint references an account of a third person rather than that of the plaintiffs. Lastly, the debtor denies the applicability of 11 U.S.C. § 523(a)(19) to this adversary proceeding, noting that it was enacted "subsequent to the time frame complained of in this Complaint as well as the June 21, 2002 filing date of this bankruptcy." In his prayer for relief, the debtor seeks dismissal of the adversary proceeding and requests payment of his costs and attorney fees under 11 U.S.C. § 523(d).

On January 15, 2003, the parties filed the cross motions for summary judgment which are presently before the court. In the plaintiffs' memorandum of law filed in support of their summary judgment motion, the plaintiffs set forth certain "uncontested facts" including the statements that "Defendant was a licensed stockbroker in Tennessee, and managed certain accounts in a fiduciary capacity for Plaintiffs"; that "Plaintiffs learned the accounts were not as represented by Defendant, and on or about January 12, 1994, they filed a civil action against Defendant in

Washington County, Tennessee Circuit Court ... [asserting] fraud, deceit, misrepresentation, alteration and falsification of documents, a breach of his fiduciary duty, and violation of various federal and state securities laws"; that "[j]udgment was entered against Defendant on September 2, 1997"; that "Defendant pleaded guilty in Sullivan County Criminal Court to theft of greater than $1,000 but less than $10,000 from Plaintiff Sam Taylor, and was convicted of that crime on or about May 30, 1995"; and that the debtor did not appeal either the civil or criminal judgments. The plaintiffs allege that these judgments are entitled to preclusive effect in this action and establish nondischargeability as a matter of law under § 523(a)(2),(4), and (19).

The debtor's motion for summary judgment is based on the issues raised by him in his answer and is supported by his personal affidavit in which he states that "[t]he Judgment entered on September 2, 1997 was a Default Judgment and to the best of my knowledge, I was not served with a Complaint or a Motion For Default Judgment prior to the Judgment being entered." The debtor also states in his affidavit that the exhibit to the state court complaint references the account of Arlene Howe rather than the plaintiffs and that Ms. Howe's account "was wrongfully used by [the plaintiffs] without the

permission or justification of any kind in the State action for Default." The debtor argues in his memorandum of law that because "Exhibit I shows on its face that it is not the account of the Plaintiff, Samuel S. Taylor, therefore the judgment upon which it was based was predicated on mistake, inadvertence, surprise, excusable neglect or fraud under Rule 60.02 of the Tennessee Rules of Civil Procedure."

Subsequent to the filing of the cross motions for summary judgment, the plaintiffs filed a response to the debtor's summary judgment motion and a request that sanctions be imposed against the debtor under Fed. R. Bankr. P. 7056 and 9011. Regarding the debtor's assertion in his summary judgment motion that the judgment against him is invalid because a computer printout showing an account other than that of the plaintiffs was attached to the complaint, the plaintiffs respond that the exhibit was not a mistake. They state that the complaint plainly references that "part of Defendant's swindle was to use another's account number to masquerade as Plaintiffs' accounts so it would appear to have substantial holdings, and to induce them to provide more money without questions."

The plaintiffs' sanctions request is based on the assertion that "Defendant was untruthful in his affidavit, and his motion [for summary judgment] is frivolous." Attached to the request

is certified copies of certain documents which establish, according to the plaintiffs, that the debtor was in fact properly served with both the state court complaint and the motion for default judgment in the state court action and that he filed a response to each. These documents are: (1) a summons and its return indicating that the state court complaint and summons were served on the debtor by a Washington County Sheriff Deputy on January 21, 1994; (2) a notice of August 9, 1994, hearing on a motion for default judgment which contains a certificate of service signed by plaintiffs' state court counsel indicating that the notice had been served on the debtor by mail: (3) an answer filed on August 11, 1994, by the debtor pro se; (4) the plaintiffs' supplement to their motion for default judgment filed June 18, 1997, which contains a certificate evidencing service on the debtor; (5) a notice setting the motion for default judgment for hearing on June 17, 1997, and containing a certificate evidencing service upon the debtor by mail on June 10, 1997; (6) a letter from the debtor dated June 16, 1997, forwarding a second answer to Don Squibb, Circuit Court Clerk; and (7) a notice dated June 20, 1997, from the Washington County Circuit Court to the debtor and the plaintiffs advising that trial had been set for July 31, 1997.

Most recently, the plaintiffs filed on April 3, 2003, a copy

of the debtor's response dated February 3, 2003, to plaintiffs' first request for admissions. The plaintiffs contend that the admissions by the debtor in the response also support their summary judgment motion. The debtor has not responded to either of these filings by the plaintiffs, including the plaintiffs' request that sanctions be imposed against him.

II.

Rule 56 of the Federal Rules of Civil Procedure, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "When reviewing cross-motions for summary judgment, the court must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." *Wily v. United States (In re Wily)*, 20 F.3d 222, 224 (6th Cir. 1994).

III.

It is well settled that issue preclusion or collateral estoppel applies in bankruptcy dischargeability proceedings,

notwithstanding the exclusive jurisdiction of the bankruptcy court over certain dischargeability determinations. *See Rally Hill Prods., Inc. v. Bursack (In re Bursack)*, 65 F.3d 51, 53 (6th Cir. 1995). "The doctrine of collateral estoppel 'precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment even if decided as part of a different claim or cause of action.'" *Markowitz v. Campbell (In re Markowitz*), 190 F.3d 455, 461 (6th Cir. 1999)(citing, *inter alia*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 n.23 (1979) ("The whole premise of collateral estoppel is that once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed.")).

As explained by the Sixth Circuit Court of Appeals:

> In determining whether to accord preclusive effect to a state-court judgment, we begin with the fundamental principle that "judicial proceedings of any court of any state shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of such State from which they are taken." 28 U.S.C. § 1738. The principles of full faith and credit reflected in § 1738 generally require "that a federal court must give to 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...."
>
> In cases involving claims within the exclusive jurisdiction of the federal courts, a court determining whether or not to apply collateral estoppel must first determine if a state court

> judgment would receive preclusive effect in the state where it was rendered. [Citation omitted.] If the answer to this question is yes, the court must give that judgment preclusive effect unless it determines that an exception to § 1738 should apply.

In re Bursack, 65 F.3d at 53.

The Sixth Circuit Court of Appeals has resolved the latter question in the context of a true default judgment, concluding that no federal policy requires an exception to the normal operation of § 1738. *See Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315 (6th Cir. 1997). As stated by the court:

> In the absence of any indication in the Bankruptcy Code or legislative history suggesting that Congress intended an exception to § 1738 apply to true default judgments and with no principled distinction between cases where a defendant participates in part in defense of the state court suit and cases where the defendant does not respond at all, we conclude that collateral estoppel applies to true default judgments in bankruptcy dischargeability proceedings in those states which would give such judgments that effect.

Id. at 322.

In light of this conclusion, the applicability of collateral estoppel to the present case turns on the first *Bursack* question: Whether Tennessee would give preclusive effect to the plaintiffs' state court judgment against the debtor? Under Tennessee law, "collateral estoppel bars relitigation of an issue if it was raised in an earlier case between the same

parties, actually litigated, and necessary to the judgment of the earlier case." *In re Bursack*, 65 F.3d at 54 (citing *Massengill v. Scott*, 738 S.W.2d. 629, 632 (Tenn. 1987)).

The plaintiffs' first contention is that the state court judgment held by them establishes the elements of 11 U.S.C. § 523(a)(2)(A). In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. *See Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998). It has been noted that these elements are "virtually identical" to those necessary to establish fraud under Tennessee law. *See Rally Hill Prods., Inc. v. Bursack (In re Bursack)*, 163 B.R. 302, 305 (Bankr. M.D. Tenn. 1994). "Under Tennessee law, 'the elements of fraud are an intentional misrepresentation with regard to a material fact; knowledge of the representation's falsity, i.e., it was made "knowingly" or "without belief in its truth" or "recklessly" without regard to its truth or falsity; the plaintiff reasonably relied on the misrepresentation and

suffered damages; and the misrepresentation relates to an existing or past fact.'" *Menuskin v. Williams*, 145 F.3d 755, 764 (6th Cir. 1998)(quoting *Oak Ridge Precision Indus., Inc. v. First Tenn. Bank N.A.*, 835 S.W.2d 25, 29 (Tenn. App. 1992)).

While the judgment entered by the state court was a general one, which did not set forth findings of fact and conclusions of law, an examination of the state court complaint reveals that the plaintiffs alleged therein that the debtor had engaged in various acts of fraud and deceit, that the plaintiffs would not have entrusted their funds with the debtor but for these fraudulent misrepresentations, that debtor made these misrepresentations with the intent to deceive, and that the plaintiffs reasonably[1] relied on these misrepresentations and suffered losses as the result. Accordingly, it is clear that the issues to be determined in this § 523(a)(2)(A)

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[1]*See HSSM #7 L.P. v. Bilzerian (In re Bilzerian),* 100 F.3d 886, 892 (11th Cir. 1996) (by proving reliance under reasonable reliance standard, investor satisfied justifiable reliance standard); *Dement v. Gunnin (In re Gunnin)*, 227 B.R. 332, 337 (Bankr. N.D. Ga. 1998) (fact that jury in prior state court fraud action was instructed that reliance had to be reasonable, whereas reliance for exception to discharge for fraud had to be justifiable, was irrelevant for collateral estoppel purposes, since reasonable reliance standard was more stringent than justifiable reliance standard); *Kuzniar v. Keach (In re Keach)*, 204 B.R. 851, 854 n.2 (Bankr. D.R.I. 1996) (because plaintiff met her burden at the higher standard of reasonable reliance, she would clearly satisfy the "justifiable reliance" test).

dischargeability proceeding were raised in the state court action.

The next inquiry for collateral estoppel purposes under Tennessee law is whether these issues were actually litigated. Presumably, the debtor's assertion regarding the alleged default nature of the judgment was directed at this requirement. Nonetheless, assuming that the judgment was one of default,[2] this fact alone does not negate the "actually litigated" element of collateral estoppel. Under Tennessee law, even default judgments may satisfy Tennessee's actually litigated requirement. *See In re Bursack*, 65 F.3d at 54 (citing *Lawhorn v. Wellford*, 168 S.W.2d 790, 792 (Tenn. 1943) ("A judgment taken by default is conclusive by way of estoppel in respect to all such matters and facts as are well pleaded and properly raised,

[2]It is not clear to this court that the state court judgment was actually a default judgment. The debtor filed an answer in that action and generally a default judgment is inappropriate when a defendant has filed a timely answer to a complaint. *Tenn. ex rel. Jones v. Looper*, 86 S.W.3d 189, 197 (Tenn. App. 2000). The judgment order references that the matter came before the court for trial on July 31, 1997, and the notice setting the matter for July 31, 1997, is entitled "Notice of Trial Date." Furthermore, the judgment order reflects that the trial court rendered its ruling "[a]fter due consideration of the Complaint heretofore filed, the Answer thereto, the testimony of the Plaintiffs in open Court, the exhibits, and the record as a whole." Because, as discussed in this memorandum opinion, the preclusive effect of a judgment is the same regardless of whether it was entered by default or pursuant to a directed verdict, it is not necessary for this court to determine whether the judgment was in fact one of default.

and material to the case made by declaration or other pleadings, and such issues cannot be relitigated in any subsequent action between the parties and their privies.")).

From this court's review, Tennessee state courts have not specifically addressed what the "actually litigated" requirement means in the context of a default judgment, since, by definition, a default judgment is not actually litigated. Nonetheless, provided the other elements of collateral estoppel exist, Tennessee courts have applied collateral estoppel if "the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." *See, e.g., Jenne v. Snyder-Falkinham,* 967 S.W.2d 327, 330 (Tenn. App. 1998); *Morris v. Esmark Apparel, Inc.,* 832 S.W.2d 563, 566 (Tenn. App. 1992). *See also Harris v. Byard (In re Byard)*, 47 B.R. 700, 707 n.9 (Bankr. M.D. Tenn. 1985) (The actually litigated requirement requires only that the issue was effectively raised in the prior action and "that the losing party had 'a fair opportunity procedurally, substantively, and evidentially' to contest the issue."); Hon. Bernice B. Donald & Kenneth J. Cooper, *Collateral Estoppel In Section 523(c) Dischargeability Proceedings: When Is A Default Judgment Actually Litigated?*, 12 BANKR. DEV. J. 321, 333 (1996) ("Many states give preclusive effect to a default judgment, provided

that the defendant had a full and fair opportunity to litigate the case.").

The debtor states in his affidavit that "to the best of my knowledge, I was not served with a Complaint or a Motion For Default Judgment prior to the Judgment being entered." If this were true, the debtor would not have had a full and fair opportunity to contest the issues in the prior action, a Tennessee court would not recognize the judgment, and it would have no preclusive effect in this court. *See Topham v. L.L.B. Corp.*, 493 S.W.2d 461, 462 (Tenn. 1973) ("If the court which rendered a judgment has no jurisdiction over the person or subject matter of the action, the judgment is a nullity and not entitled to recognition and enforcement in a sister state."); 50 C.J.S. *Judgments* § 989 (2002)("A personal judgment recovered in another state ordinarily will not be accorded recognition as a valid and binding adjudication unless there was actual personal service on the defendant, effected in some regular and proper manner, or a voluntary appearance by the defendant, at the commencement of the action, or by taking part in some subsequent proceeding.").

However, as previously noted, the plaintiffs dispute the debtor's representation as to lack of service. Included in the state court documents tendered to this court is a return of

service signed by Bill Wilks, as process server, wherein he certifies that on January 21, 1994, he served the summons and complaint in the state court action on the defendant Robert Eaton "by leaving a true copy in Mr. Eaton's hand." The pleadings also include an answer filed in the state court action by the debtor pro se on August 11, 1994, which states in its entirety the following:

> I, Robert V. Eaton, have been under the care of a physician for mental and physical conditions which has included medication. At this time I cannot recall the events alleged in the Complaint and I cannot admit or deny the truthfulness of the allegations contained in the Complaint and demand that the plaintiffs prove the allegations in their Complaint. I ask the court not to enter a default judgment against me.

The answer is signed by the debtor, includes a certificate evidencing service on the plaintiffs' attorney, and is accompanied by a transmittal letter from the debtor to the Washington County Circuit Court Clerk enclosing the answer for filing.

The certified copies of pleadings from the state court action also indicate that the debtor filed on June 17, 1997, a second answer to the complaint, handwritten in its entirety, wherein he states:

> (1) The conditions concerning my mental health are the same as indicated in the answer filed August 4, 1994
>
> (2) I deny all allegations of wrong doing.

Again, the answer was accompanied by a transmittal letter to the clerk from the debtor stating that another answer is enclosed and that "I have just recieved [sic] a motion for default, and thought my earlier answer was sufficient."

In plaintiffs' request for admissions filed in this adversary proceeding, the debtor was asked to admit that he "was duly and properly served with the complaint in the Washington County, Tennessee, case on or about January 21, 1994." His response was that he "has no recollection of being served on this date and would state at this time he was being treated for mental and emotional problems and was under the influence of drugs being administered for these problems, therefore Defendant neither admits nor denies." The debtor was also asked to admit that he received a copy of the June 20, 1997, notice setting a trial date of July 31, 1997, in the state court action. He responded that he "neither admits nor denies and does not have specific recollection regarding the receipt of this notice" although he did admit that the copy of the notice tendered to this court is "true, correct, and accurate." Similarly, the debtor admitted that the certified copy of the August 11, 1994, answer tendered by the plaintiffs to this court was a "true, correct, and accurate copy of [his] answer in the Civil case" and that he gave a deposition in that action.

After consideration of all of the foregoing, the court concludes that no genuine issue of material fact exists regarding whether the debtor was served with the state court complaint and summons and thus had a full and fair opportunity to litigate the issues in the state court action. Notwithstanding the debtor's affidavit to the contrary, the debtor was obviously served in the state court action; he filed not one, but two answers, the second as a response to the plaintiffs' default judgment motion, and even gave a deposition. The debtor's statement regarding lack of service is not only contradicted by the state court pleadings but also by his own response to the request for admissions in which he stated he could neither admit nor deny service, that he was under the influence of drugs due to mental and emotional problems at the time, and that he had no recollection of being served. While the debtor did not appear at the trial in the state court action, the judgment order recites "notice of the setting of the trial of this cause [was] sent to the respective parties." In light of the debtor's prior active participation in the state court proceedings, his mere failure to attend the trial does not obviate the fact that he was fully afforded the opportunity to litigate the issues raised in the state court. Accordingly, this court concludes that the actually litigated component of

collateral estoppel has been established, notwithstanding the debtor's affidavit regarding lack of service. *See Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 841 (6th Cir. 2002) ("No genuine issue for trial exists when 'the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'"); *Cox v. Ky. Dep't of Transp*., 53 F.3d 146, 150 (6th Cir. 1995) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to defeat a summary judgment motion]; there must be evidence on which the jury could reasonably find for the plaintiff.... If the record taken in its entirety could not convince a rational trier of fact to return a verdict in favor of the nonmoving party, the motion should be granted."). *See also Topham,* 493 S.W.2d at 463 ("If defendant was personally served within the jurisdiction of the court, no mere irregularity in the service or in the process, unless so radical as to deprive it of all citatory effect, can be set up against the judgment when brought in question in another state.").

The last required element of collateral estoppel is that the precise issue must not only have been raised and actually litigated, but it must also have been necessary to the judgment. *In re Bursack*, 65 F.3d at 54. As with the first two elements, the necessary component is satisfied in the present case. The

entire premise of the plaintiffs' state court action against the debtor was that he had intentionally misused his fiduciary position to defraud them. The state court could not have found for the plaintiffs without concluding that the debtor engaged in fraud. As such, the issue of fraud was necessary to the judgment.

Before the court can find for the plaintiffs on the issue of collateral estoppel, however, the court must first address the debtor's contention that the state court civil judgment "was predicated on mistake, inadvertence, surprise, excusable neglect or fraud under Rule 60.02 of the Tennessee Rules of Civil Procedure" because the computer printout attached as an exhibit to the state court complaint references an account other than that of the plaintiffs. The specifics of the debtor's argument are set forth in the memorandum in support of his summary judgment.

> Exhibit I [to the state court complaint] consists of an "Account Printout" which on it's [sic] face shows that it is account #QP 551 026477 and belonged to Arlene Howe. Paragraphs #14 and #88 of the Circuit Court Complaint show that this account of Arlene Howe was used to establish the value relied on in the dischargeability action under 11 U.S.C. §523(a)(4) and (19). The only other reference to the value of [plaintiff Samuel S. Taylor's] claim was paragraph #15 which indicates that Samuel "had been provided with computer printouts and other statements reflecting that his account at [J.B. Hillard, W.L. Lyons, Inc.] had a collective market value of more than $1,200,000.00." Clearly, the State Court record

> indicates that a mistake was made when the Judgment entered was based upon Exhibit I which was an "Account Printout" of an account not belonging to Samuel. The proof in this case will show that Samuel is well educated, having completed college and law school and that he knew or should have known that Exhibit I represented an amount much in excess of any balance which he ever had in any brokerage account.

From this discussion, it appears that debtor's assertion is that the "wrong" "Account Printout" resulted in an alleged incorrect judgment amount. While the debtor at one point in the above quoted discussion appears to attribute the use of a printout for an account other than the plaintiffs as a "mistake," the reference to plaintiff Samuel S. Taylor's education and knowledge infers a negligent or intentional misrepresentation as to the amount of damages. Although not expressly stated, presumably the debtor's argument in this regard is that this alleged mistake or fraud renders the judgment invalid and therefore without preclusive effect.

As his basis for the alleged invalidity of the state court judgment, the debtor cites Rule 60.02 of the Tennessee Rules of Civil Procedure which provides that:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party ....

Such a motion must be brought "not more than one year after the judgment, order or proceeding was entered or taken" although the rule does contain a caveat that it "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court." Tenn. R. Civ. P. 60.02.

The judgment held by the plaintiffs was entered on September 2, 1997, well more than a year before the debtor's bankruptcy filing on June 21, 2002. Thus, relief would not be available to the debtor by motion under Rule 60.02(1) or (2). Instead, the only available relief would be by way of an independent action under the savings clause of Rule 60.02. However, the courts which have construed this provision have limited its reach to instances of extrinsic fraud. *See, e.g., Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 230 (Tenn. App. 2000); *Nobes v. Earhart*, 769 S.W.2d 868, 874 (Tenn. App. 1989); *Brown v. Raines*, 611 S.W.2d 594 (Tenn. App. 1980); *Medlock v. Ferrari,* 602 S.W.2d 241 (Tenn. App. 1979); *Thomas v. Dockery*, 232 S.W.2d 594, 598 (Tenn. App. 1950). "[E]xtrinsic fraud 'consists of conduct that is extrinsic or collateral to the issues examined and determined in the action' ... while intrinsic fraud is fraud within the subject matter of the litigation, such as forged documents produced at trial or perjury by a witness." *Whitaker,* 32 S.W.3d

at 230 (quoting *Thomas,* 232 S.W.2d at 598). *See also Nobes,* 769 S.W.2d at 874 ("extrinsic fraud involves deception as to matters not at issue in the case"). "Examples of extrinsic fraud are: 'Keeping the unsuccessful party away from court by a false promise of a compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest.'" *Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. App. 1991) (quoting *Nobes*, 769 S.W.2d at 874).

Applying these principles to the case at hand, it is beyond dispute that the amount of damages sustained by the plaintiffs and whether the account printout attached to the state court complaint accurately reflected those damages was at issue and within the subject matter of the state court litigation. As such, the debtor's allegations are of intrinsic rather than extrinsic fraud.

In *Medlock,* the plaintiff filed an action to collaterally attack a judgment, averring that the trial witnesses committed perjury and therefore practiced a fraud upon the court. The court dismissed the collateral action, noting that the allegations were of intrinsic fraud and observing that "there is nothing to explain why these alleged false statements could not

have been challenged at the original trial." *Medlock,* 602 S.W.2d at 245-46. Similarly, the debtor in the present case could have advised the state trial court that the exhibit was an incorrect one and that it should not be used in calculating the plaintiffs' damages. His failure to do so is not a basis for collaterally attacking the judgment against him once the judgment has become final, regardless of whether his allegations are true. As stated by the Tennessee Supreme Court in *Thomas*:

> [A] judgment that has become final in the full sense of res adjudicata may not be set aside on allegation and proof of the falsity of the internal evidence on which it was procured....
>
> The reason for the rule is that litigation must be brought to a close; it would never terminate if each party successively could reopen the last judgment by charging false evidence.

Thomas, 232 S.W.2d at 598. *See also Medlock,* 602 S.W.2d at 246 ("It may be said that the fundamental principle of jurisprudence that material facts or questions which were in issue in a former action and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and such facts or questions become res judicata and may not again be litigated in a subsequent action brought between the same parties or their privies.").

The court having concluded that the plaintiffs' state court judgment against the debtor is entitled to preclusive effect and

establishes the elements of 11 U.S.C. § 523(a)(2)(A), it is not necessary for the court to resolve whether the debt is also nondischargeable under § 523(a)(4) or (19) or the applicability of § 523(a)(19) to this adversary proceeding. The court will enter an order contemporaneously with the filing of this memorandum opinion, granting the plaintiffs' motion for summary judgment and denying the debtor's motion. The order will also set the plaintiffs' request for sanctions against the debtor for hearing.

FILED: April 29, 2003

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE