

**IN THE UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF ARKANSAS  
LITTLE ROCK DIVISION**

**IN RE: JAMES G. BALLEW, Debtor**

**No. 4:04-bk-24640  
Ch. 7**

**BRIAN CROSS AND BARBARA CROSS**

**PLAINTIFFS**

**vs.**

**AP No. 4:05-ap-01267**

**JAMES G. BALLEW**

**DEFENDANT**

**MEMORANDUM OPINION AND ORDER**

Before the Court is the Plaintiffs' Motion For Partial Summary Judgment filed on January 31, 2006, and the debtor's Response to Plaintiffs' Motion For Summary Judgment filed on February 10, 2006. The Court held a hearing on the motion and response on March 15, 2006, and took the matter under advisement. For the reasons set forth below, the Court grants the plaintiffs' motion for partial summary judgment.

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rules of Bankruptcy Procedure 7052 and 7056.

The primary argument raised by the parties relates to collateral estoppel. The Court can grant summary judgment if it determines that collateral estoppel principles preclude it from conducting further proceedings on issues that have been litigated and ruled upon previously. *Fisher v. Scarborough (In re Scarborough)*, 171 F.3d 638, 641 (8th Cir. 1999). In determining whether the state court judgment in this case is entitled to preclusive effect, the Court must apply the law of Arkansas. *Id.* (stating that the court must look to the substantive law of the forum state in applying collateral estoppel). In Arkansas, there are four elements required to establish collateral estoppel: "(1) the issue

sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment.” *Riverdale Dev. Co. v. Ruffin Bldg. Sys., Inc.*, 146 S.W.3d 852, 855 (Ark. 2004). The parties agree that only the first element is at issue in this case.

The plaintiffs, Brian and Barbara Cross [the Crosses], argue that the judgment they received in state court after a jury trial is exempt from discharge in the debtor’s bankruptcy case under 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) of the bankruptcy code states that discharge is not available to a debtor for debts obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.” 11 U.S.C. § 523(a)(2)(A). The debtor argues that because the jury instructions were broader than what is required under § 523(a)(2)(A), the specific element relating to the debtor’s knowledge under § 523(a)(2)(A) has not been met and this Court is not precluded from making an independent determination relating to the allegations of fraud and false representation.

In order for a debt to be determined nondischargeable under § 523(a)(2)(A) based on a false representation, the creditor must prove by a preponderance of the evidence that (1) the debtor made a representation; (2) at the time the debtor knew that the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained the alleged loss and damage as the proximate result of the representation having been made. *Merchants Nat’l Bank of Winona v. Moen (In re Moen)*, 238 B.R. 785, 790 (B.A.P. 8th Cir. 1999) (citing *In re Ophaug*, 827 F.2d 340 (8th Cir. 1987)). The elements of fraud and deceit under Arkansas law are substantially similar. The creditor must prove by a preponderance of the evidence the following: “(1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation;

(4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance.” *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 580 (Ark. 2002). When the state court proceeding was presented to the jury, the jury was given jury instructions substantially similar to the elements of proof required under state law, including that the debtor either knew or believed that the representation was false, or he knew or believed he did not have a sufficient basis of information to make the representation.<sup>1</sup>

The debtor argues that the second element, relating to knowledge, is broader under state law than that required under the bankruptcy code. State law requires either knowledge that the representation is false *or* a finding that there is insufficient information upon which to make the representation. The bankruptcy code requires that the debtor knew the statement was false. However, that difference is not sufficient to defeat the plaintiffs’ motion for partial summary judgment. According to *Moen*, the knowledge requirement under § 523(a)(2)(A) can be satisfied indirectly because “[a] false representation made under circumstances where a debtor should have known of the falsity is one made with reckless disregard for the truth, and this satisfies the knowledge requirement.” *Moen*, 238 B.R. at 791 (quoting *In re Duggan*, 169 B.R. 318, 324 (Bankr. E.D.N.Y. 1994)).

In this case, the second jury instruction established that the debtor made a false representation of a material fact. The third jury instruction appears in the disjunctive. The first part establishes that the debtor either knew or believed that the representation was false, in which case the knowledge requirement is clearly met. The second part establishes that the debtor either knew or believed he did not have a sufficient basis of information to make the representation. Under *Moen*, the result is the same. If the debtor

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<sup>1</sup> The relevant jury instructions are the second and third instructions:

“Second, that a false representation of a material fact was made by Ballew;

Third, that Ballew either knew or believed that the representation was false, or he knew or believed he did not have a sufficient basis of information to make the representation.”

believed he did not have a sufficient basis of information to make the false representation and made it anyway, it was made with a reckless disregard for the truth and the knowledge requirement is satisfied. This is especially so given the jury's finding in accordance with the second jury instruction that the debtor made a false representation of a material fact.

The Court finds that the first element relating to collateral estoppel has been met. Because the parties stipulated that all of the other elements required to establish collateral estoppel have also been met, the Court is precluded from conducting further proceedings relating to the plaintiffs' allegations of fraud and false representation. Accordingly, the plaintiffs' motion for partial summary judgment in relation to their complaint to determine the dischargeability of debt is granted. The debt represented by the state court judgment in favor of the plaintiffs is nondischargeable under § 523(a)(2)(A). All other issues set forth in the plaintiffs' complaint remain for trial at a date to be set by the Court.

IT IS SO ORDERED.

March 30, 2006

DATE



RICHARD D. TAYLOR  
UNITED STATES BANKRUPTCY JUDGE

cc: Phyllis M. McKenzie  
Sheila F. Campbell  
M. Randy Rice