IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF KANSAS

In Re:

JERALD R. CAREY,

DEBTOR(S))

NO. 92-40827-7

CHAPTER 7

VIRGINIA I. McCOSKREY,

PLAINTIFF(S),)

v.

JERALD R. CAREY,

DEFENDANT(S)

ADV. NO. 92-7108

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BUT GRANTING STAY RELIEF

This proceeding is before the Court on the plaintiff's motion for summary judgment. Plaintiff Virginia I. McCoskrey appears by counsel Michael Tamburini and Terrance Summers. The defendant-debtor appears by counsel Geoff W. Hetley. The Court has reviewed the relevant pleadings and is now ready to rule.

Ms. McCoskrey asks the Court to declare an arbitration award rendered by the National Association of Securities Dealers (NASD) a nondischargeable debt through the application of the principles of res judicata and collateral estoppel. Alternatively, should this Court conclude the award is not final, she seeks stay relief to allow the award to be confirmed in state court. The debtor contends that res judicata and collateral estoppel do not apply to arbitration awards but only to judicial decisions, or if they can apply to some arbitration awards, they do not apply to this one. Having considered the record of hearing before the NASD arbitration panel, the award, and the parties' memoranda, the Court concludes that Ms. McCoskrey's motion for summary judgment must be denied, but that she is entitled to stay relief to seek to have the award confirmed by a Missouri state court.

FACTS

On two days in September and November of 1991, the parties tried Ms. McCoskrey's complaint against the debtor and the Carey Company, a company he owned, before an arbitration panel. The panel awarded her $9,874 plus 9% interest in actual damages and $9,874 in punitive damages against the defendants, jointly and severally. Shortly after the debtor filed this bankruptcy, the award was confirmed by the Circuit Court of Jackson County, Missouri. Upon learning that the confirmation was entered after the debtor filed bankruptcy, the court withdrew its confirmation of the award against the debtor but left intact the confirmation of the award against the Carey Company.

Ms. McCoskrey's complaint in the NASD hearing alleged claims based on a breach of fiduciary duty, unsuitability, violation of Missouri securities laws, violation of Section 10(b) of the 1934 Securities Act and Rule 10b-5 thereunder, and fraud. The "Statement of Claim" and "Supplemental Authority Supporting Award of Punitive Damages" (attached to pleading 26 as Exhibit A) which she submitted to the arbitrators make clear that she contended the debtor and the Carey Company could be liable for actual and punitive damages based on negligent or reckless conduct, as well as for intentional acts or omissions. She sought $40,000 in actual damages, plus interest, costs, and attorney fees, and punitive damages in the amount of 15% of her actual damages. Much of the evidence presented at the hearing concerned the debtor's failure to solicit current information about Ms. McCoskrey's economic status and needs, whether the investments made fit her investment risk profile, the degree of her market sophistication, the type of disclosures the debtor made to her, and the type appropriate for an investor like her.

Ultimately, in a terse written decision, the NASD arbitration panel, "in full and final resolution of the issues," awarded Ms. McCoskrey $9,874 plus interest from the date of the award and $9,874 in punitive damages, and ordered the parties to bear their own costs and attorney fees. The panel stated no findings regarding any disputed facts and offered no explanation of the basis for its conclusion the defendants should pay those amounts. It did not disclose which of the multiple causes of action it found to be successfully proved. The panel did not explain why it granted less than 25% of the claimed actual damages, why punitive damages were awarded, or why they exceeded the amount of punitive damages Ms. McCoskrey had sought.

Ms. McCoskrey now asks the Court to determine that her claim against the debtor is nondischargeable under 11 U.S.C.A. §523(a)(2), (a)(4), or (a)(6). She contends the arbitrators necessarily decided the debtor obtained money from her by false pretenses, a false representation, or actual fraud, committed fraud or defalcation while acting in a fiduciary capacity toward her, or caused willful and malicious injury to her property.

DISCUSSION AND CONCLUSIONS

Federal Rule of Civil Procedure 56, governing grants of summary judgment, is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056. FRCP 56 provides that this Court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a motion for summary judgment, the Court must examine all the

evidence in the light most favorable to the party against whom summary judgment is sought. Summary judgment is inappropriate if an inference can be deduced from the facts which would allow the nonmovant to prevail. The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. Where different ultimate inferences may properly be drawn, summary judgment should be denied. *United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986)*.

Although the parties have discussed Ms. McCoskrey's motion in terms of "res judicata" and "collateral estoppel," the Tenth Circuit, along with other federal courts, has followed the lead of the Supreme Court and instead calls the concepts "claim preclusion" and "issue preclusion." *Carter v. City of Emporia, 815 F.2d 617, 619 n. 2 (10th Cir. 1987); see also 18 Wright, Miller & Cooper, Fed. Prac. & Pro.: Jurisdiction, §4402 (1981) (discussing and explaining changing terminology, and citing cases)*. "Claim preclusion" refers to the doctrine that forbids litigating in a later suit claims that were or should have been litigated in a prior suit; "issue preclusion" refers to the doctrine that forbids relitigating in a later suit issues that were adequately litigated in a prior suit. *18 Wright, Miller & Cooper, Fed. Prac. & Pro.: Jurisdiction, §4402; Hybert v. Shearson Lehman/American Express, Inc., 688 F.Supp. 320, 325 (N.D.Ill. 1988)*. The Court will address issue preclusion first.

The requirements of issue preclusion (or collateral estoppel) are:

(1) the issue to be precluded is the same as that involved in the prior state action, (2) the issue was actually litigated by the parties in the prior action, and (3) the state court's determination of the issue was necessary to the resulting final and valid judgment.

In re Tam, 136 B.R. 281, 285 (Bankr.D.Kan. 1992). Putting aside for the moment the difference between a state court judgment and an arbitration award, the issues Ms. McCoskrey seeks to keep the debtor from relitigating were involved in the prior suit and appear to have been actually litigated then by the parties. The problem with her argument is that it is impossible to tell whether the arbitrators based the award on any of the issues she now alleges were necessarily resolved against the debtor.

As indicated, the arbitration ruling does not explain the basis of the monetary award. It might have been based on any one or more of the theories described in Ms. McCoskrey's "Statement of Claim." Several of the claims made permit the award of both actual and punitive damages based on a defendant's negligence or recklessness. At least the Missouri securities law claims allow such awards to be based on mere negligence, a basis which is insufficient to cause an award to be nondischargeable under §523(a)(2)(A). *See In re Tam, 136 B.R. at 286*. Similarly, since negligent or reckless behavior could have authorized the award, the arbitrators did not necessarily decide the debtor committed a defalcation while acting in a fiduciary capacity or willfully and maliciously injured her property, and the debt does not necessarily meet the requirements to be nondischargeable under §523(a)(4) or (6). All the Court can tell is that the arbitrators decided the debtor was liable for actual and punitive damages. Faced with a similar issue preclusion argument, the court in *Hybert v. Shearson Lehman/American Express, Inc., 688 F.Supp. 320, 326 (N.D.Ill. 1988)*, said:

[T]he arbitrators' decision . . . is fatally terse. [Citation omitted.] It tells us who wins, but not what issues were decided, and it does not tell us how the arbitrators arrived at that decision. The

record generated by the arbitration is a long one, with a 465 page transcript [362 in this case] and many exhibits; defendants correctly note that many of the issues which plaintiffs now seek to litigate were raised, at some length, during the arbitration. But this alone proves little. We do not know what went on in the arbitrators' minds. . . . We cannot hold that defendants have shown "with clarity and certainty" that any particular fact was the only rational one the factfinder could have found to reach the result. Therefore, we must conclude that the arbitrators' judgment has no issue preclusive effect as to plaintiffs' claim against either defendant."

The most this Court can say is that the arbitrators *might* have believed facts sufficient to make Ms. McCoskrey's claim nondischargeable, not that they *must* have.

Although the award has not been reduced to a confirmed judgment, the arbitrators certainly did consider the claims Ms. McCoskrey made against the debtor and concluded he should pay her some money. Rather than decide whether such an award alone is sufficient for issue or claim preclusion, or must first be confirmed by an appropriate court, in light of the state court's clear indication that it would confirm the award if free to do so, the Court believes the proper course is to grant stay relief so the state court may perform the ministerial act of re-entering its confirmation order. Once this is accomplished, the Court believes the award will have some claim or issue preclusive effects. The debtor will not be able to raise any defense that would completely defeat all of Ms. McCoskrey's claims against him, nor will she be able to seek damages beyond those awarded by the arbitrators.

For these reasons, the Court concludes Ms. McCoskrey's motion for summary judgment must be denied. Her alternative request for stay relief is hereby granted so that she may again ask the state court to confirm the arbitrators' award.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of October, 1994.

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JAMES A. PUSATERI

CHIEF BANKRUPTCY JUDGE