

Property of the Estate  
11 USC § 523(a)(6)  
Default Judgment  
Post-petition transfer

Wurst v. Cofer, Adversary No. 06-6284-fra  
John R. Cofer, Case No. 06-61576-fra7

5/2/2007 FRA

Unpublished

Plaintiff, as trustee for the estate of Evelyn Cofer, commenced an adversary proceeding against John Cofer to recover a post-petition transfer of a vehicle. The Trustee sought a judgment avoiding the transfer under § 549 and the award of a money judgment in the amount of \$30,000. The parties settled on the terms that John Cofer pay the estate \$6,500. The settlement was approved, but Mr. Cofer did not pay the agreed upon money to the estate. The Trustee sought entry of, and received, a default judgment in the amount of \$30,000.

John Cofer, the debtor herein, then filed bankruptcy, scheduling the claim in the amount of \$30,046. The Plaintiff filed this adversary proceeding, alleging that the Debtor transferred the vehicle after the Evelyn Cofer estate's liquidator had inspected the property, thereby rendering the default judgment obtained non-dischargeable under § 523(a)(6). The Plaintiff also asked the court to rule that the default judgment conclusively established the facts alleged in the complaint, i.e. that the vehicle was property of the estate and that the transfer was avoidable under § 549.

The bankruptcy court ruled that the "actually litigated" component of federal collateral estoppel had not been met. The facts presented with the Plaintiff's notice of intent to settle the adversary proceeding in the Evelyn Cofer bankruptcy revealed that the vehicle had been transferred by Evelyn to Kenneth Cofer prior to her bankruptcy filing and Kenneth transferred it back to Evelyn after the petition date. She then transferred the vehicle to John Cofer. At Evelyn Cofer's petition date, the vehicle, while possibly the subject of a fraudulent transfer by her to Kenneth, was not property of her estate.

Defendant John Cofer's failure to pay the amount of the settlement was more a breach of his contractual obligation to the Trustee than a tortious conversion. Plaintiff's claim therefore failed.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case
	)	No. 06-61576-fra7
JOHN R. COFER,	)	
	)	
_____ Debtor.	)	
DAVID F. WURST,	)	Adversary Proceeding
	)	No. 06-6284-fra
	)	
Plaintiff,	)	
vs.	)	
	)	
JOHN R. COFER,	)	
	)	MEMORANDUM OPINION
_____ Defendant.	)	

In this adversary proceeding the Trustee claims that a \$30,000 judgment obtained against the Debtor/Defendant in connection with the bankruptcy of the Defendant's mother is excepted from discharge. The Court, for the reasons set out below, finds for the Defendant.

I. BACKGROUND

In January of 2004 the Plaintiff, in his capacity as Trustee of the bankruptcy estate of Evelyn Cofer, commenced an adversary proceeding against Defendant John Cofer seeking to avoid and recover a post-petition transfer. The complaint alleged among other things:

- 1 • That a certain 1955 Ford Thunderbird was "at all material times"  
2 property of the estate;  
3 • That, post-petition, Evelyn Cofer transferred the vehicle to John  
4 Cofer; and  
5 • That the vehicle was worth \$30,000.

6 The Trustee sought a judgment avoiding the transfer and awarding a  
7 money judgment in the sum of \$30,000.

8 Negotiations ensued, and, on June 10, 2004, the Trustee filed a  
9 motion and notice of intent to settle the adversary proceeding. The  
10 notice stated the terms of the settlement as follows:

11 The debtor [that is, Evelyn Cofer] and the debtor's deceased  
12 husband were the owners of a 1955 Ford Thunderbird. He  
13 passed away prior to the filing of the bankruptcy petition  
14 by the debtor. Pre-petition the debtor transferred the  
15 vehicle to her son, Kenneth Cofer, who transferred the  
16 vehicle back to her post-petition. The debtor then  
17 transferred the vehicle to her son, John Cofer. The Trustee  
18 commenced an adversary proceeding against John Cofer to  
19 avoid the transfer of the vehicle to him. The Trustee and  
20 John Cofer have agreed to settle the estate's claim to the  
21 vehicle for payment to the estate of \$6,500 and the estate's  
22 transfer of the estate's interest in the vehicle to John  
23 Cofer. Upon receipt of the foregoing \$6,500, the Trustee  
24 shall file a Notice of Dismissal of the adversary  
25 proceeding.

19 The Court ordered that the settlement would be approved unless objection  
20 was made by an interested party, which in any case did not occur.

21 Defendant John Cofer did not pay the money required by the  
22 settlement, and the Trustee sought entry of a default judgment. The  
23 Court convened a hearing on December 9, 2004, at which both parties to  
24 this matter were present. The Court ordered the Debtor to pay the \$6,500  
25 to the Trustee within 90 days. It was further ordered that, if the  
26 Debtor decided to contest the matter notwithstanding the settlement, he

1 could file an answer within 30 days of the hearing. If neither occurred,  
2 the Trustee was directed to submit a default order and judgment. An  
3 order consistent with the ruling from the bench was entered on December  
4 14th; no payment was made, and a judgment was entered on January 31,  
5 2005, in the amount of \$30,000. Even at that point, the Defendant was  
6 given a last chance to settle on the agreed terms: the judgment provided  
7 that it would be "satisfied in full if Defendant pays to Plaintiff \$6,500  
8 on or before March 9, 2005."

9 The payment was not made. Instead, John Cofer filed his own  
10 petition for relief under Chapter 7 of the Bankruptcy Code on August 14,  
11 2006. The schedules submitted with the petition included the Trustee's  
12 claim in the amount of \$30,046.

13 In his complaint in the instant adversary proceeding, the Trustee  
14 alleges that the Defendant "purportedly transferred" the subject vehicle,  
15 following inspection of the vehicle by the estate's liquidator. The  
16 complaint alleges that Defendant "willfully and maliciously converted the  
17 vehicle belonging to plaintiff and plaintiff's judgment against  
18 defendant, including interest, is non-dischargeable under 11 U.S.C.  
19 § 523(a)(6)."

20 The matter came on for trial on April 19, 2007. The Plaintiff  
21 relied largely on the record described above, and a request for admission  
22 delivered to the Defendant:

23 "Request No. 5: Defendant willfully and maliciously converted the  
24 vehicle belonging to Plaintiff.

25 **Response to Request No. 5:**

26 Willful, but not maliciously."

1 II. DISCUSSION

2 The original default judgment against the Debtor was entered by  
3 the U.S. Bankruptcy Court. The Bankruptcy Court is now asked to hold that  
4 the allegations of fact in the complaint of the earlier action are  
5 binding on the court in the present action, i.e. that the vehicle was  
6 property of the estate "[a]t all times material herein," and that the  
7 transfer was avoidable under § 549. To make that determination, the  
8 court must apply the elements of federal collateral estoppel (issue  
9 preclusion). See In re Pomeroy, 353 B.R. 371 (Bankr. D. Mass.  
10 2006) (internal citations omitted).

11 The elements of federal collateral estoppel are as follows:

12 (1) there was a full and fair opportunity to litigate the  
13 issue in the previous action; (2) the issue was actually  
14 litigated in that action; (3) the issue was lost as a result  
15 as a result of a final judgment in that action; and (4) the  
16 person against whom collateral estoppel is asserted in the  
17 present action was a party or in privity with a party in the  
18 previous action.

19 In re Smith, 2007 WL 987278 (Bankr. D.Ariz. 3/30/07) (citing In re Palmer,  
20 207 F.3d 566, 568 (9th Cir. 2000)). Where a default judgment is entered,  
21 "the 'actual litigation' requirement may be satisfied by substantial  
22 participation in an adversary contest in which the party is afforded a  
23 reasonable opportunity to defend himself on the merits, but chooses not  
24 to do so." In re Daily, 47 F.3d 365, 369 (9th Cir. 1995). It is within  
25 the discretion of the court to apply collateral estoppel to a default  
26 judgment. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1979).

27 The "actually litigated" element in the prior action is a close  
28 one, but in this case the facts are further illuminated by the Motion and  
29 Notice of Intent to Settle prepared by the Trustee's attorney. While the

1 complaint alleges that, at all material times, the Ford was property of  
2 the estate, the notice revealed that the vehicle had been transferred  
3 *prior* to the bankruptcy petition by Evelyn to Kenneth Cofer. Kenneth  
4 then transferred the vehicle back to Evelyn after her bankruptcy petition  
5 had been filed, and Evelyn then transferred the vehicle to John.

6 At the time the petition was filed, the vehicle did not belong to  
7 the estate: it belonged to Kenneth. It may have been subject to an  
8 action to avoid the transfer, but no such judgment was ever obtained.  
9 When Kenneth conveyed the car back to Evelyn he was not transferring it  
10 back to the estate; Evelyn was a mediate transferee of an asset which was  
11 the subject of a (possibly) fraudulent transfer by her pre-petition to  
12 Kenneth.

13 The judgment finally entered against the Defendant was, for all  
14 intents and purposes, a judgment enforcing the parties' original  
15 compromise. It is notable that it did not decree the avoidance of either  
16 of the transfers of the vehicle. The Defendant's failure to pay is less  
17 in the nature of a tortious conversion than a breach of his contractual  
18 obligation to the Trustee. It follows that the Court cannot find that  
19 the Debtor converted property of the estate. For that reason, the  
20 Trustee's claim fails.

21 This Memorandum Opinion contains the Court's findings of fact and  
22 conclusions of law. A form of judgment will be entered by the court.  
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25 FRANK R. ALLEY, III  
26 Bankruptcy Judge