

UNITED STATES BANKRUPTCY APPELLATE PANEL  
FOR THE FIRST CIRCUIT

In re: \*  
\* BAP NO. MB 97-097  
\*  
JAMES G. MACDONALD, \*  
Debtor. \*  
\*\*\*\*\* \*  
\*  
FILOMENA TREGLIA and \*  
VIRGINIA TREGLIA, \*  
Plaintiffs/Appellants, \*  
\*  
\* V. \*  
\* Bankruptcy  
\* No. 91-  
\* 18787-CJK  
\* Adversary No. 92-1024  
\*  
JAMES G. MACDONALD, Individually \*  
and as Trustee of MacDonald \*  
Realty Trust, \*  
Defendant/Appellee. \*  
\*\*\*\*\*

Before GOODMAN, HAINES AND CARLO, U.S. Bankruptcy Judges

MEMORANDUM AND ORDER CERTIFYING LEGAL QUESTION TO THE  
SUPREME JUDICIAL COURT OF MASSACHUSETTS

**Per Curiam.** Before us is Filomena and Virginia Treglia's appeal from the bankruptcy court's final order discharging James G. MacDonald's \$94,365.15 debt to them. Relying on the preclusive effect of a state court default judgment, the Treglias seek a determination that the debt is excepted from discharge under 11 U.S.C. § 523(a)(2)(A). The court below held that MacDonald is not precluded from litigating the elements of fraud by virtue of the default judgment and, after taking evidence, determined that the Treglias have not proved their case.

**1. The Question at Hand**

This appeal raises a discrete legal issue under Massachusetts law: When a defendant appears in a civil action, files a motion seeking interlocutory relief, obtains that relief, but does not thereafter answer or defend; and when, after a damages hearing (in which the defendant does not participate), default judgment enters; does Massachusetts law preclude the defendant's litigation of the substantive elements underlying the default judgment in a subsequent action initiated by the same plaintiffs?

## **2. Certification**

The question posed is critical to the case before us. The Treglias have not challenged the bankruptcy court's factual findings, nor its conclusion that those facts do not satisfy § 523(a)(2)(A)'s elements for nondischargeability. Only if issue preclusion operates can they prevail.<sup>1</sup>

Because Massachusetts law on the point is not settled, we will, sua sponte, certify the question to the Massachusetts Supreme Judicial Court pursuant to its Rule 1:03, Uniform Certification of Questions of Law.<sup>2</sup>

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<sup>1</sup> Having reviewed the record at some length, we consider that the question's critical importance is not simply a function of the appellants' tactical decisions. The bankruptcy court's factual findings are well supported by the record, and its conclusion that the facts did not satisfy § 523(a)(2)(A)'s elements is unassailable. It is only if those elements were conclusively established by the default judgment that the plaintiffs could prevail, as their sole argument is that the bankruptcy court erred as a matter of law in providing the debtor a trial on the elements of fraud.

<sup>2</sup> In pertinent part, Rule 1:03 of the Massachusetts Rules of the Supreme Judicial Court provides:

### 3. The Legal Landscape

Issue preclusion can operate to foreclose litigation of some or all the elements of a bankruptcy dischargeability claim. See 28 U.S.C. § 1738 (requiring federal court to give full faith and credit to state court judgments); Grogan v. Garner, 498 U.S. 279, 284 n. 11 (1991) ("[C]ollateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)."). The applicable principle is that of issue preclusion, as opposed to

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**Section 1. Authority to Answer Certain Questions of Law.** This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

**Section 2. Method of Invoking.** This rule may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.

Mass. R. Sup. J. Ct. 1:03.

The Bankruptcy Appellate Panel for the First Circuit is not expressly listed among the courts from whom the Supreme Judicial Court will accept certified questions. However, we conclude that we may appropriately certify the question in this instance. Acting as the intermediate appellate court in bankruptcy matters, the U.S. District Court for the District of Massachusetts has certified questions to the Supreme Judicial Court. See Dwyer v. Cempellin, 424 Mass. 26, 673 N.E.2d 863 (1996). We are the functional equivalent of the U.S. District Court in hearing bankruptcy appeals. See 28 U.S.C. § 158(c). Moreover, our power to decide bankruptcy appeals is premised upon express authority granted by the U. S. Court of Appeals for the First Circuit. See 11 U.S.C. § 158(b) (1).

claim preclusion. As one bankruptcy court has recently explained:

Because dischargeability questions are unique to bankruptcy and their resolution depends on criteria established by the Bankruptcy Code, prior state court judgments will never relate to the same "cause of action" so as to present the potential for claim preclusion.

....

Although some elements of state court claims may be identical with elements of discharge exceptions (e.g., common law fraud and § 523(a)(2)(A)), a claim to establish nondischargeability (in a bankruptcy that is yet to occur) is not among the claims that could have been asserted in pre-bankruptcy litigation. Thus, although the right to a judgment of nondischargeability may well be established by a pre-bankruptcy judgment, it results from a comprehensive preclusion of the elements of the claim, not from a preclusion of the claim itself.

McAlister v. Slosberg (In re Slosberg), 225 B.R. 9, 13 n.3 (Bankr. D. Me. 1998) (citations omitted).

Under Massachusetts law, the elements of issue preclusion are (1) the issue(s) sought to be precluded must be the same as those involved in the prior action; (2) the issue must have been actually litigated; (3) the issue(s) must have been actually determined by a valid and binding judgment; and (4) the determination of the issue(s) must have been essential to the judgment. See Martin v. Ring, 401 Mass. 59, 61, 514 N.E.2d 663, 664 (1987); see also Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 50-51 (1st Cir. 1997) (Massachusetts law); Rutanen v. Baylis (In re Baylis), 222 B.R. 1, 6-7 (Bankr. D. Mass. 1998) (Massachusetts law).

MacDonald not contest the presence of elements (1), (3), and (4). He disputes only whether the parties "actually litigated" the elements of fraud in the state court proceeding. At first blush, one might conclude that, because judgment was entered by default on

account of MacDonald's failure to answer, they were not. See, e.g., Phalon v. Varrasso (In re Varrasso), 194 B.R. 537, 539 (Bankr. D. Mass. 1996). The court below so held.<sup>3</sup>

Were this a simple no-appearance, no answer default, we would comfortably affirm the bankruptcy court. But, as the facts set forth below demonstrate, MacDonald did indeed appear and participate in the state court proceedings before he was defaulted.

#### **4. Facts**

##### **a. State Court Proceedings**

On January 17, 1990, the Treglias brought an action against MacDonald in Middlesex County Superior Court, alleging breach of contract and fraud in connection with a real estate deal. They alleged that MacDonald gave them a \$75,000.00 promissory note

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<sup>3</sup> The bankruptcy court explained:

In this instance the Debtor's liability for fraud was established in the earlier proceeding by default; the court received evidence only as to the amount of damages. As to liability, the court received no evidence and made no findings of fact or conclusions of law. Thus the issues pertaining to liability for fraud in the earlier proceeding were not actually litigated. Spilman v. Harley, 656 F.2d 224, 228 (6th Cir. 1981) ("If the important issues were not actually litigated in the prior proceeding, as is the case with a default judgment, then collateral estoppel does not bar relitigation in the bankruptcy court."); Tolbert v. Clay, 64 B.R. 313, 314-15 (Bankr. W.D. Pa. 1986) (default judgment does not satisfy requirement of actual litigation). See Commonwealth of Massachusetts v. Hale, 618 F.2d 1980 (noting but not deciding the issue of whether collateral estoppel may be invoked where the prior judgment was by default). Therefore, the Plaintiffs may not invoke collateral estoppel.

Treglia v. MacDonald (In re MacDonald), Ch.7 Case No. 91-18787-CJK, Adv. No. A92-1024, slip op. at 3-4 (Bankr. D. Mass. June 8, 1997).

secured by collateral of insufficient value to secure his repayment obligation and that he induced them to do so through fraudulent representations. With their complaint, the Treglias filed an ex parte motion for attachment of real estate together with a supporting affidavit. The state court issued a writ of attachment in the amount of \$85,000.00 on January 17, 1990. The Treglias served the writ of attachment on MacDonald, filing proof of service with the state court on April 30, 1990. On May 10, 1990, they filed a copy of the summons with evidence that MacDonald had been served with their complaint.

On May 14, 1990, MacDonald appeared through counsel and filed a motion to discharge or modify the Treglias' attachment, together with a supporting affidavit. The court granted MacDonald's motion. Thereafter, MacDonald failed to answer the complaint and, on July 5, 1990, he was defaulted. On February 14, 1991, the state court conducted a damages hearing and, the next day, entered judgment for the Treglias in the amount of \$94,365.15 on their fraud claim.<sup>4</sup>

#### **b. Bankruptcy Proceedings**

MacDonald filed his voluntary Chapter 7 bankruptcy petition on October 18, 1991. The Treglias filed a timely complaint seeking a determination that MacDonald's obligation to them under the fraud judgment was excepted from discharge under § 523(a)(2)(A). As explained above, the bankruptcy court rejected the Treglias' contention that they were entitled to judgment as a matter of law

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<sup>4</sup> The Treglias obtained judgment on their contract claims, as well.

under Massachusetts issue preclusion principles and proceeded to the merits, entering judgment for MacDonald.

**5. Conclusion**

Determinative of this appeal is the question whether a default judgment entered under circumstances such as those present here carries issue preclusive effect as to each of the elements of the claims upon which it was entered. Therefore, we hereby certify the question set forth in **Section 1** above to the Supreme Judicial Court of Massachusetts.

SO ORDERED.

**DATED: February 18, 1999**

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**JAMES A. GOODMAN**  
**Presiding Judge**