

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

MARK WOLOSHUK,
Debtor.

No. 7-00-10909 SS

CHARLES CURRAN,
Plaintiff,

v.

Adv. No. 00-1108 S

MARK WOLOSHUK,
Defendant.

**MEMORANDUM OPINION ON CROSS
MOTIONS FOR SUMMARY JUDGMENT**

This matter is before the Court on the Cross Motion for Summary Judgment. Plaintiff is represented by his attorney Larry Leshin. Defendant is represented by his attorney Douglas Booth. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

Plaintiff's motion is based on the collateral estoppel effect of a judgment entered against Defendant in an action in the First Judicial District, Santa Fe, New Mexico ("Judgment"). Defendant's motion is based on the effect of a Stipulated Motion to Dismiss all claims against Woloshuk filed in the same action after a settlement had been reached. Although both motions, mainly Plaintiff's, ignore procedural requirements for establishing the factual record for a ruling on a motion for summary judgment, see NM LBR 7056-1 of the Local Rules of the United States Bankruptcy Court for the

District of New Mexico (August 13, 1996), the Court will nevertheless consider and rule on the merits of the motions.

The Judgment states, in relevant part:

This matter comes before the Court on the Settlement Agreement between plaintiff Charles Curran ("Curran") and the Defendant Mark Woloshuk ("Woloshuk") the Court having reviewed the Settlement Agreement, reviewed the pleadings, and being otherwise fully advised in the premises:

FINDS:

...

5. Curran relied on Woloshuk's misleading or false statements resulting in economic harm.
6. Woloshuk breached his fiduciary duty to Curran and committed fraud.
7. Judgment should be entered against Woloshuk in the amount of \$25,000.00 with interest at 15% per annum.
8. The Settlement Agreement between Curran and Woloshuk provides that this Judgment shall only be filed in the event Woloshuk defaults on the terms contained in that Agreement.

The Settlement Agreement referred to in the Judgment provides, in relevant part:

THIS SETTLEMENT AGREEMENT ... is entered into ... by and between Charles Curran ("Curran") and Defendant Mark Woloshuk ("Woloshuk").

RECITALS

...

- B. ... Curran seeks to collect damages from Woloshuk based on, but not limited to, Woloshuk's fraud and breach of fiduciary duty.
- C. Woloshuk has disputed Curran's claims.

...

- E. The Parties in this matter desire to enter into this Settlement Agreement to fully resolve and compromise their claims and the dispute between them pursuant to the terms and conditions set forth below.

AGREEMENT

- ...
2. Stipulated Judgment. Concurrently with the filing of this Settlement Agreement, Woloshuk agrees to the entry of a Stipulated Judgment ... which Stipulated Judgment will contain a Court finding that Woloshuk committed fraud against Curran and breached his fiduciary duty to Curran.
- ...
8. No Admission. By executing this Settlement Agreement and Mutual Release, it is expressly understood that neither Curran nor Woloshuk admit any liability or fault.

Discussion

Federal Courts in New Mexico must give the same preclusive effect to a judgment as would a New Mexico court.

Fowler Brothers v. Young (In re Young), 91 F.3d 1367, 1374

(10th Cir. 1996). See also Corzin v. Fordu (In re Fordu), 201 F.3d 693, 703 (6th Cir. 1999):

When a federal court is asked to give preclusive effect to a state court judgment, the federal court must apply the law of the state in which the prior judgment was rendered in determining whether and to what extent the prior judgment should be given preclusive effect in a federal action. (Citations omitted.)

Therefore, this Court should look at the preclusive effect that the New Mexico state court would give to the consent judgment.

Under New Mexico law, to invoke collateral estoppel a party must establish four elements: 1) same parties or privity, 2) subject matter of the two suits are different, 3)

the ultimate facts or issues were actually litigated, and 4) the issue was necessarily determined. Reeves v. Wimberly, 107 N.M. 231, 233, 755 P.2d 75, 77 (Ct. App. 1988). In the case of a consent judgment¹ the third element is generally not met. “[S]ettlements and consent judgments are not normally considered fertile ground for issue preclusion.” State ex rel. Martinez v. Kerr-McGee Corporation, 120 N.M. 118, 122, 898 P.2d 1256, 1260 (Ct. App.), cert. denied, 120 N.M. 68, 898 P.2d 120 (1995). However, a consent judgment can, by its terms, preclude an issue. Arizona v. California, 530 U.S. 392, 120 S.Ct. 2304, 2319 (2000) (“[S]ettlements ordinarily occasion no issue preclusion (sometimes called collateral estoppel), unless it is clear ... that the parties intend their agreement to have such an effect.”) See also Fowler Brothers, 93 F.3d at 1376 (Consent decrees are of a contractual nature and their terms may alter the preclusive effect.)

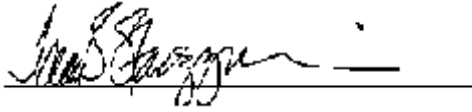
Having reviewed the materials presented, the Court finds that Plaintiff’s motion for summary judgment should be denied. First, there is no evidence that any facts or issues were

¹ A “consent judgment” is a negotiated agreement between the parties that is entered as a judgment of the court. Pope v. The Gap, Inc., 125 N.M. 376, 383, 961 P.2d 1283, 1289 (Ct. App. 1998).

actually litigated or necessarily determined by the court. Second, the Court cannot find from the language of the Judgment or Settlement Agreement that the parties intended the consent judgment to have preclusive effect. The Judgment does have a finding that Woloshuk breached his fiduciary duty to Curran and committed fraud, but the Settlement Agreement itself recites that Woloshuk disputes Curran's claims and expressly agrees that execution of the settlement is not an admission of liability or fault. At best the Court finds the documents ambiguous, suggesting that summary judgment is not proper.

With regard to Defendant's Motion for summary judgment, Defendant relies on a portion of the underlying complaint that initiated the state court action. However, no copy of the complaint is attached to any of Defendant's or Plaintiff's filings. In any event, the Court also finds that the filing of a Stipulated Motion to Dismiss, executed at approximately the same time as the settlement, should not, without additional facts, have any preclusive effect.

The Court will enter an Order denying the Motions for Summary Judgment.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered or mailed to the listed counsel and parties.

Douglas Booth
1223 S. St. Francis Drive Ste C
Santa Fe, NM 87505-4053

Laurence M. Leshin
PO Box 3326
Albuquerque, NM 87190

