

**THIRD DIVISION
GOBEIL,
COOMER and HODGES, JJ.**

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March 13, 2019

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A18A1775. PAUL J. KATZ v. COHAN LAW GROUP, LLC et al.

GOBEIL, Judge.

This appeal arises from a suit alleging malpractice, initiated by Paul J. Katz against the defendant law firm Cohan Law Group, LLC (the “law firm”), Tracy Kathryn Haff, Esq., and Louis R. Cohan, Esq. (collectively referred to as the “defendants”). Katz alleged malpractice based on Cohan’s prior representation of Katz in a successful breach of contract and fraud action against Kenneth Wilson, as well as Katz’s subsequent efforts to collect on the judgment. Following a jury verdict and entry of judgment in favor of Katz, Wilson filed a petition for relief under Chapter 7 of the Bankruptcy Code, listing Katz’s judgment as a dischargeable debt. The defendants did not file an adversary proceeding in bankruptcy court, despite Katz’s request that they do so, and the debt was discharged. Katz then filed a

malpractice complaint against the defendants. Katz appeals from the order of the State Court of Fulton County, which granted the defendants' motion for summary judgment and denied Katz's motion for partial summary judgment. On appeal, Katz argues the trial court erred by granting the defendants' motion for summary judgment because, according to Katz, the judgment was nondischargeable in bankruptcy. Katz further argues that the additional grounds asserted in the defendants' motion for summary judgment do not support judgment as a matter of law. For the reasons explained more fully below, we reverse the trial court's order and remand the case to the trial court for further proceedings.

A party is entitled to summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. OCGA § 9-11-56 (c). On appeal from the grant of summary judgment, we construe the evidence most favorably towards the nonmoving party, who is given the benefit of all reasonable doubts and possible inferences. The party opposing summary judgment is not required to produce evidence demanding judgment for it, but is only required to present evidence that raises a genuine issue of material fact.

Ansley v. Raczka-Long, 293 Ga. 138, 140 (2) (744 SE2d 55) (2013) (citations omitted); see also *Home Builders Assn. of Savannah v. Chatham County*, 276 Ga. 243, 245 (1) (577 SE2d 564) (2003).

The relevant facts, when viewed most favorably toward Katz as the nonmovant, show that Katz hired Wilson to build a home for him in or around September 21, 2000, at a contract price of \$447,424. During the course of construction, Katz discovered that Wilson was diverting the money intended to be used for the completion of the home to other uses. Several subcontractors hired by Wilson placed liens on Katz's property after Wilson failed to pay them for materials and supplies. Katz retained Cohan¹ to file suit against Wilson in the Superior Court of Fayette County. Cohan, on behalf of Katz, filed a complaint against Wilson alleging breach of contract, fraud, conversion, negligence, breach of express and implied warranty, and seeking actual damages, attorney fees pursuant to OCGA § 13-6-11, and punitive damages.

Following a trial in January 2005, a jury returned a verdict in favor of Katz on his claims for fraud and attorney fees, but found that Wilson was not negligent in the construction of Katz's home. The jury awarded Katz \$283,727.97 in actual damages, and \$83,387.00 in attorney fees, plus post-judgment interest, but declined to award punitive damages. The jury's award of damages was not apportioned between the

¹ At the time he filed suit on behalf of Katz in the Superior Court of Fayette County, Cohan was employed by a law firm that is not a party to this appeal.

fraud and breach of contract claims. The trial court adopted the jury's finding that Wilson "committed fraud" as to Katz and entered judgment on the jury's verdict in early 2005 (hereinafter, the "judgment"). Cohan continued to represent Katz in his efforts to collect on the judgment, including filing several garnishment actions against Wilson's employers. Katz recovered approximately \$42,822.64 of his judgment from Wilson through garnishment.

In addition to the civil judgment in superior court, in 2004, Wilson ultimately pleaded guilty to several criminal offenses related to conversion of payments for real property improvements, false swearing, and other crimes, all of which stemmed from fraudulent real estate construction practices. The Superior Court of Fayette County sentenced him to 20 years' probation. The superior court entered a restitution order finding that Wilson was indebted to more than a dozen entities and individuals. As part of the restitution order, the court found the amount of Katz's damages to be \$283,727.97. The court determined that Wilson's annual gross income was \$140,000 and his financial condition was "strong." The court ordered Wilson to pay approximately \$3,400 per month in restitution into the registry of the court, reasoning that allowing Wilson to avoid incarceration and repay his debts would best serve the goals of restitution, including making the victims "as nearly whole as possible given

the facts and circumstances of this case.” Wilson has paid \$146,482.72 under the restitution order.

On February 23, 2014, Wilson filed for bankruptcy protection pursuant to Chapter 7 of the United States Bankruptcy Code. In his petition, Wilson indicated that he owned a business, “C & K Development, Inc.,” and listed his assets as a pick-up truck, clothing, a computer, and a bank account, the value of those assets totaled \$5,907. He further reported a combined household gross monthly income of \$10,619.38, with no expectation of an increase or decrease in income within the next year. Among his listed monthly expenditures was the \$3,400 restitution payment. Wilson named several non-priority unsecured creditors in the filing, listing the amount of Katz’s judgment as “unknown” and the total restitution amount (payable to the superior court) as \$456,891.67. The bankruptcy court set a deadline of May 27, 2014, within which creditors could challenge the dischargeability of debts listed in the petition.

Tracy Haff, a senior associate attorney with the law firm, received notice of the bankruptcy filing and contacted Katz regarding a strategy going forward. Haff informed Katz that garnishment proceedings would be stayed during the pendency of the bankruptcy, but advised against pursuing an independent action against one of

Wilson’s employers. Instead, Haff recommended filing an adversary proceeding² in the bankruptcy court to “mak[e] sure the debt Wilson owes [Katz] is not discharged in the bankruptcy.” Katz responded in an e-mail instructing the law firm to “move forward accordingly and cost consciously.” The associate responded, “Will do.” Haff drafted an adversary complaint and forwarded it to Cohan. Cohan testified that he reviewed Wilson’s bankruptcy petition, and he concluded that based on the limited assets that Wilson possessed, recovery of any portion of the judgment would be difficult. The parties dispute what occurred next: Cohan averred that he and Katz spoke by phone and he advised Katz against filing the adversary complaint because of the high cost and low odds of recovery; Katz disputes that this phone call occurred.³ Haff left her employment with the law firm on April 15, 2014.

² “‘Adversary proceeding’ is a term of art used in bankruptcy practice for a lawsuit brought within a bankruptcy proceeding . . . to determine the dischargeability of a debt.” *In re Duncan*, 448 F3d 725, 726 n.1 (4th Cir. 2006). Rule 7001 (1) of the Federal Rules of Bankruptcy Procedure provides that an adversary proceeding includes “a proceeding to recover money or property[.]”

³ Construing the record in favor of Katz, as we must, we presume that this phone call did not occur. See *Hardee’s Food Systems, Inc. v. Evans*, 197 Ga. App. 5, 5 (397 SE2d 474) (1990) (in reviewing whether summary judgment was warranted, Court resolves factual inconsistencies against movant).

The deadline to file an adversary complaint passed without a challenge to discharge from Katz, and, on June 10, 2014, the bankruptcy court granted Wilson a discharge pursuant to 11 USC § 727. The bankruptcy trustee determined that there was no property available in Wilson's estate to be distributed to his creditors.

Following discharge of the judgment, Katz filed suit in the State Court of Fulton County against the defendants, alleging malpractice based on the defendants' failure to file an adversary proceeding on his behalf in Wilson's bankruptcy proceeding, thereby failing to protect Katz's judgment from discharge. Katz also asserted claims for breach of fiduciary duty, liability for the acts of others (against the law firm and Cohan), punitive damages, and attorney fees and expenses pursuant to OCGA § 13-6-11. The defendants moved for summary judgment, contending that Katz's malpractice claim must fail because he cannot prove the proximate cause element of that claim. Specifically, the defendants argued that (1) the superior court judgment would not have been entitled to preclusive effect in the bankruptcy court; and (2) Katz could not prove that the judgment would be collectible in any amount. Katz filed a cross-motion for partial summary judgment, seeking a ruling that, had the adversary proceeding been filed in Wilson's bankruptcy case, the judgment would

have been found nondischargeable pursuant to 11 USC § 523 (a). Katz also asserted that the judgment was collectible as a matter of law.

In granting the law firm's motion for summary judgment, the trial court ruled that Katz failed to satisfy his burden of showing that but for the law firm's negligence in failing to pursue an adversary proceeding, he would have succeeded in having his judgment excepted from discharge in the bankruptcy case. The trial court did not expressly rule on the other grounds raised in the defendants' motion for summary judgment. The court denied Katz's motion for partial summary judgment as moot.

At the outset, we note that

[t]o establish a legal malpractice claim, a plaintiff must prove (1) he employed the defendant attorney, (2) the attorney failed to exercise ordinary care, skill, and diligence, and (3) this failure was the proximate cause of damages to the plaintiff. To establish proximate cause, the client must show that but for the attorney's error, the outcome would have been different; any lesser requirement would invite speculation and conjecture. The defendant attorney is entitled to summary judgment if he shows that there is an absence of proof adduced by the client on the issue of proximate cause.

Kidd v. Ga. Assn. of Educators, Inc., 263 Ga. App. 171, 173 (587 SE2d 289) (2003) (citations and punctuation omitted). Where a plaintiff asserts a legal malpractice

claim based on an attorney's failure to file an action timely, proximate cause may be established by showing that the client would have been successful in the underlying suit. *Tucker v. Rogers*, 334 Ga. App. 58, 64 (3) (778 SE2d 795) (2015). Whether an adversary proceeding in the bankruptcy court would have been successful is a question of law, and hence, proper for summary adjudication. See *In re St. Laurent*, 991 F2d 672, 676 (II) (A) (11th Cir.1993) ("the ultimate issue of dischargeability is a legal question to be addressed by the bankruptcy court in the exercise of its exclusive jurisdiction to determine dischargeability") (citation omitted).

With these considerations in mind, we now turn to Katz's specific claims of error.

1. Katz argues the trial court erred in ruling that his judgment against Wilson was dischargeable in bankruptcy. Specifically, Katz maintains that, had the adversary proceeding been filed, the doctrine of collateral estoppel would have precluded the relitigation of the dischargeability of the debt pursuant to section 523 (a) (2) (A) of the Bankruptcy Code. We agree.

"The Bankruptcy Code protects insolvent debtors, allowing them a fresh start, free of preexisting debt." *In re Hooks*, 238 BR 880, 887 (Bankr. S.D. Ga. 1999). This protection is limited to the "honest but unfortunate debtor" and generally, any debt

for money, property, services, or credit, to the extent obtained by fraud, is not dischargeable in bankruptcy. *Local Loan Co. v. Hunt*, 292 U. S. 234, 244 (54 SCt 695, 78 LEd 1230) (1934); 11 USC § 523 (a) (2) (A) (“A discharge under section 727, 1141, 1228 (b), or 1328 (b) of [title 11] does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by [] false pretenses, a false representation, or actual fraud[.]”). In the bankruptcy context, the Supreme Court of the United States has held that collateral estoppel applies in discharge exception proceedings under 11 USC § 523 (a). *Grogan v. Garner*, 498 US 279, 284 (1) n. 11 (111 SCt 654, 112 LEd2d 755) (1991). Therefore, where a creditor has obtained a judgment in state court on a claim of fraud, such judgment may be given preclusive effect in the bankruptcy court, and the debtor is precluded from challenging the dischargeability of the debt. *In re St. Laurent*, 991 F2d at 676 (II) (A).

Because the judgment at issue in this case was issued by a state court, the federal bankruptcy court would have applied Georgia law in determining whether the doctrine of collateral estoppel applies. See *In re St. Laurent*, 991 F2d at 675-676 (II) (A) (“If the prior judgment was rendered by a state court, then the collateral estoppel

law of that state must be applied to determine the judgment’s preclusive effect.”).

Under Georgia law,

[t]he doctrine of collateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies. . . . [C]ollateral estoppel does not require identity of the claim—so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be relitigated, even as part of a different claim.

Gwinnett County Bd. of Tax Assessors v. Gen. Elec. Capital Computer Svcs., 273 Ga. 175, 178 (1) (538 SE2d 746) (2000) (citation and punctuation omitted). To bar relitigation, the issue must have been essential to the prior judgment. *Kent v. Kent*, 265 Ga. 211, 211 (1) n. 2 (452 SE2d 764) (1995). Georgia law also provides that “[t]he tort of fraud has five elements: a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff.” *Kilroy v. Alpharetta Fitness, Inc.*, 295 Ga. App. 274, 275-276 (1) (671 SE2d 312) (2008) (citation and punctuation omitted).

Both parties’ motions for summary judgment were based on the preclusive effect of the superior court judgment. The issue before us is thus whether the superior court judgment would have precluded the relitigation of Katz’s fraud allegation in the

bankruptcy court. If the language in the underlying superior court judgment is sufficient for a determination that the state court attributed Katz's damages to Wilson's fraud, collateral estoppel would apply to except the debt from discharge. *In re Williams*, 282 BR 267, 275 (Bankr. N.D. Ga. 2002). However, where it is "impossible to determine with certainty" that the state court awarded judgment on a creditor's fraud claim, the judgment would not have been given preclusive effect. *Sterling Factors, Inc. v. Whelan*, 245 BR 698, 707 (II) (B) (3) (N.D. Ga. 2000).

The defendants argue that the superior court judgment's failure to apportion the damages between the breach of contract and fraud claims renders the doctrine of collateral estoppel inapplicable in this case. We disagree. In evaluating collateral estoppel in fraud discharge proceedings, bankruptcy courts have noted that the question of apportionment of damages among several claims is a common issue, since it is unusual to bring a suit for fraud alone. See, e.g., *In re Hooks*, 238 BR at 885-886; *In re St. Laurent*, 991 F2d at 676. Because the jury's verdict in the superior court case included an express finding that Wilson committed fraud, we need not speculate as to which of the two independently adequate grounds the verdict was predicated. Here, the superior court judgment would have been afforded preclusive effect because it is possible to determine with certainty that the issue of fraud was in fact adjudicated.

Therefore, the fact that the judgment was made in satisfaction of the breach of contract claim, in addition to the fraud claim, does not prevent the application of collateral estoppel. *In re Hooks*, 238 BR at 886.

In granting the defendants' motion for summary judgment, the trial court relied on *Sterling Factors*, supra, and the parties to this appeal cite that case in support of their respective positions. An examination of that case does not alter our conclusion here. In *Sterling Factors*, the bankruptcy court denied the creditor's request to give preclusive effect to a default judgment entered in the Superior Court of DeKalb County in favor of the creditor on fraud and other claims. 245 BR at 701 (I). The judgment included an unapportioned award of damages, as well as an award of attorney fees. *Id.* at 701-702 (I). On appeal, the district court reversed, finding that the judgment was entitled to preclusive effect because the clear language of the judgment established the debtors' liability for damages for fraud. *Id.* at 707-708 (II) (B) (3).

The present case involves a jury verdict that includes an express finding that Wilson committed fraud as to Katz. Although the award of damages is not specifically apportioned between the fraud and breach of contract claims, there is no

ambiguity as to whether judgment was awarded on the fraud claim.⁴ And, because damages are an essential element of a fraud claim in Georgia, the jury necessarily found that Katz sustained damages as a consequence of Wilson’s fraud. The issue of fraud was fully litigated, and, “[to] require [Katz] to incur additional expense to litigate an issue which he has already pursued diligently [would be] unreasonable” and inconsistent with bankruptcy policy. *In re Camacho*, 411 BR 496, 505 (3) (Bankr. S.D. Ga. 2009) (citation and punctuation omitted). Moreover, all of the damages in the superior case were attributable to Wilson’s fraudulent *course of conduct*, and the superior court’s finding of fraud against Wilson was essential to its award of damages. See *In re Williams*, 282 BR at 275 (“[e]ven if the face of the Verdict and Judgment, standing alone, insufficiently apportioned damages, the [bankruptcy] [c]ourt would still conclude that all of the damages were attributable to the Debtor’s fraudulent conduct). We therefore conclude that the superior court judgment was entitled to preclusive effect in the bankruptcy proceeding, and was nondischargeable under 11 USC § 523 (a) (2) (A). See *In re Williams*, 282 BR 276

⁴ Specifically, on its verdict form, the jury checked the space indicating that it found Wilson committed fraud as to Katz. In its judgment entered on the jury’s verdict, the trial court “adopt[ed] the finding of the jury that [Wilson] breached his contract with [Katz], that [Wilson] committed fraud as to [Katz], and that [Wilson] caused [Katz] unnecessary trouble and expense[.]”

("[e]ven if the jury intended to adjudge liability on grounds other than fraud, all damages in the case flowed from the Debtor's fraudulent course of conduct"); see also *In re Hooks*, 238 BR at 886 ("the fact that [the default judgment] was made in satisfaction of three other claims as well does not prevent application of collateral estoppel"). Accordingly, we find the trial court erred in granting the defendants' motion for summary judgment.

2. Alternatively, the defendants argue that Katz's legal malpractice claim must also fail because he cannot show that he could have collected all or part of the judgment against Wilson. The trial court did not address this ground below, but the defendants urge this court to affirm the trial court's order under the "right for any reason" rule.⁵ This argument is without merit.

Here, the sole basis upon which the trial court granted the defendants' motion for summary judgment was its conclusion that collateral estoppel would not have exempted Katz's judgment from discharge as a matter of law. Where a judgment is based on an erroneous legal conclusion, the "right for any reason" principle does not

⁵ "Under the 'right for any reason' rule, an appellate court will affirm a judgment if it is correct for any reason, even if that reason is different than the reason upon which the trial court relied." *City of Gainesville v. Dodd*, 275 Ga. App. 834, 835 (573 SE2d 369) (2002) (citation omitted).

apply. *NUCOR Corp. v. Meyers*, 211 Ga. App. 787, 788 (1) (440 SE2d 531) (1994). In deciding that the superior court judgment was not entitled to preclusive effect, the trial court committed legal error. “Because the trial court’s ruling rests upon an erroneous legal theory, reversal is required.” *Id.* at 789 (1).

3. Katz also argues that the trial court erred in granting the defendants’ motion for summary judgment on his claims for breach of fiduciary duty, punitive damages, and attorney fees. However, the trial court’s decision to grant summary judgment to the defendants on an erroneous legal theory leaves unanswered the additional claims raised by Katz. Under these circumstances, judicial economy is best served by reversing the judgment below and permitting the trial court, upon remittitur, to consider the remaining issues on their merits. *Henson v. Tucker*, 278 Ga. App. 859, 865 (2) (630 SE2d 64) (2006).

Judgment reversed and case remanded. Coomer and Hodges JJ., concur.