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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION**

In re:
BRIAN DUBOIS and CONNIE DUBOIS,

Debtor(s).

INDRA S. JHAVERI and MARY JHAVERI,

Plaintiff(s),
v.
BRIAN DUBOIS and CONNIE DUBOIS,

Defendant(s)

Bk. No. SV 06-12053 MT
Chapter 7
Adv. No. SV 07-01026 MT

**MEMORANDUM OF DECISION RE:
MOTION FOR SUMMARY JUDGMENT**

Date: December 19, 2007
Time: 11:00 a.m.
Place: Courtroom 302

I. INTRODUCTION:

Plaintiffs Indra S. Jhaveri and Mary Jhaveri (“Plaintiffs”) filed a Notice of Renewed Motion and Motion for Summary Judgment on October 31, 2007, asking the court to grant summary judgment in favor of Plaintiffs and declaring Plaintiffs’ judgment from the Los Angeles County Superior Court against Brian Dubois to be non-dischargeable. For the reasons stated below, Plaintiffs’ motion is denied.

1 **II. FACTS:**

2 Plaintiffs sued Brian Dubois (“Debtor”) and others in Los Angeles County
3 Superior Court for fraud and other claims, case no. BC 242306. On January 20, 2005,
4 the Los Angeles County Superior Court rendered a judgment for fraud and punitive
5 damages against Debtor totaling \$2,408,706.30, with interest continuing to accrue at
6 10% per annum (“Judgment”). Plaintiffs and Debtor entered into a post-judgment
7 settlement agreement, which Debtor later breached.

8 Debtor filed chapter 11 bankruptcy on November 28, 2006. The case was
9 converted to chapter 7 on February 28, 2007. On February 8, 2007, Plaintiffs initiated
10 an adversary proceeding against Debtor, adv. no. SV 07-01026. In Plaintiff’s Complaint
11 for Non-Dischargeability of Debt, Plaintiffs seek: (1) a determination that the Judgment
12 is non-dischargeable within the meaning of 11 U.S.C. §§523(a)(2), 523(a)(4) and/or
13 523(a)(6); (2) costs of suit incurred herein; and (3) for such other and further relief as
14 this court may deem proper.

15 Plaintiffs filed their first motion for summary judgment on June 26, 2007. An
16 initial hearing on the matter was held on August 16, 2007. Because the state court
17 judgment was not yet final at the time the motion was filed but became final in the
18 interim, a continued hearing was held on October 24, 2007. The court denied the
19 motion for summary judgment without prejudice, finding that Plaintiffs failed to meet
20 their burden of proof on the motion for summary judgment and noting that Plaintiffs
21 failed to provide authority to show the effects of the breach of the settlement on the
22 Judgment.

23 Plaintiffs brought a second motion for summary judgment (renewed) on October
24 31, 2007 (“MSJ”). This MSJ is the subject of this memorandum.

1 **III. DISCUSSION:**

2 Plaintiffs' four page motion argues that summary judgment should be granted
3 because (1) the state court judgment is collateral estoppel as to non-dischargeability,
4 and (2) the settlement agreement is not enforceable by Debtor.

5 **Summary Judgment Standard:**

6 Under F.R.C.P. Rule 56(c), incorporated by F.R.B.P. Rule 7056, summary
7 judgment should be granted "if the pleadings, depositions, answers to interrogatories,
8 and admissions on file, together with the affidavits, if any, show that there is no genuine
9 issue as to any material fact and that the moving party is entitled to a judgment as a
10 mater of law." Under *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), "a party
11 seeking summary judgment always bears the initial responsibility of informing the []
12 court of the basis for its motion, and identifying those portions of 'the pleadings,
13 depositions, answers to interrogatories, and admissions on file, together with the
14 affidavits, if any,' which it believes demonstrate the absence of a genuine issue of
15 material fact." Under *C.A.R. Transportation Brokerage Co. v. Darden Restaurants, Inc.*,
16 213 F.3d 474, 480 (9th Cir. 2000), "When the party moving for summary judgment
17 would bear the burden of proof at trial, 'it must come forward with evidence which would
18 entitle it to a directed verdict if the evidence was uncontroverted at trial.'" Further,
19 *Countrywide Home Loans, Inc. v. U.S.*, 2007 WL 87827 at 7 (E.D. Cal. 2007), states:
20 "When the moving party has the burden of proof at trial, that party must carry its initial
21 burden at summary judgment by presenting evidence affirmatively showing, for all
22 essential elements of its case, that no reasonable jury could find for the non-moving
23 party." *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982).

24 **Collateral Estoppel Issue:**

25 While Plaintiffs may be able to show that collateral estoppel might bar relitigation
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1 of the §523 issues that are the subject of this adversary complaint, issue preclusion
2 involves a more involved analysis than Plaintiffs' brief indicates. Plaintiff fails to show
3 how the elements of §523(a)(2)(A) and/or §523(a)(6) are satisfied if collateral estoppel
4 applies. Plaintiffs failed to address what issues were actually addressed in the state
5 court proceeding and how they apply in §523 actions. See e.g. *In re Lopez*, 367 B.R.
6 99, 104-108 (9th Cir. B.A.P. 2007); *In re Munton*, 352 B.R. 707, 712 (9th Cir. B.A.P.
7 2006). Under *Celotex Corporation v. Catrett*, 477 U.S. at 324, Plaintiff "bears the initial
8 responsibility of informing the [] court of the basis for its motion." Plaintiff also "must
9 carry its initial burden at summary judgment by presenting evidence affirmatively
10 showing, for all essential elements of its case, that no reasonable jury could find for the
11 non-moving party." *Countrywide Home Loans, Inc. v. U.S.*, 2007 WL 87827 at 7. Simply
12 attaching the state court findings with no further analysis of how each of those findings
13 relates to a § 523 element is asking the court to make plaintiffs' case for them and not
14 giving the debtor the opportunity to respond. Plaintiffs failed to meet their burden to
15 show why summary judgment should be granted and why Debtor's debt should be
16 deemed non-dischargeable pursuant to §523(a)(2)(A) and/or §523(a)(6).

17 Settlement Issue:

18 Plaintiffs also argue that the settlement agreement is not enforceable by Debtor.
19 Specifically, Plaintiffs argue that Debtor breached the settlement agreement, thereby
20 rendering the settlement enforceable and that there was no waiver of any breach of the
21 settlement agreement. At the October 24, 2007 hearing on the first motion for summary
22 judgment, the court told Plaintiffs that there were outstanding issues on what effect a
23 breach of the settlement agreement had on the Judgment and denied the first motion for
24 summary judgment because Plaintiffs failed to adequately address relevant authority
25 and the issues involved. These issues raised previously by the court that Plaintiffs still
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1 failed to address include: (1) how does California Code of Civil Procedure §664.6 and
2 the state court's denial of Plaintiffs' request to enforce the settlement agreement affect
3 the enforceability of the settlement agreement and Judgment?; (2) does the settlement
4 agreement supersede the Judgment?; (3) what effect does a breach of settlement
5 agreement have on the Judgment?; (4) is the state court judgment reinstated or is the
6 sole remedy damages arising from the breach of the settlement? In relation to whether
7 or not there is a waiver of the breach of settlement agreement, plaintiff needs to address
8 whether there may be a material fact in dispute as to whether or not there were actions
9 taken by Plaintiffs that waived the breach of the settlement.

10 Because of this, the court cannot say whether there are any genuine issues of
11 material fact or whether plaintiff is entitled to judgment as a matter of law.

12 **IV. CONCLUSION:**

13 Based on the inadequacies of the papers filed, the court informed all parties that
14 no appearance was required. The court found that oral argument was unnecessary
15 where Plaintiffs' moving papers failed to meet their initial burden and any additional
16 arguments or authorities not initially briefed by Plaintiffs would prejudice Debtor and
17 cause unnecessary expense.

18 Plaintiffs may have a third and final chance to file a motion for summary
19 judgment that adequately addresses the court's concerns.

20 DATED:12/19/07

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MAUREEN A. TIGHE
United States Bankruptcy Judge

CERTIFICATE OF SERVICE BY MAIL

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I certify that a true copy of this **ORDER** was mailed on **DEC 19 2007**

to the parties listed below:

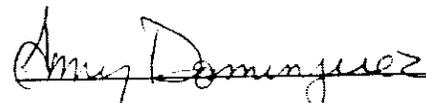
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Dated:

DEC 19 2007


DEPUTY CLERK