COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2284 **Cir. Ct. No. 2005CV3156**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FOLEY & LARDNER, LLP,

PLAINTIFF-COUNTERCLAIM-DEFENDANT,

V.

DOUGLAS D. STITGEN,

DEFENDANT-COUNTERCLAIM-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

THOMAS J. KRUEGER AND DEBORAH J. KRUEGER,

THIRD-PARTY DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Thomas and Deborah Krueger appeal the circuit court's order determining that their debt to Douglas Stitgen was not discharged by their bankruptcy court proceedings. The Kruegers argue that Stitgen's complaint against them in the present action failed to state a claim upon which relief can be granted because Stitgen (1) failed to sufficiently allege that the debt was not discharged and (2) failed to allege the elements for nondischargeability under 11 U.S.C. § 523(a)(19), covering debts for federal or state securities laws violations. The Kruegers also argue that Stitgen should be barred by claim or issue preclusion from asserting that the debt is not dischargeable. We reject these arguments, and affirm the circuit court's order.

Background

¶2 Stitgen was a creditor of the Kruegers when the Kruegers filed for bankruptcy in federal court. Stitgen claimed he was owed more than $284,000. The Foley & Lardner law firm represented Stitgen. This case began when Foley & Lardner sued Stitgen in an effort to collect legal fees from Stitgen arising out of the Kruegers' bankruptcy proceeding. Stitgen counterclaimed, alleging that Foley & Lardner negligently represented him in bankruptcy court and that, as a result, the Kruegers' debt to Stitgen was discharged.

¶3 Stitgen filed a third-party complaint against the Kruegers, asserting that they were necessary parties. The allegations in that complaint provide additional background. According to Stitgen's complaint:

- Thomas Krueger was a Wisconsin licensed stockbroker who acted as Stitgen's stockbroker.
- Krueger sold Skylink stock that Krueger owned "off the books" to Stitgen.

- Krueger sold Skylink stock to Stitgen at times when the stock was not registered for sale in Wisconsin.

- Skylink collapsed, and the stock became worthless.

- Krueger's conduct violated securities laws; Krueger obtained monies from Stitgen by fraud; and Krueger willfully or maliciously injured Stitgen's property.

- Stitgen and Krueger executed a settlement agreement, under the terms of which Krueger agreed to buy back worthless stock for $284,000 plus interest and acknowledged violating federal and state securities laws.

- The settlement agreement resulted in a circuit court judgment for $383,990.37.

- The Kruegers filed for bankruptcy.

- Foley & Lardner, on Stitgen's behalf, filed an adversary complaint in the bankruptcy proceedings, asserting that the Kruegers' debt to Stitgen was not dischargeable pursuant to 11 U.S.C. § 523(a)(4), governing debt for certain instances of fraud, and under 11 U.S.C. § 523(a)(6), governing debt for certain instances of willful and malicious injury to an entity or its property.

- During the adversary proceedings, Foley & Lardner also asserted that the debt was not dischargeable pursuant to 11 U.S.C. § 523(a)(2), governing debt for certain instances of false pretenses, false representations, and actual fraud.

- At no time during the bankruptcy proceedings did Foley & Lardner assert that the debt was not dischargeable pursuant to 11 U.S.C. § 523(a)(19), governing debt for violations of federal or state securities laws.

- The bankruptcy court directed a verdict in favor of the Kruegers and granted them a general discharge.

¶4 In defending against Stitgen's negligence claim, Foley & Lardner contended that the Kruegers' debt to Stitgen was not dischargeable under 11 U.S.C. § 523(a)(19), regardless whether Foley & Lardner, on behalf of Stitgen,

had raised § 523(a)(19) in the bankruptcy proceedings. Stitgen requested that the circuit court determine whether the Kruegers' debt to Stitgen was discharged as a result of the bankruptcy proceeding and, if it was not, that the court award damages on Stitgen's claim against the Kruegers.

¶5 The Kruegers moved to dismiss Stitgen's complaint, and Stitgen and Foley & Lardner each moved for summary judgment. The Kruegers argued, among other things, that Stitgen's complaint failed to state a claim upon which relief could be granted and that their debt to Stitgen had been discharged in their bankruptcy case.

¶6 The circuit court denied the Kruegers' motion to dismiss and denied Stitgen's and Foley & Lardner's summary judgment motions. The circuit court concluded that Stitgen's complaint stated a valid claim against the Kruegers and that the Kruegers' debt to Stitgen was not discharged.[1] The Kruegers appealed.[2] We reference additional facts as needed below.

[1] We note that the circuit court's summary judgment decision makes reference to "findings of fact." Although courts and litigants commonly use this terminology in summary judgment context, we take this opportunity to point out that this is incorrect. Summary judgment does not involve fact finding, that is, summary judgment does not involve choosing between competing reasonable inferences or making credibility determinations. In rare instances, summary judgment involves determining a fact as a matter of law because the undisputed facts permit no other reasonable inference, but that sort of analysis is not in play in this case. We urge the circuit court to refrain from using the phrase "findings of fact" when the court means "undisputed facts." *See* ***Bank of New Glarus v. Swartwood***, 2006 WI App 224, ¶11 n.5, 297 Wis. 2d 458, 725 N.W.2d 944.

[2] The circuit court deemed the order the Kruegers have appealed to be final, and Stitgen does not argue otherwise even though the court stated that it was denying the Kruegers' motion to dismiss. It appears that the court and parties may have agreed that the Kruegers were no longer necessary parties as a result of the court's rulings. Thus, the Kruegers were at least arguably dismissed from the case even though the circuit court said otherwise. We do not decide whether the order was final because we conclude that, even if it was not final, we would exercise our discretion to allow the Kruegers to appeal a non-final order. *See* WIS. STAT. RULE 808.03(2); (continued)

Discussion

A. Whether Stitgen's Complaint Failed To State A Claim

¶7 The Kruegers argue that Stitgen's complaint against them fails to state a claim. Whether a complaint states a claim upon which relief can be granted is a question of law that we review *de novo*. *See* ***John Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180. Wisconsin is a "notice pleading" jurisdiction, and we must liberally construe a complaint so as to do substantial justice. *See* ***id.***, ¶35.

¶8 Stitgen's complaint sought a "determination regarding whether the Kruegers' debt to Stitgen [had] been discharged" and, if the debt had not been discharged, for damages and other appropriate relief. The complaint also alleged, among other things, that "Foley & Lardner contends that 11 U.S.C. § 523(a)(19) debts are not dischargeable."

¶9 The Kruegers argue that Stitgen's complaint is insufficient because Stitgen failed to personally allege that the Kruegers' debt was not dischargeable under 11 U.S.C. § 523(a)(19). Rather, as indicated, the complaint alleges that "*Foley & Lardner contends* that 11 U.S.C. § 523(a)(19) debts are not dischargeable" (emphasis added). The Kruegers point out that, under WIS. STAT. § 802.02(1)(a), a pleading must allege that "*the pleader* is entitled to relief" (emphasis added). The Kruegers also point out that Stitgen has alleged in other pleadings that the Kruegers' debt to him was discharged. For all of these reasons,

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Milwaukee County v. Louise M., 205 Wis. 2d 162, 176, 555 N.W.2d 807 (1996). Resolving the Kruegers' appeal at this juncture will materially advance the termination of the litigation. *See* RULE 808.03(2)(a).

the Kruegers argue, Stitgen's complaint is insufficient to state a claim. We disagree.

¶10 In addition to containing the allegations detailed above, the complaint referenced and attached Foley & Lardner's complaint against Stitgen as well as Stitgen's answer and counterclaim against Foley & Lardner. Liberally construing Stitgen's complaint as a whole, we conclude that the complaint provided fair notice to the Kruegers that Stitgen's claim against them requested a declaration as to whether the debt was discharged and, if the debt was not discharged, sought damages and any other appropriate relief. It should have been obvious to the Kruegers that Stitgen was in an awkward position. His negligence claim against Foley & Lardner required him to allege that the Kruegers' debt was discharged as a result of Foley & Lardner's negligence. Yet, if that allegation was shown to be false, Stitgen needed to preserve his ability to collect on the Kruegers' debt. Stitgen's failure to "personally" allege that the debt was not discharged does not undermine his claim against the Kruegers, nor does it deprive the Kruegers of full and fair notice of the nature of Stitgen's claim.[3]

¶11 The Kruegers also argue that Stitgen's complaint fails to sufficiently allege that their debt to Stitgen was not dischargeable under 11 U.S.C. § 523(a)(19) because the complaint does not demonstrate all of the elements

[3] In their reply brief, the Kruegers argue that Stitgen should be judicially estopped from alleging that the debt was not discharged. This argument comes too late. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief."). Moreover, we conclude that the argument lacks merit because, as we have explained, Stitgen's "inconsistent" arguments are really alternative arguments made of necessity. There may be additional reasons why the Kruegers' judicial estoppel argument fails, but we need not address them.

required by that section of the bankruptcy code. As relevant here, § 523(a)(19) requires that the debt be for a violation of federal or state securities laws and that the debt result from a judgment or a settlement agreement. *See* § 523(a)(19)(A)(i) and (B)(i) and (ii).[4]

¶12 Specifically, the Kruegers argue that Stitgen's complaint was insufficient because the parties' settlement agreement, in which Thomas Krueger admitted securities laws violations, was no longer in effect and because Stitgen's

[4] Section 523(a)(19) of the bankruptcy code provides, more fully, as follows:

> A discharge … does not discharge an individual debtor from any debt—
>
> ….
>
> (19) that—
>
> (A) is for—
>
> (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(47)]), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
>
> (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
>
> (B) results from—
>
> (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
>
> (ii) any settlement agreement entered into by the debtor; or
>
> (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

judgment against the Kruegers makes no reference to any securities laws violations. We are not persuaded.

¶13 Stitgen's complaint plainly alleges that Stitgen has a judgment against the Kruegers, and that the transactions underlying the judgment involved violations of securities laws. These allegations are sufficient to allege that the Kruegers' debt was the type of debt covered by 11 U.S.C. § 523(a)(19). Stitgen did not have to *prove* these allegations were true in order to state a claim.[5]

B. Whether Claim Or Issue Preclusion Bars Stitgen From Asserting That The Kruegers' Debt Is Not Dischargeable Under 11 U.S.C. § 523(a)(19)

¶14 The Kruegers argue that Stitgen is barred by claim or issue preclusion from asserting that the debt is not dischargeable under 11 U.S.C. § 523(a)(19). The Kruegers rely primarily on preclusion case law that does not involve bankruptcy. *See generally* ***Wickenhauser v. Lehtinen***, 2007 WI 82, 302 Wis. 2d 41, 734 N.W.2d 855; ***Kruckenberg v. Harvey***, 2005 WI 43, 279 Wis. 2d 520, 694 N.W.2d 879.

¶15 In response, Stitgen relies on the bankruptcy code and argues that the Kruegers' preclusion argument is inconsistent with provisions in the code. We agree with Stitgen.

¶16 Section 523(a) of the bankruptcy code lists numerous categories of debt that are not necessarily discharged by a general discharge in bankruptcy

[5] The Kruegers also argue that the circuit court committed reversible error because, in addressing their motion to dismiss, the court considered facts outside the pleadings. The Kruegers fail, however, to point to any facts outside the pleadings that were necessary to the circuit court's decision. Similarly, our decision does not depend on any facts outside the pleadings.

court. Four of those categories are relevant here: § 523(a)(2) (covering certain instances of misrepresentation involving money, property, services, or an extension, renewal, or refinancing of credit), § 523(a)(4) (covering fraud by a fiduciary, embezzlement, or larceny), § 523(a)(6) (covering willful and malicious injury by the debtor to an entity or an entity's property), and § 523(a)(19) (covering, as already indicated, violations of federal or state securities laws).

¶17 Although § 523(a) of the bankruptcy code states that a discharge "does not discharge" these and other enumerated debt categories, another provision in the code requires further action to avoid discharge of three of the four categories listed above and relevant here. Under § 523(c)(1), "the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) … unless, on request of the creditor …, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15)." Thus, a creditor wishing to avoid discharge of a debt covered by § 523(a)(2), (4), or (6) must affirmatively seek a nondischargeability determination in bankruptcy court.[6]

¶18 Here, Stitgen, by his attorney Foley & Lardner, raised 11 U.S.C. § 523(a)(2), (4), and (6) as grounds for nondischargeability in the bankruptcy court. The bankruptcy code required this in order for Stitgen to avoid discharge on any of those grounds.

¶19 The bankruptcy code does not impose the same requirement for other categories of debt, including debts covered by 11 U.S.C. § 523(a)(19).

[6] Section 523(c)(1) of the bankruptcy code contains an exception that is not relevant here. *See* 11 U.S.C.S. §§ 523(c)(1) and 523(a)(3)(B).

Rather, these other categories listed in § 523(a) simply are not dischargeable. *See* 11 U.S.C.S. § 523(a); *see also* ***In re McClung***, 304 B.R. 419, 424 (D. Idaho 2004) ("there is no prerequisite that a creditor seek a determination from the bankruptcy court that a debt is nondischargeable" under § 523(a)(19) (emphasis omitted)); ***In re Star***, No. 06-30571-DOT, 2008 WL 2705092, at *2 (E.D. Va. July 1, 2008) ("Section 523(a) lists the types of debts that are not discharged when the debtor receives a discharge…. [T]his is an automatic provision requiring no action from debtor or creditor," except for those debts subject to § 523(c)(1) (emphasis omitted)).

¶20 The Kruegers acknowledge that, under the bankruptcy code, Stitgen may not have been required to raise 11 U.S.C. § 523(a)(19) in the bankruptcy court in order to preserve an assertion that the debt was not dischargeable under that section. They argue, however, that, once Stitgen chose to file an adversary complaint in the bankruptcy court seeking a nondischargeability determination, it was incumbent upon him to assert all possible grounds for nondischargeability. We disagree.

¶21 The Kruegers' argument is inconsistent with the bankruptcy code provisions we have discussed. Nothing in the code required Stitgen to raise 11 U.S.C. § 523(a)(19) in bankruptcy court, regardless whether he raised other grounds for nondischargeability. If we applied preclusion principles here, we would, in effect, be requiring creditors in bankruptcy court to assert *all* possible grounds under § 523(a) whenever the creditor asserts *any* ground subject to § 523(c), even though the code contemplates a different procedure.

¶22 If there is authority demonstrating how the Kruegers' preclusion argument could be squared with the bankruptcy code, the Kruegers have not

provided it. The Kruegers cite ***Lyman v. Lyman***, 184 Wis. 2d 124, 516 N.W.2d 767 (Ct. App. 1994), and ROBERT E. GINSBERG, ROBERT D. MARTIN & SUSAN V. KELLEY, GINSBERG & MARTIN ON BANKR. § 11.07(E) (2009). However, these authorities address the reverse situation where a party in bankruptcy court seeks to preclude litigation of certain dischargeability issues in bankruptcy court using existing non-bankruptcy-court findings. *See* ***Lyman***, 184 Wis. 2d at 128 n.3 (suggesting that state court ruling on dischargeability of maintenance award would preclude subsequent litigation of the matter in bankruptcy court); GINSBERG & MARTIN ON BANKR. § 11.07(E) (referring to situations in which "[a] creditor … comes into bankruptcy court armed with a judgment against the debtor, obtained in a non-bankruptcy forum, which judgment contains specific findings on issues relevant to the dischargeability of the claims"). Application of preclusion principles in that context does not present the same problem.

¶23 For the reasons stated, we reject the Kruegers' argument that Stitgen should be precluded from asserting that the Kruegers' debt is not dischargeable under 11 U.S.C. § 523(a)(19).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.