

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

IN RE:

BARRY IRWIN HENSLEY

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HARRY (SONNY) MARGOLIS, et al.

v.

BARRY IRWIN HENSLEY

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Case No. 4:14-cv-770

**MEMORANDUM OPINION AND ORDER ON APPEAL**

Currently before the Court is Appellant Barry Irwin Hensley's appeal of the Bankruptcy Court's orders entering judgment against Appellant in its ruling on, and denying evidentiary objections raised in response to, Appellees' Second Motion for Summary Judgment disposing of all claims of the parties. Jurisdiction over this matter is proper in this Court as an appeal from a final judgment of the Bankruptcy Court pursuant to 28 U.S.C. § 158(a).

After reviewing the parties' briefs, the record in this case, and the applicable law, the Court **AFFIRMS** the order of the Bankruptcy Court.

**I. PROCEDURAL AND FACTUAL BACKGROUND**

On November 26, 2012, Appellees Harry Margolis and Dana Margolis filed their original complaint in Adversary Proceeding No. 12-4180 in the United States Bankruptcy Court for the Eastern District of Texas. On March 26, 2014, Appellees (Plaintiffs in the adversary action) filed their Second Motion for Summary Judgment (Doc. No. 24 in USBC Case No. 12-4180<sup>1</sup>),

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<sup>1</sup> The Court will refer to docket entries in the adversary action as "USBC Doc. No. XX" and to docket entries in the instant case as "Doc. No. XX."

which is at the core of the instant appeal. On October 1, 2014, the Bankruptcy Court entered four documents: (1) an Order Granting Plaintiffs' Second Motion for Summary Judgment (USBC Doc. No. 33); (2) an Order Denying Defendant's Evidentiary Objections Contained in Defendant's Response to Plaintiffs' Second Motion for Summary Judgment (USBC Doc. No. 34); (3) a Judgment (USBC Doc. No. 35); and (4) a Memorandum of Decision Regarding Plaintiffs' Second Motion for Summary Judgment (USBC Doc. No. 36). On October 14, 2014, Appellant filed a Notice of Appeal in the Bankruptcy Court (USBC Doc. No. 41) from "the judgment, order, or decree of the bankruptcy judge entered in this adversary proceeding on the 1st day of October 2014." The same Notice of Appeal, with a Bankruptcy Cover Sheet, a copy of the docket of the Bankruptcy Court adversary proceeding, a copy of the Judgment and a copy of the Memorandum of Decision attached, was then filed in this Court on November 25, 2014 (Doc. No. 1). The Appellant's Brief was filed on December 2, 2014 (Doc. No. 2) and the Appellees' Brief was filed on December 30, 2014 (Doc. No. 4). On July 14, 2015, Appellees filed Notice (Doc. No. 6) of the Bankruptcy Court's Order in Bankruptcy Case No. 15-40508, a Chapter 13 proceeding, lifting the automatic stay to permit litigation to proceed.

This case revolves around a contract between Appellees, a couple who wished to have a home built, and Appellant, a contractor who wished to build the home. Although the parties often disagree about what was promised, for how much, and what happened at the time the contract fell apart, the main thrust of the matter is that Appellees claim they entered into a contract with Appellant and paid him substantial sums of money in his role as a contractor. Appellant then allegedly diverted some of that money to other uses and ultimately could not complete the project. The parties then proceeded to litigate in state court; arbitrate before a state-court-ordered Arbitrator; and, on Appellant's filing for Chapter 7 relief, in the Bankruptcy Court.

Appellees filed the adversary action in the Bankruptcy Court and obtained a lift of the automatic stay in the Chapter 7 proceeding to allow the matter that is the subject of this appeal to continue.

The Bankruptcy Court's Memorandum of Decision contains a succinct Factual and Procedural Background of the case as it was determined in the adversary action (referring to Appellant as Defendant and Appellees as Plaintiffs):

In mid-2008, the Plaintiffs began discussions with the Defendant with regard to the proposed construction of a residence for the Plaintiffs in the Shaddock Creek Estates development near Frisco, Texas. After having received an estimate from the Defendant regarding the costs of constructing the home, the Plaintiffs contracted with the Defendant in the summer of 2009 to construct the residence. The construction process was a contentious one, with each side now contending that various actions of the other precluded the successful construction of the house as contemplated.

On September 10, 2010, the Plaintiffs filed a state court lawsuit against the Defendant for breach of fiduciary relationship before the 219th Judicial District Court of Collin County, Texas (the "State Court") under case no. 219-03753-2010 (the "State Court Litigation"). On February 24, 2012, the State Court entered an order abating the prosecution in state court and submitting the matter to arbitration by the agreement of the parties. Richard Abernathy, Esq. was appointed as the Arbitrator by the State Court.

Before that arbitration could take place, on October 15, 2012, the Defendant filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in this Court under Case No. 12-42785, the Hon. Brenda T. Rhoades, presiding. After a contested hearing in the bankruptcy case, the Court modified the stay in order to allow the arbitration hearing to take place and for a final judgment to be entered. FN5.

FN5. Meanwhile, the Plaintiffs had timely filed a complaint to determine dischargeability of a debt on November 26, 2012, seeking to except their claims from the scope of any discharge granted to the Defendant. The prosecution of this adversary proceeding was subsequently abated to allow that state court process to be completed. That abatement was terminated on August 16, 2013.

On April 17, 2013, the Arbitrator ruled that the Defendant, jointly and severally with other parties, owed the sum of \$98,737.99 to the Plaintiffs "for violations of Chapter 162, Texas Property Code, FN6 including Section 162.005, Texas Property Code." The Arbitrator also awarded to the Plaintiffs attorney's

fees in the sum of \$75,000, court costs of \$4,204.57, and denied all of the counterclaims filed by the Defendant. That arbitration award was finalized into a Final Judgment issued by the State Court on April 19, 2013 (the “State Court Judgment”). In interpreting the arbitration award and granting final judgment, the State Court confirmed the award in favor of the Plaintiffs and against the Defendant for “\$98,737.99 for violation and fraud under Chapter 162, Texas Property Code, including a finding of fraudulent conduct under 162.005 of said Texas Property Code.” No other findings of fact or conclusions of law were entered. The Final Judgment also confirmed the attorney’s fee award, the court costs assessment and the denial of the Defendant’s counterclaims. It further ordered that post-judgment interest would accrue on the judgment at the rate of 5% per annum. No appeal was taken from the entry of the State Court Judgment.

FN6. *See* 5 TEX. PROP. CODE ANN. § 162.001(a) *et. seq.* (Vernon 2011 and Vernon Supp. 2014). The provisions of Chapter 162 are often referenced collectively as the Texas Construction Trust Fund Act (hereafter referenced as the “CTFA”).

After the parties renewed the prosecution of this adversary proceeding, the Plaintiffs filed this Second Motion for Summary Judgment. FN12. They assert that there are no genuine issues of material fact pertaining to the CTFA award and that, under such uncontested facts, they are entitled to a determination as a matter of law that the sum of \$98,737.99 awarded for violations of the CTFA, together with other ancillary awards, as evidenced by the State Court Judgment, are collectively nondischargeable as a debt for fraud or defalcation while acting in a fiduciary capacity under §523(a)(4). FN13.

FN12. A first motion for summary judgment had been filed by the Plaintiffs after the abatement of this lawsuit had been terminated, but it was dismissed by the Court as premature since the post-abatement management conference resulted in certain clarifying directives being issued to the Plaintiffs.

FN13. As stated earlier, the Plaintiffs’ amended complaint also contains asserted causes of action under 11 U.S.C. §523(a)(2)(A) and §523(a)(6). The (a)(6) claim was not addressed by the Second Motion for Summary Judgment. The Second Motion for Summary Judgment did address the same portion of the award under the State Court Judgment under §523(a)(2)(A). However, because of the summary judgment granted herein under §523(a)(4), the Court need not adjudicate those claims under either subsection.

Memorandum of Decision (USBC Doc. No. 36) at 2-5 (footnotes referring to the parties’ exhibits before the Bankruptcy Court omitted; substantive footnotes retained). The Bankruptcy Court

went on to grant Appellees' Second Motion for Summary Judgment and found the \$98,737.99 in actual damages from the State Court Judgment to be nondischargeable, along with \$54,750.00 in attorneys' fees and \$3,069.34 in court costs from the State Court Judgment, with an additional \$293.00 in courts costs incurred in the adversary proceeding. Memorandum of Decision at 19-22. In sum, the total amount found nondischargeable from the State Court Judgment is \$156,557.33, along with \$293.00 from the adversary proceeding.

Appellant appeals these findings, as they are memorialized in the Bankruptcy Court's Judgment (USBC Doc. No. 35) and the Memorandum of Decision (USBC Doc. No. 36). Those two documents are listed in Appellant's Notice of Appeal. Appellant added the Bankruptcy Court's Order Granting Plaintiffs' Second Motion for Summary Judgment (USBC Doc. No. 33) and its Order Denying Defendant's Evidentiary Objections Contained in Defendant's Response to Plaintiffs' Second Motion for Summary Judgment (USBC Doc. No. 34) to his Appellant's Brief before this Court, though they are not mentioned in the Notice of Appeal. Specifically, Appellant summarizes the issues he raises on appeal as:

1. Whether the Bankruptcy Court can grant a motion for summary judgment based upon collateral estoppel where such assertion or affirmative defense is not plead and was not a ground upon which the movant relied for summary judgment.
2. Whether the Bankruptcy Court erred in granting Plaintiffs' Second Motion for Summary Judgment [ ] in its order dated October 1, 2014 [ ] and through the reasoning set forth in the Judgment [ ] and the Memorandum of Decision [ ], because of the following issues:
  - a. Sub-issue 1: Whether, as a matter of law, a state court judgment against Appellant containing the word "fraud" is sufficient to create a preclusive effect such that the debt liquidated therein is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).
  - b. Sub-issue 2: Whether the Texas Construction Trust Fund Act creates a fiduciary relationship so as to deny the

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