United States District Court
Southern District of Texas

Case Number: 04-3618

ATTACHMENT

Description:

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part _____ of _____

☐ Exhibit to: _____
number(s) / letter(s) _____

Other: 45-60

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If the Debtor was willing to file pleadings in Judge Kent's Court which were "disingenuous at least and deceitful at worst," this Court cannot help but question her credibility in this adversary proceeding. Indeed, the example cited by Judge Kent—that the Debtor astoundingly represented in her motion to withdraw that her withdrawal would not delay the suit—underscores the very problem that the Debtor has exhibited in the adversary proceeding before this Court: she does not want to face reality. Just as she did not want to concede that her withdrawal from the suit in Judge Kent's court would delay the proceedings, so did she with equal fervor at trial here refuse to concede that, under the Agreement, she should have paid Rainey his 15% share at the time that the Davenport Law Firm received any net fees from any one of the Brio/DOP suits that had been settled. Her trial testimony in this Court is no less disingenuous than her representation that her withdrawal from the Galveston Division suit would not delay proceedings in Judge Kent's Court.

In sum, the Debtor's testimony was not credible, and this Court gives very little, if any, weight to her testimony.

E. Denise W. Novotny (Novotny)

Novotny was the only witness whom the Debtor called other than herself. Novotny is a licensed attorney who, in addition to having a law degree, received an undergraduate degree in accounting. Because Novotny is a well-educated person who is capable of understanding complex issues, it is logical to infer that she understands the difference between truth and lies. *See In re Graham*, 199 B.R. at 159-160; *see also In re W. World Funding, Inc.*, 52 B.R. at 753.

Novotny testified for over six hours. The Debtor called her on the fourth day of trial, and this direct examination lasted approximately 90 minutes. Rainey's counsel cross-examined Novotny on

the fifth day of the trial for approximately two hours; and on the trial's last day, Novotny was on the stand for over three hours during which Rainey's counsel completed cross-examination and the Debtor conducted re-direct. This Court therefore had ample opportunity to observe Novotny and listen to the responses that she gave to the questions posed to her.

In addition to observing and listening to Novotny at trial, this Court's review of the transcript of the trial and the Court's trial notes has convinced this Court that Novotny's testimony must be received with a healthy degree of skepticism.

There are several reasons for this conclusion. First, Novotny is the Debtor's sister, and it was clear to this Court by observing the two sisters in the courtroom that they are very close. Indeed, Novotny herself admitted at trial that she loves the Debtor and that she would "move the world" for her. [Transcript D5, p. 8, lines 20 - 22]. The Debtor resides with Novotny at Novotny's house. [Transcript D5, p. 9, lines 17 - 20]. When the Debtor formed her own firm in 1989, Novotny–who, at that time, had her degree in accounting but had not yet attended law school–helped the Debtor open her office, stayed on as an employee of the firm, and helped run the office. Then, once Novotny obtained her law degree in 1995, she worked at the Debtor's firm as a practicing lawyer.[21] [Transcript D4, p. 64, line 9 through p. 65, line 8; Transcript D5, p. 9, lines 9 - 14]. Given this extremely loving and close professional relationship, it was not surprising that while on the stand, Novotny did everything that she could to assist the Debtor in her defense–including answering questions about which she had no personal knowledge and attempting to avoid answering inquiries,

[21]Novotny has since departed from the Debtor's firm and founded her own law firm. [Transcript D5, p. 9, line 21 through p. 10, line 4].

the answers to which would undermine the Debtor's defense.[22]

For example, with respect to personal knowledge, on direct examination Novotny testified about her understanding of the terms under which Rainey came to work at the Debtor's firm. [Transcript D4, p. 127, line 1 through p. 128, line 4]. Yet, on cross examination, Novotny admitted that she had no personal knowledge of the Agreement and only knew what her sister, the Debtor, had told her. Her testimony on cross-examination reveals how little she knows about the Agreement:

Q All right. Is it fair to say that back in the time - - well, the time that Mr. Rainey came on board, you didn't really talk to Mr. Rainey about what his deal was with Valorie [i.e. the Debtor] when he came on board. I'm talking about direct - - with personal knowledge of discussion with Mr. Rainey about what the deal was?

A That's correct.

Q And if you learned something in that time frame, it came from your sister?

A That's correct.

Q And that's basically true all the way up to about 1998, isn't it?

A Regarding their arrangement?

Q Yes. Your discussions were not with Mr. Rainey. They were with your sister.

A That's probably true.

Q All right.

A I don't recall specifically speaking with Ron about that.

Q And you didn't talk to Ron directly about the assignment, Plaintiff's Exhibit #1, and

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[22]Indeed, at one point, Novotny, having been posed a question on redirect by the Debtor, attempted to respond even though she conceded–when questioned by this Court–that she did not understand the question. [Transcript D6, p. 115, line 12 through p. 116, line 6]. While this attempt no doubt reflected Novotny's laudable effort to "move the world" for her sister, the effort further undermined Novotny's credibility in this Court's eyes.

I'll put that on the board so that - -

Q See that on the screen?

A Yes.

Q It's also in your exhibit book.

A Yes.

Q But you did not talk directly to Mr. Rainey about this document, did you?

A Not when it was signed, no.

Q And you did not help prepare it, did you?

A No, I did not.

Q And you did not help Ms. Davenport prepare it, did you?

A No I did not.

[Transcript D5, p. 10, line 5 through p. 11, line 12].

Q Yeah. Before you go to that, before I leave Exhibit #1, you have no personal knowledge of Exhibit #1 in any manner, shape or form, do you, Ms. Novotny?

A I know that it exists. I know that it was signed, but I don't have any personal knowledge of - -

Q The situation around it or anything else?

A Not present, not while it was being signed or negotiated, no.

[Transcript D5, p. 13, lines 15 - 22].

Another reason why this Court views Novotny's testimony with a large grain of salt is that much of her testimony concerned the expenses associated with the Brio/DOP Litigation; yet, she conceded that "I was not doing specifically the accounting at this time. I was overseeing an

accountant we had." [Transcript D4, p. 89, lines 7 - 12; Transcript D6, p. 108, lines 8 - 9].[23] Novotny's lack of knowledge about the expense records introduced by the Debtor reflects the very fact that Novotny was not heavily involved in keeping the financial books and records of the Debtor's law firm. Indeed, on cross-examination by Rainey's attorney, when asked about Debtor's Exhibit 42—which comprised financial records of the Davenport Law Firm and also a summary prepared by Novotny [Transcript D5, p. 16, lines 20 - 22] of what the Debtor asserts is an accurate reflection of the Brio/DOP Litigation expenses—Novotny was unable to provide even slightly convincing testimony that she had command of the information. Attached to this Memorandum Opinion as **Appendix A** are multiple examples—taken from the trial transcript—of Novotny's inability to answer questions about the expense records.

Novotny's credibility is further undermined given her testimony about an expert witness listed in Debtor's Exhibit #42 setting forth the expenses that the Debtor attributed to the Brio/DOP Litigation. Novotny conceded that this expert witness, the SI Group, Inc., had worked on several cases, including some in which Rainey did not have any interest. Yet, when Rainey's counsel asked Novotny whether she, or anyone, had apportioned any of the fees paid to this expert for each of the cases that it worked on, Novotny conceded that she had not. [Transcript D5, p. 57, line 25 through p. 59, line 16]. Thus, the Debtor and her sister, who compiled this exhibit the evening before Novotny's testimony, [Transcript D4, p. 52, line 3 through p. 55, line 15; Transcript D4, line 11

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[23]Conspicuous by her absence from the trial was Ms. Sherry Freeman, who was the bookkeeper at the Davenport Law Firm through 1997 or 1998. [Transcript D6, p. 117, lines 3 - 17]. Also conspicuous by her absence was Ms. Freeman's replacement, an individual named Pat, who worked at the Debtor's law firm until 2003. [Transcript D6, p. 117, lines 18 - 25]. It appears that these two individuals had the personal knowledge that Novotny lacked regarding the books and records.

through p. 80, line 2; Transcript D4, p. 99, line 13 through p. 100, line 25], were attempting to maximize the expenses that could be deducted from the Brio/DOP Litigation fees so that under the Debtor's interpretation of the Agreement, Rainey's 15% interest would be minimized. Such a tactic does not sit well with this Court and undercuts Novotny's veracity and credibility.

Finally, and perhaps most telling, Novotny's credibility with this Court was severely damaged by testimony that she gave regarding the calculation of the total expenses that the Debtor contends should be deducted from the total fees generated by the Brio/DOP Litigation to determine if there is a surplus (15% of which Rainey would be entitled to under the Agreement). When Rainey's attorney cross-examined Novotny about the gross fees and gross expenses, Novotny conceded that the gross fees were $6,213,297.72. [Transcript D6, p. 38, line 1 through p. 38, line 20]. Then, with respect to the gross expenses, Rainey's counsel cross-examined Novotny and, in a less than definitively clear exchange, seemed to obtain admissions that the gross expenses were the sum of three figures: $932,117, $1,423,429, and $140,278.[24]

At this point, the Court, to ensure that it understood the Debtor's position on how gross expenses were calculated, had the following exchange with Novotny:

THE COURT:	Let me make sure I understand something, Ms. Novotny. You're saying that what needs to be deducted from the $6,213,297.72 figure is; first $932,117; second $1,423,429; and third, $140,278.
THE WITNESS:	I'm saying those are the expenses as we ran them, yes.

[24]The portion of the trial transcript regarding this exchange is set forth in **Appendix B** attached to this Memorandum Opinion.

THE COURT: All right.

THE WITNESS: And un-reimbursed.

THE COURT: Hold on one second, Mr. Essmyer, I want to make sure I understand what she's saying.

Are there any other expenses other than those three categories?

THE WITNESS: I don't think so, no.

THE COURT: All right. Thank you.

[Transcript D6, p. 41, line 15 through p. 42, line 4].

Novotny's testimony was clear and unequivocal: the gross expenses were the sum of $932,117, $1,423,429 and $140,278—for a gross expense figure of $2,495,824. Yet, when the Debtor took Novotny on re-direct, the Debtor attempted to increase this expense total by adducing testimony from Novotny about other expenses apparently not set forth in the Debtor's Exhibits 42, 42A and 52—and Novotny was all too willing to assist in adding to this total. [Transcript D6, p. 124, line 22 through p. 127, line 2]. When this Court reminded Novotny of her testimony earlier in the morning, all she could say was that "I misspoke, your Honor." [Transcript D6, p. 127, lines 3 - 10].

Novotny is a licensed attorney at law to whom this Court posed two very clear and important questions—and Novotny knew they were important—namely: (1) "You're saying that what needs to be deducted from the $6,213,297.72 figure is; first $932,117.00; second $1,423,429.00; and third, $140,278.00"; and (2) "Are there any other expenses other than those three categories?" Her

responses were: (1) "I'm saying those are the expenses as we ran them, yes" and (2) "I don't think so, no." They were emphatic and unequivocal responses and ones which left a strong impression with this Court. For her to change her testimony upon prodding from the Debtor reflects that, at worst, Novotny was not candid with this Court; and, at best, that Novotny does not have sufficient command of the gross expenses of the Brio/DOP Litigation to provide reliable testimony with regard to that issue. Under either interpretation, Novotny's credibility suffers.

All in all, Novotny was not a credible witness, and this Court gives very little weight to her testimony.

IV. HOW MUCH MONEY WAS RAINEY ENTITLED TO UNDER THE AGREEMENT?

At trial, the Debtor testified that under the terms of the Agreement, she owes Rainey nothing; therefore, she argues, no debt to Rainey exists for which a discharge should be denied. This Court disagrees.[25]

This Court finds that under the terms of the Agreement: (a) Rainey was entitled to receive 15% of the difference between gross fees and gross expenses for each discrete suit in the Brio/DOP Litigation that settled and generated a fee paid to the Davenport Law Firm on suits for which Rainey provided legal services; and (b) Rainey must not wait for every single suit comprising the Brio/DOP Litigation to be completed before he is entitled to receive his 15% share.[26] This Court further finds

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[25]The Debtor's argument that she owes Rainey nothing conveniently overlooks the fact that she agreed she owed Rainey a sum certain when she executed the Mediation Settlement Agreement [Rainey's Exhibit No. 22] and the $150,000.00 promissory note. [Rainey's Exhibit No. 23]. Her argument also contradicts the Judgment entered against her in the 2001 Lawsuit. Notwithstanding these points, this Court believes that it is appropriate to make findings as to how much money the Debtor owed Rainey under the agreement.

[26]This finding of fact is number 87.

that the suits in which Rainey provided legal services and that generated fees that were paid to the Debtor's law firm were: (a) the O'Quinn/Brio Litigation; and (b) the Williams/Brio Litigation.[27] The Court makes these findings based upon Rainey's testimony, which was credible; the Debtor's testimony, which was not believable and which contradicted many of her own written statements (as discussed in Section III above); and the three payments which the Debtor actually made to Rainey in September of 1997 totaling $400,000.00, representing approximately 15% of the monies that the Davenport Law Firm received in that month from the Williams Law Firm.

Given these findings, the question is how much Rainey is owed for each suit that settled and generated fees that were paid to the Debtor's Law Firm—i.e. for fees generated and paid to the Debtor's Law Firm from the O'Quinn/Brio Litigation and the Williams/Brio Litigation? There is no dispute, and this Court so finds, that the Debtor paid Rainey three payments totaling $400,000.00 in September.[28] Is Rainey entitled to more?

Even though the Debtor paid Rainey $400,000.00, Rainey is indeed entitled to more under the terms of the Agreement. This Court arrives at this finding first, by determining the amount of gross fees the O'Quinn/Brio Litigation and the Williams/Brio Litigation generated; second, by determining the amount of gross expenses the O'Quinn/Brio Litigation and the Williams/Brio Litigation generated; third, by determining the amount of the surplus after deducting gross expenses from gross fees for the O'Quinn/Brio Litigation and the Williams/Brio Litigation; and fourth, by multiplying the surplus by 15%.

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[27]This finding of fact is number 88.

[28]This finding of fact is number 89.

A. What amount of gross fees was generated and paid to the Davenport Law Firm from the O'Quinn/Brio Litigation and the Williams/Brio Litigation?

Rainey's Exhibit #4 and the Debtor's Exhibit #26 are the same document: a one-page document entitled "Settlement Reconciliation" reflecting that the gross fees to which the Davenport Law Firm was entitled from the O'Quinn/Brio Litigation was $1,165,749.39.[29] In fact, O'Quinn did not pay the amount of $1,165,749.39 to the Debtor's law firm; rather, only $162,514.03 was paid. [FOF No. 15]. The other $1,003,235.36 was not paid because O'Quinn made several deductions for outstanding personal obligations that the Debtor owed to O'Quinn. Rainey had no control over these deductions, and indeed he testified that he never agreed to finance the Debtor's personal expenses. [Transcript D1, p. 258, line 1 through p. 259, line 3]. He is correct that the Agreement contains no such provision. With respect to any other deductions made by O'Quinn–such as reimbursement of expenses totaling $173,301.10 or unresolved items totaling $180,060.06–the Debtor does not escape liability to Rainey merely because O'Quinn made these deductions without the Debtor's consent. She was the sole owner of the Davenport Law Firm [FOF No. 2], and she was the person who entered into the partnership with O'Quinn [FOF No. 10]. If O'Quinn did not live up to whatever arrangement the Debtor negotiated with O'Quinn, she alone, not Rainey, is saddled with that exposure or loss. The Agreement requires the Debtor to pay Rainey 15% of the difference between gross fees and gross expenses relating to the O'Quinn/Brio Litigation. The Court finds that the

[29]The actual fee figure is $1,157,928.75; but this document reflects that O'Quinn owed the Davenport Law Firm reimbursable expenses from this particular litigation of $5,310.13 and accrued interest of $2,510.51. The sum of these three figures is $1,165,749.39.

gross fees figure from the O'Quinn/Brio Litigation is $1,165,749.39.[30]

With respect to the gross fees figure relating to the Williams/Brio Litigation, Rainey's Exhibit #11 reflects that the Debtor's firm was entitled to $4,577,929.04. Moreover, Rainey's Exhibit #15 reflects that the Davenport Law Firm actually received another $469,619.28 from the Williams Law Firm on July 30, 1998. [FOF No. 45]. The sum of $4,577,929.04 and $469,619.28 is $5,047,548.32. The Court finds that the gross fees figure to use for calculating Rainey's share of the fees from the Williams/Brio Litigation is $5,047,548.32.[31]

The gross fees from the Williams/Brio Litigation, $5,047,548.32, combined with the gross fees from the O'Quinn/Brio Litigation, $1,165,749.39, equals an aggregate amount of $6,213,297.71. The Court finds that the amount of $6,213,297.71 represents the gross fees figure that, under the Agreement, must be used in order to calculate the amount owed by the Debtor to Rainey.[32]

B. What amount of gross expenses was incurred by the Davenport Law Firm in the O'Quinn/Brio Litigation and the Williams/Brio Litigation?

The testimony adduced at trial was that three exhibits—Rainey's Exhibit #11, the Debtor's Exhibit #42A, and the Debtor's Exhibit #52A—set forth the gross expenses that the Davenport Law Firm incurred in the O'Quinn/Brio Litigation and the Williams/Brio Litigation. Rainey's Exhibit #11 is a document entitled "Analysis of Brio Settlement-Fees & Expenses." This document reflects, and this Court so finds, that the sum of the gross expenses associated with the Williams/Brio

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[30]This finding is fact is number 90.

[31]This finding of fact is number 91.

[32]This finding of fact is number 92.

Litigation was $932,117.10.[33] The Debtor's Exhibits #42A and 52A reflect, and this Court so finds, that all the gross expenses associated with the O'Quinn/Brio Litigation, and additional gross expenses associated with the Williams/Brio Litigation, total $1,563,708.53.[34] The sum of $932,117.10 and $1,563,708.53 is $2,495,825.63. The Court finds that the amount of $2,495,825.63 represents the gross expense figure that, under the Agreement, must be used to calculate the amount owed by the Debtor to Rainey.[35]

C. What is the surplus after deducting gross expenses from gross fees?

The amount of gross fees was $6,213,297.71, and the amount of gross expenses was $2,495,825.63. Subtracting the latter from the former leaves a surplus of $3,717,472.08. This Court therefore finds that the surplus is $3,717,472.08.[36]

D. What is Rainey's share of the surplus?

Under the Agreement, Rainey is entitled to 15% of the surplus. Because the surplus was $3,717,472.08, Rainey was entitled to $557,620.82. The Debtor only paid him $400,000.00 [FOF No. 88]. This Court therefore finds that even though the Debtor paid Rainey $400,000.00 in 1997, she still owed him the amount of $157,620.82.[37]

It is worth noting that this $157,620.82 figure tracks closely with the amount for which

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[33]This finding of fact is number 93.

[34]This finding of fact is number 94.

[35]This finding of fact is number 95.

[36]This finding of fact is number 96.

[37]This finding of fact is number 97.

Rainey settled under the Mediation Settlement Agreement. Specifically, he settled for a note in the amount of $150,000.00.[38] The Debtor, with some difficulty, made thirteen payments on this note, which reduced the principal balance at the time she ceased making payments in September of 2001 [FOF No. 55] to approximately $120,359.13. [FOF No. 73]. Rainey thereafter obtained a judgment against the Debtor in the 2001 Lawsuit for this unpaid principal amount, plus accrued unpaid interest of $16,248.48; plus attorney's fees of $34,151.90; plus post-judgment interest. [FOF No. 73]. By the time the Debtor filed her Chapter 11 petition on June 3, 2003, the amount owed had increased to approximately $171,807.35. It is this $171,807.35 figure, plus the interest that continues to accrue, that this Court must determine is dischargeable or non-dischargeable.[39]

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[38]He also obtained a promise for payment of another $150,000.00 if fees were ever generated from the Davenport/Brio Litigation, but no such fees were ever forthcoming. The $150,000.00 promissory note related to the remaining fees to which Rainey was entitled from the O'Quinn/Brio Litigation and the Williams/Brio Litigation.

[39]Rainey filed a proof of claim in the Debtor's bankruptcy case for the amount of $321,807.35. [FOF No. 77]. This figure represented the sum of $171,807.35 plus the $150,000.00 that might still be paid to Rainey if the Davenport/Brio Litigation generated fees. At the time that he filed this proof of claim (September 30, 2003), the Davenport/Brio Litigation was not yet over, so there was still a possibility that this particular litigation would generate fees for the Davenport Law Firm, thereby causing Rainey to receive the $150,000.00 that the Debtor had agreed to pay to him under the Mediation Settlement Agreement. However, the plaintiffs in the Davenport/Brio Litigation eventually were unsuccessful, and therefore Rainey will not receive any amount from these suits. Thus, the foregone amount of $150,000.00 will be subtracted from the proof of claim figure of $321,807.35 to determine the amount of the claim that Rainey requested this Court to determine is nondischargeable. This amount is $171,807.35 (i.e. $321,807.35 - $150,000.00).

In passing, this Court notes that the figure of $171,807.35 appears to be a lower figure than should be the case based upon the interest rate of 18% per annum set forth in the Judgment. At the time the Judgment was rendered on March 7, 2003, the amount for which the Debtor was liable was $170,759.51 (the sum of $120,359.13 plus $16,248.48 plus $34,151.90). The Debtor filed her Chapter 11 petition on June 3, 2002, which was 88 days after the Judgment was rendered. Therefore, the amount of the Judgment—$170,759.51—accrued interest at the per annum rate of 18% for 88 days. The amount of this accrued interest was $170,759.51 x (88 days/365 days) x 18% or $7,410.49. The sum of $170,759.51 plus $7,410.49 is $178,170.00, and it is this amount which Rainey was owed on the date of the filing of the Debtor's bankruptcy petition (excluding the $150,000.00 that might have been paid from the Davenport/Brio Litigation). Why Rainey claimed $171,807.35 rather than $178,170.00 is unclear to this Court. Because Rainey filed for the lower figure, this Court accepts this figure for purposes of this adversary proceeding.

V. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

This Court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(I) and § 1334(b). The Complaint to Determine Dischargeability of Debt is an adversary proceeding pursuant to Bankruptcy Rule 7001. Venue is proper pursuant to 28 U.S.C. § 1409(a).

B. Burden of Proof

Whether Rainey's claim is dischargeable hinges on the application of 11 U.S.C. § 523 (a) (4) and (a)(6)[40] to the Debtor's behavior that gave rise to the claim. The Debtor argues that in evaluating Rainey's arguments, the Court must be persuaded by clear and convincing evidence. [Transcript D3, p. 8, lines 7 - 10]. The Debtor is wrong. In 1991, the United States Supreme Court unequivocally held that the standard of proof for the discharge exceptions under § 523(a) is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). This Court finds that Rainey has met this burden of proof with respect to embezzlement under § 523(a)(4) and willful and malicious injury under § 523(a)(6).

C. Res Judicata and Collateral Estoppel

The preclusive effect of a state court judgment in a subsequent federal lawsuit is determined by the full faith and credit statute. State judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. This statute "commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Marrese v. Am. Acad. of*

[40] Unless otherwise noted, all section references shall be to 11 U.S.C., also known as the Bankruptcy Code.

Orthopaedic Surgeons, 470 U.S. 373, 380 (1985) (citing *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481–82 (1982)); *accord Matsushita Elec. Indus. Co., Ltd. v. Epstein,* 516 U.S. 367, 373 (1996); *In re Gober*, 100 F.3d 1195, 1201 (5th Cir. 1996) (discussing preclusive effect of state judgment in bankruptcy proceedings). Consequently, since the Judgment was rendered by a Texas state court, this Court must apply Texas law in determining the preclusive effect of the Judgment. *In re Miller*, 156 F.3d 598, 601-02 (5th Cir. 1998); *In re Hayden*, 248 B.R. 519, 523 (Bankr. N.D. Tex. 2000).

Although courts sometimes use the terms interchangeably, the terms "res judicata" and "collateral estoppel" refer to two different concepts. *In re Gober*, 100 F.3d, at 1200 n.2 (noting that res judicata is the effect of a prior judgment on claims that should have been but were not argued in a lawsuit; collateral estoppel bars relitigation of issues that have already been litigated and decided). Res judicata, or claim preclusion, "prevents the relitigation of a claim or cause of action that has been finally adjudicated." *Id.*; *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Collateral estoppel, or issue preclusion, "prevents relitigation of particular issues already resolved in a prior suit." *Id.*; *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984).

As long ago as 1849, the Texas Supreme Court held that res judicata "is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided." *Foster v. Wells*, 4 Tex. 101, 104 (1849). In fact, that court further held that *res judicata* applies to matters that "were or could have been adjudicated." *Id.* In 1992, the Texas Supreme Court affirmed its earlier holding and even more explicitly stated that any subsequent suit would be precluded if the claim arises out of the same subject matter that,

with due diligence, "could have been litigated in a prior suit." *Barr* v. *Resolution Trust Corp.*, 837 S.W.2d at 631; *see also Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985) (res judicata bars not only what was litigated but also any claims that could have been litigated).

The amount in question in this adversary proceeding—$171,807.35—arises out of the Debtor's initial oral promise to pay Rainey, later memorialized in the Agreement [FOF No. 20], then reduced to a specific amount in the Mediation Settlement Agreement [FOF No. 49], and further set forth in the Judgment. [FOF No. 73]. In the 1998 Lawsuit, Rainey sued the Debtor for breach of the Agreement and later, in the 2001 Lawsuit, sued the Debtor for breach of the Mediation Settlement Agreement and the related promissory note. [FOF Nos. 44 and 58]. That the Debtor owes Rainey this sum is no longer in question; the Judgment conclusively settled this issue and, notwithstanding any appeal,[41] it is not to be relitigated.

The Debtor, however, argues that res judicata does not apply until a debtor has exercised her appellate remedies; and because the Debtor filed a Chapter 11 petition, she contends that she has not yet availed herself of the right to appeal the Judgment in the state appellate courts; therefore, res judicata is inapplicable. [Transcript D2, p. 262, lines 13 - 16; Defendant Debtor's Response to Plaintiff's Motion for Summary Judgment and Response to Motion for Sanctions at page 13]. The Debtor is correct only if the original judgment is interlocutory; a final judgment on the merits is entitled to a preclusive effect. *In re Gober*, 100 F.3d at 1201. In 1986, the Texas Supreme Court overruled ninety-three years of settled Texas law to specifically "hold that a judgment is final for the

[41] The Debtor has not yet appealed the Judgment. After her motion for a new trial was denied, the Debtor filed her Chapter 11 petition. [FOF Nos. 74, 75, and 76].