

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

Kim M. Ulwelling,

Debtor.

BKY No. 94-3-5387

Kim M. Ulwelling,

Plaintiff,

ADV No. 95-3-0252

vs.

Dick Wehner Crane Service, Inc.,

Defendant.

ORDER

This matter came before the Court on April 11, 1996, on Defendant's motion for summary judgment. Appearances were noted on the record. The Court, having reviewed and considered the moving papers, heard arguments of counsel, and otherwise being fully advised on the matter, now makes this ORDER, in accordance with the Federal and Local Rules of Bankruptcy Procedure.

I.

Statement of Dispute

Kim Ulwelling was employed by Dick Wehner Crane as its bookkeeper, and over the course of several years embezzled approximately \$70,000 from the Defendant. She plead guilty to, and was convicted of, felony theft on April 21, 1991, in state district court. Ms. Ulwelling appeared for sentencing on June 18, 1991, and was sentenced by the state district judge at that time. As part of a subsequent written sentencing order, entered on July 11, 1991, the state court ordered Ms. Ulwelling to pay restitution. A civil judgment in the amount of \$71,467, as and for restitution, was entered on December 19, 1991, in state district court. Ms. Ulwelling failed to comply with the July 11, 1991, sentencing order; the imposition of sentence, entered on June 18, 1991, was subsequently vacated by the state district court by order of February 7, 1992; and, she was incarcerated. However, neither the July 11 order, nor the December 19, 1991, civil judgment for restitution, was vacated.

Ms. Ulwelling filed a Chapter 7 Petition on June 21, 1994. In that case, the parties stipulated to nondischargeability of the debt to the Defendant under 11 U.S.C. Sections 523(a) (4) and (6). The Debtor filed her Chapter 13 petition on November 29, 1994, and incorporated the judgment for restitution in her Plan as a general unsecured claim. Following Defendant's objection to the Plan's confirmation and an evidentiary hearing, the Court denied confirmation. The Court ordered dismissal of the case unless the Debtor either: modified her Plan to recognize nondischargeability of the debt; or, commenced an adversary proceeding to determine the dischargeability of Debtor's debt to the Defendant.

The Debtor filed this adversary proceeding. Defendant then filed this summary judgment motion seeking a determination that, as a matter of law, the Debtor's debt to Defendant is a nondischargeable debt for criminal restitution, pursuant to 11 U.S.C. 1328(a)(3). None of the Debtor's arguments have merit. There exists no material fact issue; and, the Defendant is granted summary judgment, accordingly.

The Debtor advances three theories for dischargeability of the debt. First, she argues that the judgment is not enforceable because the sentencing order that imposed the restitution obligation on which it is based, was subsequently vacated by the state district court. However, the judgment remains. The judgment was not vacated; and, the judgment cannot be collaterally attacked in this Court.

The second theory advanced by the Debtor for dischargeability of the debt is that, because the judgment entered upon the debt is enforceable as a civil judgment, the debt has somehow lost its identity as a debt for "restitution...included in a sentence on the debtor's conviction of a crime." However, the manner of enforcement of the debt does not change its nature as a nondischargeable debt for restitution under the statute.

The third theory advanced by the Debtor for dischargeability is that the Defendant is precluded from claiming that the debt is a restitution obligation by the stipulation, agreed to by the Defendant, in her Chapter 7 case. It is true that the stipulation made no reference to the debt as restitution; or, to its nondischargeability as a penalty under 11 U.S.C. Section 523(a)(7). However, silence on the point, in the stipulation entered in the Chapter 7 nondischargeability proceeding, has no preclusive effect in this proceeding.

II. Facts

The Debtor was employed at Dick Wehner Crane Service as its bookkeeper from 1983 through 1989. During the course of her employment, she embezzled over \$70,000 from Defendant. A criminal proceeding was brought against the Debtor in the State District Court of Minnesota, Third Judicial District, alleging that she committed felony theft against the Defendant.

On April 22, 1991, the Debtor entered a plea of guilty to felony theft. An imposition of sentence was entered June 18, 1991, apparently on a bench order. An order of

sentence was entered on July 11, 1991. The Debtor was sentenced to probation and ordered to pay the Defendant restitution in the amount of \$71,467, plus interest.(FN1) A judgment was entered against the Debtor for the Defendant in this amount, as and for restitution, on December 19, 1991.

The Debtor violated her probation by her failure to comply with the restitution payment schedule. Following a hearing, Judge Mork entered an order on December 12, 1991, which revised the payment schedule.

In January 1992, a second probation violation hearing was held before Judge Mork, at the request of the Department of Corrections, for the Debtor's failure to make a restitution payment in accordance with the state court's order dated December 12, 1991. On February 7, 1992, as a result of Debtor's continued noncompliance with the restitution payment schedule, Judge Mork vacated the imposition of sentence ordered on June 18, 1991. Due to her repeated probationary violations, the Debtor was committed to the Commissioner of Corrections of the State of Minnesota for 21 months.

On April 27, 1992, Ulwelling was released to the Intensive Community Supervision Program, subject to the probation terms determined by the Department of Corrections. The probation terms required restitution payments, different from the payments required in the July 11, 1991, court order. On December 31, 1993, the Debtor's sentence and probation were discharged.(FN2)

The Debtor filed a Chapter 7 Petition on June 21, 1994. The Defendant commenced an adversary proceeding to determine the dischargeability of the Debtor's restitution obligation, pursuant to 11 U.S.C. Section 523 (a)(4), (6) and (7). The parties subsequently settled the adversary, on stipulation that the debt was nondischargeable pursuant to 11 U.S.C. Section 523 (a)(4) and (6). A judgment of nondischargeability pursuant to the stipulation was entered on December 13, 1994.

The Debtor later filed a Chapter 13 Petition on November 29, 1994, and scheduled the debt to the Defendant as a general unsecured claim. The Defendant filed an objection to the confirmation of the Debtor's Plan, and this Court denied its confirmation. To avoid a dismissal of the case, the Debtor filed this adversary proceeding to determine the dischargeability of the debt in the Chapter 13 case. The Defendant filed this motion for summary judgment February 27, 1996.

1. The Judgment for Restitution.

11 U.S.C. Section 1328 (a)(3) provides, in pertinent part:

- (a) As soon as practicable after completion by the debtor of all payments under the plan, . . . , the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt---
 - (3) for restitution, or criminal fine, included in a sentence on the debtor's conviction of a crime.

The Debtor was convicted of a crime, and ordered by the state court to make restitution of \$71,467.00, due to her criminal behavior. The order for restitution was included as part of her sentence. The state court entered its written order on July 11, 1991, and ordered that a judgment be entered accordingly. A judgment was entered by the Mower County Court Administrator, for the Defendant and against the Debtor on December 19, 1991. The judgment awards to the Defendant the sum of \$71,467, "as and for restitution", and accrued interest from July 6, 1991. The judgment was duly recorded; it was not appealed; and, it has not been vacated by the state district court.

It is not relevant to this proceeding that the June 18, 1991, imposition of sentence was ultimately vacated. The order entered by Judge Mork, dated February 7, 1992, which vacates the June 18, 1991, imposition of sentence, did not vacate the December 19, 1991, restitution judgment. The February 7, 1992, order makes no mention of the December 19, 1991, judgment.(FN3) The state court judgment remains against the Debtor, as and for restitution.

The December 19, 1991, state court judgment is not subject to collateral attack in this forum; but, it is entitled to full faith and credit. See: *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S.Ct. 768 (1986); *Postma v. First Federal savings & Loan Of Sioux City*, 74 F.3d 160 (8th Cir. 1996); and, *Insurance Company Of North America v. Bay*, 784 F.2f 869 (8th Cir. 1986). A Challenge to the validity of the judgment might properly lie in the court of its origin, but not here, in the context of the Debtor's bankruptcy case.

The Debtor's obligation to Defendant is a debt of restitution, included in a sentence on the Debtor's conviction of a crime; and, later memorialized in a judgment that has not been vacated. Accordingly, the debt is not dischargeable in the Debtor's Chapter 13 case, pursuant to 11 U.S.C. Section 1328(a)(3).(FN4)

2. The Chapter 7 Case.

The stipulation of nondischargeability of the Debtor's obligation in the earlier Chapter 7 case, with reference to 11 U.S.C. Sections 523 (a)(4) and (6), has no effect on the debt and its dischargeability in the Chapter 13 case. Dick Wehner Crane Service asserted in its complaint, filed by adversary proceeding in the Debtor's Chapter 7 case, that the Debtor's debt was nondischargeable under three subsections of 11 U.S.C. Section 523: the two above; and, 11 U.S.C. Section 523 (a)(7). Although the parties stipulated to the entry of judgment for nondischargeability only within the context of (a)(4) and (a)(6), the nature of debt was not altered in any way by the stipulation. The Defendant did not stipulate, in the earlier proceeding, that the debt was not for restitution. 11 U.S.C. Section 1328 had no application to either the Chapter 7 case or the adversary proceeding involving the Section 727 discharge. The debt, however, was excepted in its entirety from the Debtor's general 11 U.S.C. Section 727 discharge. The same debt remains; and, the Defendant is entitled to consideration of the debt in the context of

11 U.S.C. Section 1328, for dischargeability purposes.

IV.
Disposition

Based on the foregoing, IT IS ORDERED:

1. Defendant is entitled to summary judgment.

2. The Debtor's debt to Defendant Dick Wehner Crane Service, Inc., in the amount of \$71,467, based on that judgment in State of Minnesota, District Court, Third Judicial District, County of Mower, in the case of Herbert F. Wehner, d/b/a Wehner Crane Service, Inc., vs. Kim Marie Ulwelling, Court File No.: C5-91-1490, is a nondischargeable debt pursuant to 11 U.S.C. Section 1328(a)(3).

LET JUDGMENT BE ENTERED ACCORDINGLY.
Dated: June 21, 1996

By The Court:

Dennis D. O'Brien
Chief U.S. Bankruptcy Judge

(FN1) The Honorable James L. Mork presided over the plea of guilty. Judge Mork imposed a sentence of 30 months imprisonment. The imposition of the sentence was stayed for 10 years, during which Ulwelling would be placed on supervised probation with the Commissioner of Corrections subject, in part, to the conditions of payment of restitution of \$71,467.

(FN2) The Debtor offers documentary evidence, in the form of correspondence between Judge Mork, and Elaine Perleberg (the corrections officer assigned to Debtor's case) regarding the status of her restitution obligation following the Debtor's imprisonment. As discussed later in this opinion, for purposes of this proceeding, the facts relating to the sentencing order are irrelevant to the judgment for restitution, entered on December 19, 1991. This judgment was not appealed or vacated; and, the judgment remains to this day. The state court judgment cannot be collaterally attacked in this dischargeability proceeding.

(FN3) The February 7, 1992, order refers to the July 11, 1991, order; but does not vacate that order, either. Reference is made to the July order as containing the reasons justifying departure from the Minnesota sentencing guidelines.

(FN4) Alternatively, the Debtor argues that enforcement of restitution through a civil judgment in favor of the victim, is simply enforcement of civil liability; not the collection of restitution owed to the state as a part of sentencing. According to the Debtor, only restitution owed the state is nondischargeable under 11 U.S.C. Section 1328(a)(3).

However, Section 1328(a)(3) does not distinguish between victim and state creditors regarding nondischargeable restitution. The December 19, 1991, judgment constitutes a debt to the Defendant, by its express terms, for restitution. That restitution was included in a sentence on the debtor's conviction of a crime. The debt is nondischargeable under the unambiguous language of the statute.