UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

Case No. 92-27252

FRANK PIO CRIVELLO,

Debtor.

Chapter 7

CENTURY SHOPPING CENTER FUND I
LIMITED PARTNERSHIP,

Plaintiff,

v.

Adversary No. 94-2346

FRANK PIO CRIVELLO,

Defendant.

MEMORANDUM DECISION ON PLAINTIFF'S
MOTION TO REOPEN ADVERSARY PROCEEDING

The plaintiff, Century Shopping Center Fund I Limited Partnership, filed a motion to reopen this adversary proceeding. The motion was brought pursuant to a prior stipulation and order allowing the reopening upon a judgment in specific state court litigation and upon the plaintiff's motion before the bankruptcy court. The debtor objected to the motion to reopen.

This court has jurisdiction under 28 U.S.C. § 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

On November 20, 1992, the debtor, Frank Pio Crivello, filed for chapter 11 bankruptcy protection. The debtor later converted his case to chapter 7 and received a discharge in May 1995. This adversary proceeding was filed against the debtor on November 7, 1994, alleging that the debtor conspired with others to create a monopoly, violated state antitrust and racketeering laws and, as a result, caused damage to the plaintiff, Century Shopping Center Fund I. At the time the debtor filed his bankruptcy petition, there was an action pending in state court concerning the same set of operative facts. The state court defendants were the debtor, his cousin Joseph A. Crivello, Crivello Properties, and Godfrey Company, a subsidiary of Fleming Companies, Inc., all of whom allegedly conspired to harm the plaintiff. Joseph Crivello and Frank Crivello were equal partners in Crivello Properties. The suit also charged that Godfrey, which runs Sentry Foods, intentionally damaged space in the Howell Plaza mall, which was owned by Century. According to the state court complaint, Godfrey filled floor drains and refrigerator pipes with concrete at the location of its anchor store. Godfrey then moved the Sentry store out of the Howell Plaza and into a Crivello mall across the street. Godfrey continued leasing the Howell Plaza site, effectively keeping the site dark, which reduced the value of other space in the mall and the rent received for that space.

When Frank Crivello filed bankruptcy on November 20, 1992, the state case was automatically stayed as to him. Also, at some point in the state case, Crivello was dismissed as a party.

The parties agreed to hold this adversary proceeding in abeyance pending the state case:

> The parties, by their attorneys, stipulate that all proceedings, including the filing of defendant's answer, shall be held in abeyance until thirty days after final resolution of the state court action referred to in plaintiff's complaint.

(Stipulation between Century Shopping Center Fund I Limited Partnership and Frank Pio Crivello, signed December 12 & 13, 1994). On December 20, 1994, this adversary proceeding was dismissed:

> Upon consideration of the stipulation of Century Shopping Center Fund I Limited Partnership, plaintiff, and Frank Pio Crivello, defendant,
>
> IT IS ORDERED that the above-entitled adversary proceeding is dismissed, without prejudice, subject to reopening, without costs, upon the plaintiff's motion and judgment in Milwaukee County Circuit Court Case No. 88-CV-018071.

(December 20, 1994, Order of Chief Bankruptcy Judge Charles N. Clevert).

The state court case settled on the eve of trial, and on February 1, 1999, a final judgment was entered in the state case dismissing the plaintiff's complaint on the merits, with prejudice. The settlement between Century and Godfrey resulted in payment to Century, and it granted Crivello Properties and Joseph Crivello a covenant not to sue, as they did not contribute to the settlement fund.

ARGUMENTS

The debtor opposes the reopening of this adversary proceeding. The debtor claims that the doctrine of res judicata or claim preclusion precludes the plaintiff from seeking judgment against him. *Juneau Square Corp. v. First Wisconsin Nat. Bank*, 122 Wis. 2d 673, 682, 364 N.W.2d 164, 169 (Ct. App. 1985); *Matter of Energy Coop., Inc.*, 814 F.2d 1226, 1230 (7th Cir. 1987). A dismissal on the merits is a final adjudication which will bar a subsequent suit. The complaint in the state case is virtually identical to this complaint to determine dischargeability of

debt. The debtor contends that he was privy to the defendants who were parties to the state case at the time of final determination. The state court settlement also set the plaintiff's damages – which were higher than the alleged damages – and this court is bound by that determination. Additionally, the debtor argues that because no judgment was ever entered against him, one of the conditions to reopening the adversary proceeding has arguably not been satisfied. The plaintiff failed to exercise its option to ask the bankruptcy court for relief from the automatic stay to proceed against the debtor in state court.

The plaintiff, on the other hand, disagrees with the debtor's contentions. The supreme court has stated that a compromise settlement with some, but not all, joint tortfeasors does not fix the amount of the plaintiff's damages. *Pierringer v. Hoger*, 21 Wis.2d 182, 191-92, 124 N.W.2d 106 (1963). Furthermore, the plaintiff points out that § 113.02, Wis. Stats., provides that a judgment against one defendant does not discharge another defendant who was not a party to the proceeding wherein the judgment was rendered. The settling defendants are not privies to the debtor; and even if they were, both the former partnership and general partner stipulated in state court that the state court judgment would not affect the plaintiff's claims against the debtor. The plaintiff further notes that the settling defendants did not represent the debtor's legal interests since their defense was that the debtor was acting in his individual capacity in the events at issue. Finally, the bankruptcy court order dismissing the adversary without prejudice did not require obtaining a judgment against the debtor in the state court case.

DISCUSSION

Effect of Stipulation and Bankruptcy Court Order

The debtor contends that the bankruptcy court order dismissing this adversary, subject to reopening "upon the Plaintiff's motion and judgment," contemplated a judgment against the debtor. On the contrary, the order does not say that any state court judgment need be against the debtor. The stipulation upon which the order is predicated states only that the state court case come to a final resolution, which occurred when the remaining parties to that action settled the matter. Indeed, judgment against the debtor would have been impossible as he was not a party when resolution finally occurred. All that was required to reopen this adversary proceeding was a motion by the plaintiff and judgment in state court, both of which have occurred.

Issue Preclusion: State Court Order of Dismissal

The debtor further argues that the claims against Godfrey, having been dismissed with prejudice, now preclude any conspiracy claims against the debtor in this proceeding. Century, on the other hand, cites § 113.02, Wis. Stats., which states that a judgment against one obligor does not discharge a co-obligor who was not a party to the proceeding wherein the judgment was rendered.[1]

The Settlement Agreement, signed by the Crivello defendants' attorney, who was also the debtor's attorney at the time, specifically states:

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[1]The Wisconsin Supreme Court has limited the application of chapter 113 solely to releases that expressly refer to the chapter or where the intention of the parties is so inadequately expressed. *Pierringer v. Hoger*, 21 Wis. 2d 182, 191, 124 N.W.2d 106, 111 (1963). Century's release did not contain a reference to the statute, and the parties' intention that the plaintiff's action against Frank Crivello was not released is adequately expressed.

> Subject to the execution of this Agreement and the Dismissal Stipulation by an authorized representative of Crivello Properties and Joseph Crivello, Plaintiffs agree to dismiss without prejudice and covenant and agree not to sue or otherwise assert any claims or causes of action against Crivello Properties or Joseph Crivello. Plaintiffs expressly reserve any and all of their rights, claims and causes of action against Frank P. Crivello and nothing in this Agreement or the exhibits hereto shall be interpreted as a waiver or release of any of those rights, claims, and causes of actions.

Issue preclusion is designed to limit the relitigation of issues contested in a previous action between the same or different parties. *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327, 332 (1993). Thus, the doctrine does not require an identity of parties, but states:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (cited with approval in *Landess v. Schmidt*, 115 Wis. 2d 186, 197, 340 N.W.2d 213, 219 (Ct. App. 1983)). Here, the operative determination, the liability of Frank Crivello, was not actually litigated and determined by a valid and final judgment. In fact, no issue was actually litigated by the prior action because it settled. Therefore, issue preclusion does not bar the claims against the debtor.

A release or covenant not to sue is a contract and is construed as such. *St. Clare Hosp. v. Schmidt, Garden, Erickson, Inc.*, 148 Wis. 2d 750, 755, 437 N.W.2d 228, 230 (Ct. App. 1989). Generally, the interpretation of a contract is a question of law. *Caraway v. Leathers*, 58 Wis. 2d 321, 328, 206 N.W.2d 193, 197 (1973). If an ambiguity exists in the written document, however, the question is one of fact. *Lambert v. Wrensch*, 135 Wis. 2d 105, 115, 399 N.W.2d 369, 373-74 (1987). As the supreme court has stated

> [A]n agreement releasing one joint tortfeasor must be construed in accordance with the intention of the parties. It is generally agreed that if the document shows on its face that

> it was not the intention of the injured party to relinquish his claim against the other joint tortfeasors, as where he expressly reserves his right of action against them or when it appears that the payment he received was not accepted as full satisfaction, it will be regarded as a covenant not to sue, no matter what its form.

Brown v. Hammermill Paper Co., 88 Wis. 2d 224, 232-33, 276 N.W.2d 709, 712-13 (1979).

The supreme court has also held that the "effect of a release 'would seem to be that a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so or unless he has received such full compensation that he is no longer entitled to maintain it.'" *Swanigan v. State Farm Ins. Co.*, 99 Wis. 2d 179, 202, 299 N.W.2d 234 (1980) (quoting Prosser, Law of Torts § 49 at 304 (4th ed. 1977), quoted with approval in *Brown*, 88 Wis. 2d at 237). The agreement here is clear on its face that Century did not intend to relinquish its claim against Frank Crivello. Whether the plaintiff was fully compensated will be discussed below.

Automatic Stay

The debtor also claims that Century could and should have moved to lift the automatic stay to include him in the state case. Plaintiff's failure to take advantage of its opportunity for a full and fair determination should not now be the debtor's burden. Century, on the other hand, notes that at the time it stipulated with the debtor to hold this adversary proceeding in abeyance, there was no reason to request a lifting of the automatic stay. The state court litigation had been dismissed and Century was in the process of filing an appeal. After Century succeeded on appeal, the litigation between the plaintiff and Godfrey continued.

This court is not aware of any authority that requires a plaintiff to request relief from the automatic stay to sue the debtor in state court, even if other parties are sued under the same set of operative facts. The debtor insists that the plaintiff had a "right" to have the stay lifted, again citing no authority. Perhaps the stay would not have been lifted to add the debtor again as a party, given that the bankruptcy court has exclusive jurisdiction to determine dischargeability of a debt. In any event, the debtor has no right to dictate the plaintiff's strategy or choice of forum.

Conspiracy Cause of Action and Privity with Godfrey

The debtor contends that his liability is dependent upon a determination that Godfrey breached its contract with Century. The common claims against Godfrey and the debtor were those of conspiracy, which cannot exist in the absence of an underlying wrong in this case. The only basis for the conspiracy claims against the debtor was the contract between Godfrey and Century. No Wisconsin court has recognized that a party can tortiously interfere with it own contract as Century has claimed Godfrey did in concert with the debtor. Because the common claims have now been dismissed with prejudice, the debtor argues that the conspiracy claims against him cannot stand alone.

The plaintiff points out, however, that the state court granted summary judgment on Century's breach of contract claim based on the fact that Godfrey's refusal to surrender the Howell Plaza premises pursuant to its illegal agreement with the debtor was a direct violation of its contractual duties to Century. Additionally, the allegations in the complaint support findings of a contract in restraint of trade in violation of § 133.03, Wis. Stats., and malice under § 134.01, Wis. Stats.

The debtor correctly points out that a party generally cannot tortiously interfere with their own contract. *See Caulfield v. Litho Prods., Inc.*, 155 F.3d 883, 889 (7th Cir. 1998) (applying Wisconsin law). Nevertheless, the plaintiff has alleged that the debtor and Godfrey entered into a conspiracy to injure Howell Plaza, Inc., in its business, all in violation of § 134.01, Wis. Stats. Section 134.01 provides that

> Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever ... shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.

§ 134.01, Wis. Stats. This statute gives rise to a civil claim for damages by those injured by the conspiracy. *Radue v. Dill*, 74 Wis.2d 239, 244-45, 246 N.W.2d 507, 510-11 (1976).

The plaintiff has also alleged that the debtor and Godfrey conspired to restrain trade and commerce in violation of § 133.03, Wis. Stats. This provision provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal." § 133.03(1), Wis. Stats. Section 133.03(1) is interpreted in accordance with the federal courts' interpretation of section 1 of the Sherman Act. *Independent Milk Producers Co-op v. Stoffel*, 102 Wis. 2d 1, 6, 298 N.W.2d 102, 104 (Ct. App. 1980). The plaintiff's allegations of violations of §§ 133.03 and 134.01, Wis. Stats., are causes of action separate and distinct from an allegation that the debtor tortiously interfered with his own contract.

The debtor further correctly states that "[t]here can be no conspiracy if malice is not found in respect to both conspirators." *Maleki v. Fine-Lando Clinic*, 162 Wis. 2d 73, 86, 469 N.W.2d 629, 634 (1991). However, it does not follow that because the claims have been dismissed against one of the defendants, due to a negotiated settlement, that the cause of action

against the remaining defendant does not survive alone. The supreme court in *Brown v. Hammermill Paper Co.*, 88 Wis. 2d 224, 232-33, 276 N.W.2d 709, 712-13 (1979), rejected the common-law rule that release of one tortfeasor releases all joint tortfeasors. When the alleged liability of co-defendants is joint and several, as is the liability of co-conspirators, *see Dalton v. Meister*, 71 Wis. 2d 504, 520, 239 N.W.2d 9, 18 (1976), the plaintiff may proceed against all parties in one action or individually in separate actions. *Davis v. Schmidt*, 126 Wis. 461, 468, 106 N.W. 119, 121 (1906). Partial satisfaction for an injury, discussed below, does not bar the claim against a non-settling tortfeasor. 66 AM. JUR. 2D *Release* § 40 (1973).

The facts here are further distinguished from the case cited by the debtor, *Farmers State Bank v. Easton Farmers Elevator*, 457 N.W.2d 763 (Minn. Ct. App. 1990). There, the buyer of crops paid the sellers/debtors directly, in disregard of the bank's security interest in the crops being sold. The bank settled its claim against the debtors and released them from their debt to the bank. The buyer argued that the release of the debtors operated to release it from further liability and the court agreed, stating, "[a] settlement between the secured party and the farmer operates to discharge any secondary liability of the grain buyers." *Id*. at 766. The court noted that the buyers' liability "is vicarious and conditioned completely on proof that the secured party has a valid claim against the farmer, who is in a position analogous to a primary tortfeasor." *Id*. Crivello's reliance on the case is misplaced, inasmuch as the case holds that the release of a primary tortfeasor operates to release one who is merely secondarily liable. There is no primary and secondary liability in the instant case. No party has alleged that Crivello and Godfrey had a relationship, such as master and servant or principal and agent, which would give rise to vicarious or secondary liability, and thus, the release of Godfrey does not release Crivello.

Privity with Other Crivello Defendants

Century takes issue with the debtor on his claim that he was in privity with the other Crivello defendants, namely Joseph Crivello and Crivello Properties. Century points out that the other Crivello defendants agreed to allow the claims against the debtor to remain after the state case was dismissed. Also, the other Crivello defendants argued before the state court that the debtor had not acted for their benefit and that they have no interest in the Oak Creek Centre. Notwithstanding these assertions by the other Crivello defendants, the debtor argues that he can still claim privity because the other Crivello defendants did not prevail on summary judgment.

Black's Law Dictionary defines privity as "such an identification of interest of one person with another as to represent the same legal right." BLACK'S LAW DICTIONARY 1199 (6th ed. 1990). The debtor testified under oath in the state court proceedings that he owned Oak Creek Centre in his individual capacity, that Crivello Properties has no interest in Oak Creek Centre and that he "had no partners in the property." (11/5/96 Deposition of Frank Pio Crivello, at 58.) A party's clear, deliberate and unequivocal statement of fact is a judicial admission and is binding on the party. *Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 17, 539 N.W.2d 916, 921 (Ct. App. 1995). The debtor certainly cannot now piggy-back onto the plaintiff's covenant not to sue the other Crivello defendants, when the plaintiff expressly reserved the right to proceed against the debtor.

Damages

The debtor claims that Century is entitled to one satisfaction of its debt and cannot collect a double recovery. The state court settlement with Godfrey apparently more than compensated

Century for its alleged damages. According to the debtor, the settled amount set the limit of liability in the adversary and the plaintiff is precluded from recovering any additional amount from the debtor. Century disagrees and asserts that the settlement did not determine any fault, liability or the actual amount of its damages, but was rather a compromise of disputed claims.

Even though Godfrey has settled with Century, the allegations of conspiracy against the debtor involved his actions in concert with Godfrey. As noted above, once a conspiracy is found, the liability of the co-conspirators is joint and several.[2] *See Dalton v. Meister*, 71 Wis. 2d 504, 520, 239 N.W.2d 9, 18 (1976). Century is entitled to the full amount of its damages from the co-conspirators as determined by the trier of fact. *See Haase v. Employers Mutual Liability Ins. Co.*, 250 Wis. 422, 431-32, 27 N.W.2d 468, 473 (1947) (injured party can have only one satisfaction for his or her injuries and amount paid by one tortfeasor in settlement of claims is considered as a satisfaction pro tanto to the joint tortfeasors). The amount of Century's damages has not been determined by a court. The complaint prayed for a judgment "for the amount due on the debt, including attorney's fees, interest and costs, and grant the plaintiff whatever further relief is equitable." Double and triple damages on certain counts, plus punitive damages, were also requested in the complaint. If such damages are awarded, the settlement with Godfrey may not have fully compensated the plaintiff.

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[2]Without the settlement with Godfrey, Century would be entitled to collect the entire amount of any future judgment from any of the defendants, assuming they have both been found to be co-conspirators. Because a contribution action requires negligent wrongdoers, neither defendant, as intentional tortfeasors, would have the right to commence a contribution action against the other. *See C.L. v. School District of Menomonee Falls*, 221 Wis. 2d 692, 705-06, 585 N.W.2d 826, 831 (Ct. App. 1998).

As discussed above, the release of and covenant not to sue the other defendants specifically and unequivocally did not release the debtor. Therefore, the consideration given by Godfrey was accepted by Century as a compromise and final settlement of all claims between those two parties, rather than as full compensation for all injuries, which have yet to be determined. *See Brown v. Hammermill Paper Co.*, 88 Wis. 2d 224, 234-35, 276 N.W.2d 709 (1979).

CONCLUSION

Based upon the foregoing, the adversary proceeding will be reopened.

Dated at Milwaukee, Wisconsin, October 5, 1999.

BY THE COURT:

___/s/_____
Honorable Margaret Dee McGarity
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

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Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO REOPEN ADVERSARY PROCEEDING

For the reasons set forth in the court's memorandum decision entered on this date, IT IS ORDERED the plaintiff's motion to reopen the above entitled adversary proceeding is granted.

IT IS FURTHER ORDERED that a scheduling conference will be held on November 3, 1999, at 9:30 a.m., via telephone. The court will initiate the conference call.

Dated at Milwaukee, Wisconsin, October 5, 1999.

BY THE COURT:

____/s/_____
Honorable Margaret Dee McGarity
United States Bankruptcy Judge

105:10/5/99