SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: April 27, 2021

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

EARNIE MARTIN AND SANDRA MARTIN,	**CASE NO. 19-03585-NPO**
DEBTORS.	**CHAPTER 7**
DONALD DEMORY	**PLAINTIFF**
VS.	**ADV. PROC. NO. 20-00008-NPO**
EARNIE MARTIN	**DEFENDANT**

ORDER ON DONALD DEMORY'S MOTION
FOR AWARD OF ATTORNEY'S FEES AND EXPENSES

This matter came before the Court on Donald Demory's Motion for Award of Attorney's Fees and Expenses (the "Motion") (Adv. Dkt. 56) filed by Donald Demory ("Demory") and the Ernest L. Martin Answer to Motion for Award of Attorney's Fees & Expenses (the "Response") (Adv. Dkt. 57) filed by Earnie Martin ("Martin") in the above-referenced adversary proceeding (the "Adversary").

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this Adversary pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), and (O). Notice of the Motion was proper under the circumstances.

Facts

A trial was held on March 15 and 16, 2021 (the "Trial") on the Amended Complaint to Determine the Dischargeability of a Debt Pursuant to 11 U.S.C. § 523 (the "Adversary Complaint") (Adv. Dkt. 7) filed by Demory. In the Adversary Complaint, Demory sought an exception to the discharge of the debt owed him in the amount of $137,123.55 under 11 U.S.C. § 523(a)(2)(A) and (a)(6). He also sought reimbursement of his attorneys' fees and costs incurred in the Adversary. *See Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991) (holding that "where a party has contracted to pay attorneys' fees for the collection of a nondischargeable debt, the fees also will not be discharged in bankruptcy").

The debt in question arose from a default judgment entered by the Circuit Court of Culpeper County, Virginia in the amount of $125,239.00, plus interest, on June 29, 2017 (the "Default Judgment") (Ex. 6).[1] Demory brought the state court action against Martin for breach of a promissory note (the "Note") (Ex. 5 at 4-5). Included in the total amount awarded in the Default Judgment was an award of attorneys' fees of $25,000.00.

At Trial, the Court bifurcated the issue of attorneys' fees and costs for later determination. At the conclusion of Trial, the Court ruled from the bench that the debt owed by Martin to Demory is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A). The Court then instructed Demory to submit a motion in accordance with MISS. BANKR. L.R. 7054-1(b)(2) in support of his request for attorneys' fees and costs. Shortly thereafter, Demory filed the Motion, and Martin filed the Response. On April 27, 2021, the Court entered the Memorandum Opinion and Order on Amended Complaint to Determine the Dischargeability of a Debt Pursuant to 11 U.S.C. § 523 (Adv. Dkt. 60), memorializing and supplementing its bench ruling at Trial and reserving the issue

[1] The exhibits cited in this Order were introduced into evidence at Trial.

of attorneys' fees and costs for resolution by separate order. This Order resolves the reserved issue.

As grounds for his claim, Demory relies on a contractual provision in the Note in which Martin agreed to pay Demory's attorneys' fees and costs "for collection or suit." Attached to the Motion is the affidavit of Demory's counsel, Stacey Moore Buchanan ("Buchanan"), and an itemization of time expended by Buchanan and other legal professional at Jones Walker LLP from January 16, 2020 through March 16, 2021, the last day of Trial. Buchanan asserts in her affidavit that Jones Walker LLP incurred $91,008.00 in attorneys' fees and $657.11 in expenses in pursuing and litigating the Adversary. In the Answer, Martin opposes the amount of the attorneys' fees requested as excessive.

Discussion

In adversary proceedings, there is no general right to attorneys fees. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 447-48 (2007). Demory acknowledges that he does not have a statutory right to attorneys' fees because 11 U.S.C. § 523(d) only gives that right to prevailing debtors. Creditors, however, still have "the contractual right to attorney's fees . . . when that right arises from a contract between the creditor and the debtor that is enforceable under state law." *In re Luce*, 960 F.2d 1277, 1286 (5th Cir. 1992). The parties do not dispute that the Note provides Demory with a contractual right to attorneys' fees and costs upon default. Indeed, the Default Judgment awarded Demory $25,000.00 in attorney's fees based on this contractual provision. A question arises, however, as to the preclusive effect of the Default Judgment. Did the Note merge into the Default Judgment so that the Note, including the provision for attorneys' fees and costs, was no longer enforceable when the Adversary Complaint was filed? Whether the doctrine of merger eliminated any such claim for additional legal fees incurred in the Adversary

requires an examination of Virginia law.[2] *See Gauthier v. Continental Diving Servs., Inc.*, 831 F.2d 559, 561 (5th Cir. 1987) (noting that *Rooker-Feldman* requires a federal court to "give the same deference to a state court judgment that a court of the rendering state would give it").

In Virginia, the defense of *res judicata* is established by the following four elements: (1) "identity of the remedies sought"; (2) "identity of the cause of action"; (3) "identity of the parties"; and (4) "identity of the quality of the persons for or against whom the claim is made." *See Lofton Ridge, LLC v. Norfolk S. Railway Co.*, 601 S.E.2d 648, 650 (Va. 2004). Once established, *res judicata* bars the assertion in a subsequent proceeding of all claims actually brought in an earlier proceeding as well as all claims constituting the same cause of action that could have been brought. *Id*. With all other elements of *res judicata* clearly being present, the question here hinges upon whether Demory's claim for attorney's fees is part of the same "cause of action" as his underlying claim for enforcement of the Note under Virginia law.

The Virginia Supreme Court first addressed this issue in *Sands v. Roller*, 86 S.E. 857 (1915). There, a lawsuit was brought after a judgment had been rendered in favor of the plaintiff on a promissory note. The plaintiff sought to recover its attorney's fees and expenses incurred in obtaining the judgment based on a provision in the note. The Virginia Supreme Court affirmed the dismissal of the lawsuit. *Id*. at 858.

> [W]hen the judgment was obtained . . . , it merged the entire contract upon which the suit was brought, and the plaintiff could not afterwards maintain a suit for another recovery under that contract. The alleged fees and expenses were provided for in the contract, which was reduced to judgment. That cause of action can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment. . . . [S]uch contract and all rights under it ceased to exist, and the judgment became the only and superior evidence of the defendant's liability.

[2] The Note provides that it is governed by Virginia law. (Ex. 5 at 5).

Id. (citations & quotations omitted). Under *Sands*, therefore, a claim for legal fees and expenses based on a contract is part of the "cause of action" for breach of that contract and must be pursued in the original action or will be extinguished "in the judgment." *See Republic Ins. Co. v. Culbertson*, 717 F. Supp. 415, 419 (E.D. Va. 1989) (rejecting, as contrary to *Sands*, claim that suit for attorney's fees incurred after judgment "involve[d] a new cause of action, separate from the [underlying] cause"). *Sands* has been cited by the Virginia Court of Appeals for the "well settled" principle that "[w]hen a cause of action has been reduced to a judgment, the cause of action is merged into the judgment and cannot form the basis for future suits between the parties." *Bazzle v. Bazzle*, 561 S.E.2d 50, 55 (Va. Ct. App. 2002). *Sands* also has been cited by the Virginia bankruptcy court for the proposition that a "claim for attorney's fees [is] merged into the original judgment and may not be the subject of a later suit" under Virginia law. *In re Chen*, 351 B.R. 355, 363 (Bankr. E.D. Va. 2006) (holding that the amount of attorneys' fees awarded in underlying judgment is the total amount of attorneys' fees that may ever be collected). Accordingly, based on *Sands* and its progeny, the Court finds that Demory's claim pursuant to the Note for additional attorneys' fees and costs incurred in the Adversary was extinguished by the Default Judgment under Virginia law.

Conclusion

Having recovered his attorneys' fees and costs in the Default Judgment, Demory is barred by *res judicata* from attempting to re-litigate the issue of attorney's fees and costs in the Adversary. The Court, therefore, finds that the Motion should be denied. Because the Court finds that Demory's claim for attorneys' fees and costs is precluded by the Default Judgment, the Court does not address the reasonableness of the amount of attorneys' fees requested in the Motion. With the adjudication of the Motion, no other claims or matters remain in the Adversary for resolution, and

a separate final judgment shall be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF ORDER##