UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

In re FREEMAN HORN, INC.
DEBTOR

CASE NO. 93-01304-JC
CHAPTER 11

TRUSTMARK NATIONAL BANK
PLAINTIFF

v.

ADVERSARY NO. 93-0172

CARL D. FREEMAN, JR., JOSEPH A. HORN, and C. E. STONE
DEFENDANTS

and

JOSEPH A. HORN
PLAINTIFF

v.

ADVERSARY NO. 98-0070

TRUSTMARK NATIONAL BANK
DEFENDANT

and

CARL FREEMAN
PLAINTIFF

v.

ADVERSARY NO. 98-0228

TRUSTMARK NATIONAL BANK
DEFENDANTS

MEMORANDUM OPINION

The court considers three adversary proceedings that emanate from the banking relationship existing between Trustmark National Bank and Freeman Horn, Inc., an electrical contracting company owned by Carl D. Freeman, Jr. and Joseph A. Horn. By memorandum opinion and judgment entered on June 30, 1998, the court previously entered judgment in three other adversary

proceedings in favor of Trustmark and against Freeman Horn, Mr. Freeman, Mr. Horn, and a related entity called Inelco, Inc.[1] Trustmark now moves for summary judgment in the three pending adversary proceedings asserting that the claims are barred by the doctrines of res judicata and/or collateral estoppel. Finding that the pending adversary proceedings are barred by res judicata, the court will grant the motions for summary judgment.

I. FACTS

A. The pending adversary proceedings

1. Trustmark National Bank v. Carl D. Freeman, Jr., Joseph A. Horn, and C. E. Stone, Adversary No. 93-0172

Trustmark filed this suit on August 13, 1993 in the Circuit Court of Hinds County, Mississippi, First Judicial District, Case No. 93-76-344. Made defendants were Mr. Freeman, Mr. Horn, and C.E. Stone. The suit seeks a judgment against Mr. Freeman and Mr. Horn in the amount of $749,127.70, and against Mr. Stone in the amount of $92,850.69, based upon continuing guarantees executed for loans made by Trustmark to Freeman Horn and Inelco, Inc. Mr. Freeman and Mr. Horn own all the stock of Freeman Horn, which owns all the stock of Inelco.

Mr. Freeman and Mr. Horn filed an answer and cross-complaint, which requested cancellation of the debt, and actual and punitive damages against Trustmark. Trustmark removed the suit to the United States District Court for the Southern District of Mississippi on September 24, 1993, where it was given Civil Action No. 3:93CV603LC. Trustmark filed a motion to refer the case

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[1] *See Freeman Horn, Inc. v. Trustmark National Bank*, Adversary No. 93-0173; *Inelco, Inc. v. Trustmark National Bank*, Adversary No. 93-0174; and *Trustmark National Bank, et al. v. Freeman Horn, Inc., Inelco, Inc., Joseph A. Horn, and Carl D. Freeman, Jr.*, Adversary No. 94-0059 (Bankr. S.D. Miss Jun. 30, 1998).

to the bankruptcy court. The district court's order granting the motion to refer case to the bankruptcy court was entered on October 20, 1993.

This court heard the amended motion of Mr. Freeman, Mr. Horn, Freeman Horn, and Inelco[2] to remand and/or transfer and/or abstain on September 19, 1997. On that date, the court determined that it would hold the proceeding in abeyance pending a ruling by the district court on a pending motion to withdraw the reference filed by the Freeman Horn entities.[3]

2. Joseph A. Horn v. Trustmark National Bank, Adversary No. 98-0070

On July 22, 1997, Mr. Horn filed a complaint against Trustmark in the Circuit Court of the First Judicial District of Hinds County, Case No. 251-97-759CIV. The complaint alleges that Trustmark failed to honor its commitment to make a term loan and line of credit available to Freeman Horn as set forth in a letter of November 11, 1992. Mr. Horn asserts that as president and 50% owner of Freeman Horn, he suffered and continues to suffer from severe emotional and psychological stress, and from post-polio syndrome symptoms brought about by Trustmark's acts and/or omissions. The complaint seeks to recover actual and punitive damages for Trustmark's malicious, intentional, and wrongful acts.

Trustmark timely removed the case to the United States District Court for the Southern District of Mississippi, where it was assigned Civil Action No. 3:97-CV-594WS. By order entered March 31, 1998, the district court referred the case to this court, as a case related to a matter arising

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[2] These entities are sometimes referred to collectively as the "Freeman Horn entities".

[3] *See* Pl. 101 - Transcript of September 19, 1997 at 68, 89-90; Pl. 102. The court was advised by the parties that a motion to withdraw reference had been filed, but no further information has been made available.

under Title 11 of the United States Code.

3. Freeman v. Trustmark National Bank, Adversary No. 98-0228

This proceeding was commenced by Mr. Freeman against Trustmark on August 21, 1997 in the Circuit Court of the First Judicial District of Hinds County, Case No. 251-97-896CIV. The factual basis of the complaint and the causes of action are virtually identical with the allegations made by Mr. Horn in Adversary Proceeding No. 98-0070. The complaint seeks to recover actual and punitive damages for Trustmark's malicious, intentional, and wrongful acts.

Trustmark timely removed the case to the United States District Court for the Southern District of Mississippi, where it was assigned Civil Action No. 3:97-CV-655WS. By order entered September 24, 1998, the district court referred the case to this court, as a case related to a matter arising under Title 11 of the United States Code.

B. The previous trial and adversary proceedings

The court held a trial on several days in late 1997 and early 1998 in three other adversary proceedings, also involving the Freeman Horn entities and Trustmark.

The first suit, Freeman Horn, Inc. v. Trustmark National Bank, Adversary No. 93-0173, was a suit by Freeman Horn against Trustmark alleging lender liability fraud and a host of other causes of action arising out of an alleged loan commitment set forth in a letter of November 11, 1992 that Trustmark had allegedly failed to honor. Freeman Horn claimed that Trustmark's actions caused it to file for relief under Chapter 11 of the Bankruptcy Code on April 19, 1993, and that its assets securing the loans from Trustmark were wrongfully seized and sold at a public auction held on October 12, 1993.

The second suit, Inelco, Inc. v. Trustmark National Bank, Adversary No. 93-0174, was a suit by Inelco alleging similar lender liability causes of action against Trustmark arising out of the same facts.

The third suit, Trustmark National Bank, et al. v. Freeman Horn, Inc., Inelco, Inc., Joseph A. Horn, and Carl D. Freeman, Jr., Adversary No. 94-0059, is a suit by Trustmark seeking a deficiency judgment against the Freeman Horn entities based upon the execution of promissory notes and guaranties. Mr. Freeman and Mr. Horn raised as defenses the same lender liability claims arising out of the same facts as the Freeman Horn and Inelco lender liability suits against Trustmark.[4]

The claims and defenses asserted by Freeman Horn, Inelco, Mr. Freeman and Mr. Horn in these three adversary proceedings are very similar and arise out of the same basic factual circumstances involved in the three pending adversaries. The foundation for all of the claims and defenses involved a letter of November 11, 1992 from Mr. Nelson Gibson of Trustmark to Mr. Horn that was alleged to be a commitment letter.

The court made the following findings and conclusions in a memorandum opinion entered on June 30, 1998 in the three prior adversary proceedings:

1. The letter of November 11, 1992 was neither a loan commitment letter nor any other type of contract to lend that was enforceable under Mississippi law.[5]

2. Even if the November 11, 1992 letter were an enforceable contract, it was unenforceable because the conditions set forth in the letter were not met.[6]

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[4] *Supra*, at 2.

[5] *See* Memorandum Opinion at 19-25.

[6] *Id.* at 25-27.

3. Trustmark did not maliciously or tortiously breach the alleged November 11, 1992 contract because no contract based upon the letter existed.[7]

4. The Freeman Horn entities failed to prove that Trustmark committed any negligent and/or fraudulent misrepresentation or any actual or constructive fraud with respect to any principal of Freeman Horn.[8]

5. The November 11, 1992 letter did not constitute material information upon which the Freeman Horn entities relied to their detriment and thus did not give rise to causes of action for promissory or equitable estoppel.[9]

6. Trustmark did not breach an implied covenant of good faith and fair dealing in its dealings with the Freeman Horn entities.[10]

7. Trustmark did not commit the Mississippi tort of interference with the right to labor and/or contract to do work.[11]

8. The October 12, 1993 public auction of Freeman Horn and Inelco property was conducted by Trustmark in a commercially reasonable manner.[12]

9. Deeds of trust and guaranties executed by Mr. Freeman and Mr. Horn constituted a valid and perfected lien on property given as security for debts of

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[7] *Id.* at 27.

[8] *Id.* at 27.

[9] *Id.* at 27-28.

[10] *Id.* at 28.

[11] *Id.* at 28.

[12] *Id.* at 28-32.

Freeman Horn and Inelco to Trustmark.[13]

10. Because the Freeman Horn entities failed to meet their burden of proof as to the lender liability claims asserted against Trustmark, the claims were not a defense to Trustmark's judicial foreclosure and deficiency action, including that against Mr. Freeman and Mr. Horn.[14]

C. Comparison of the pending complaints to the complaints in the previously tried adversary proceedings.

The claims asserted by Mr. Freeman and Mr. Horn against Trustmark in the cross-complaint in the pending Adversary No. 93-0172 arise out of the same facts and circumstances as the claims and affirmative defenses asserted by the Freeman Horn entities in the three adversary proceedings that were previously tried. Specifically, the cross-complaint asserts that Trustmark failed to honor the financing commitment set forth in the letter of November 11, 1992 and that this resulted in damage to Mr. Freeman and Mr. Horn.

Similarly, the complaint filed by Mr. Horn in Adversary No. 98-0070 and the complaint filed by Mr. Freeman in Adversary No. 98-0228 arise out of the same facts and circumstances and is also based upon the same November 11, 1992 letter.

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[13] *Id.* at 32.

[14] *Id.* at 33-34.

II. Conclusions of law

A. Jurisdiction of the court

Mr. Freeman and Mr. Horn make the same arguments in each of the three pending adversary proceedings. They assert that their claims are based upon state law causes of action in that they assert, among other things, claims for personal injury and emotional and psychological distress. They contend that no "general" rule prohibits identical suits from proceeding concurrently in state and federal court. They further assert that they are entitled to a jury trial on the claims, and that because the bankruptcy court may not conduct jury trials absent consent of the parties, which has not been given, their right to a jury remains intact. Finally, they argue that the court lacks subject matter jurisdiction to decide the case because of the jury demand, and because the district court has found that this is a "related case", the court should transfer the case back to the district court.

The court agrees with Mr. Freeman and Mr. Horn to the extent that there is no general rule that prohibits identical suits from proceeding concurrently in state and federal court. The court disagrees with the remainder of their argument.

The complaint filed by Freeman Horn and Inelco in Adversary Nos. 93-0173 and 93-0174 assert virtually the same causes of action as those asserted by Mr. Freeman and Mr. Horn in the pending adversary proceedings. Paragraph 1 of each of these complaints alleges that "this court has exclusive core jurisdiction of this action pursuant to 28 U.S.C. Section 157(b)(2)(C)". It is true that Adversary Nos. 93-0173 and 93-0174 were brought by the corporations, rather than Mr. Freeman and Mr. Horn individually. Nevertheless, it is without doubt and undisputed that this court had jurisdiction to decide Adversary Nos. 93-1073 and 93-1074. Furthermore, the answer filed by Mr. Freeman and Mr. Horn to Trustmark's complaint in Adversary No. 94-0059 contains virtually the

same causes of action as a defense to Trustmark's claim.[15] The answer filed in Adversary No. 94-0059 admitted that there was jurisdiction under 28 U.S.C. § 1334 and 11 U.S.C. § 105(a).[16]

The Fifth Circuit has determined that lender liability claims are core proceedings.[17] Therefore, this court clearly had jurisdiction to determine the issues raised by Freeman Horn in Adversary No. 93-0173, by Inelco in Adversary No. 93-1074, and by Trustmark in 94-0059.

The assertion by Mr. Freeman and Mr. Horn that they are entitled to a jury trial assumes that their claims have not already been tried. If their claims are barred by res judicata or collateral estoppel, they are not entitled to a jury trial, or any other additional trial, because their claims have already been tried. Dispositive motions such as the pending motions for summary judgment do not impact on the right to a jury trial; they determine whether or not there is a legal right to a trial at all.[18]

Finally, Mr. Freeman and Mr. Horn's argument that this court should transfer the cases back to the district court because the cases are related cases overlooks the fact that the district court referred the cases to the bankruptcy court.

The court concludes that it has jurisdiction to decide Trustmark's motion for summary judgment and determine whether the claims are barred by res judicata or collateral estoppel.

In the alternative, Mr. Freeman and Mr. Horn argue that the court should stay the proceeding

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[15] *See* Pl. 5 in Adversary No. 94-0059 - "Separate Answer of Defendants Carl D. Freeman, Jr. and Joseph A. Horn"

[16] *See* Pl. 1 in Adversary No. 94-0059 - "Complaint to Foreclose Deeds of Trust and for Deficiency Judgment"; and Pl. 5 at ¶ 11.

[17] *In re Baudoin*, 981 F.2d 736 (5th Cir. 1993).

[18] *See In re Mathews*, 203 B.R. 152, 161 (Bankr. D. Minn. 1996)(Holding that the bankruptcy court would rule on dispositive motions before transferring case to the district court in for a jury trial).

pending a resolution by the district court of the appeal from the decision of this court rendered in Adversary Nos. 93-0173, 93-0174, and 94-0059.

The court declines to do so. A final judgment is final for res judicata purposes even if an appeal from the judgment is pending.[19]

B. Standard for summary judgment

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[20]

C. Res judicata

Federal law determines the preclusive effect of a prior federal court judgment.[21] Under the doctrine of res judicata, parties and their privies are precluded from relitigating claims that were or should have been raised in a prior action and have reached a final judgment on the merits.[22]

Under federal standards there are four requirements for the application of res judicata:

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[19] *See Haynes v. Lemann*, 921 F.Supp. 385, 390 n. 1 (N.D. Miss. 1995), *affirmed*, 98 F.3d 1339 (5th Cir. 1996); *In re Jordan*, 151 B.R. 373, 377 (Bankr. N.D. Miss. 1992), *citing*, *Fidelity Standard Life Insurance Co. v. First National Bank & Trust Co.*, 510 F.2d 272 (5th Cir.1975) and *A.F. Pylant, Inc. v. Republic Creosoting Co.*, 285 F.2d 840 (5th Cir.1961).

[20] Bankruptcy Rule 7056, *adopting*, Fed.R.Civ.P. 56(c); *Smith v. Brenoettsy*, 158 F.3d 908 (5th Cir. 1998).

[21] *Haynes v. Lemann*, 921 F.Supp. at 389, *citing*, *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir.1995).

[22] *Haynes v. Lemann*, 921 F. Supp. at 389, *citing*, *Metro Charities, Inc. v. Moore*, 748 F.Supp. 1156, 1159 (S.D. Miss.1990); *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981).

(1) there must be an identity of parties or their privies in the two actions; (2) the judgment in the prior action must have been rendered by a court of competent jurisdiction; (3) the prior action must have concluded with a final judgment on the merits; and (4) the same claim or cause of action must be involved in both suits.[23]

These requirements have been met in the three pending adversary proceedings. As to the first requirement that there must be an identity of parties or their privies in the two actions, Mr. Freeman and Mr. Horn were both parties in the prior case. Each was directly named as a defendant in Adversary No. 94-0059, the suit by Trustmark seeking a deficiency judgment against the Freeman Horn entities based upon the execution of promissory notes and guaranties. They raised the lender liability claims as a defense to Trustmark's suit. In addition, as officers and shareholders of Freeman Horn, Mr. Freeman and Mr. Horn are in privity with Freeman Horn who was the plaintiff in Adversary No. 93-0173 asserting the same causes of action asserted in the pending cases.[24]

The second requirement is that the judgment in the prior action must have been rendered by a court of competent jurisdiction. This court had jurisdiction to determine the issues raised in the prior trial, which resulted in the memorandum opinion and judgment entered on June 30, 1998. Two of the matters were core proceedings that had been filed by the debtors, Freeman Horn and Inelco. The court also had jurisdiction over the complaint filed by Trustmark.

The third requirements is that the prior action must have concluded with a final judgment on the merits. The opinion and judgment rendered on June 30, 1998 is clearly a final judgment on the

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[23] *Id., citing, U. S. v. Shanbaum*, 10 F.3d 305, 310 (5th Cir.1994).

[24] *See Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir. 1992)(Where a non-party's interests were adequately represented by a party in the prior action, there is sufficient identity between the parties to apply the principles of res judicata.).

merits.

The fourth requirement is that the same claim or cause of action must be involved in both suits. To make this determination, the Fifth Circuit mandates application of the "transactional" test of the *Restatement (Second) of Torts § 24.*[25] Under this approach, the critical issue is whether the two actions were based on the "same nucleus of operative facts".[26] The court looks to "the factual predicate of the claims asserted, not the legal theories upon which the plaintiff relies".[27] A judgment on the merits operates as a bar to the later suit, even though a different legal theory of recovery is advanced in the second suit.[28]

The fourth requirement is met in this case. The claims raised by Mr. Freeman and Mr. Horn in the cross-complaint against Trustmark in Adversary No. 93-0172 arise out of the same factual circumstances as that previously tried in this court, namely the claim that Trustmark breached its obligations to them by failing to honor the loan commitment contained in the November 11, 1992 letter. These same issues were also raised by Mr. Horn in Adversary No. 98-0070 and by Mr. Freeman in Adversary No. 98-0228. The latter two adversary proceedings may arguably raise additional claims with respect to the extent of the damage caused by Trustmark's alleged wrongful acts. This does not affect, however, the court's conclusion that the same claim or cause of actions exist.

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[25] *Eubanks*, 977 F.2d at 171.

[26] *Id.*

[27] *Id.*

[28] *Nilsen v. City of Moss Point*, 701 F.2d 556, 564 (5th Cir. 1983). *See also Haynes*, 921 F.Supp. at 390 (because claims arise out of same operative facts pled in the original action, subsequent cause of action still constitutes same cause of action even though plaintiff purports to add new legal theories).

All of the elements of res judicata have been met. The claims raised by Mr. Freeman and Mr. Horn in the pending adversary proceedings have previously been adjudicated and decided against Mr. Freeman and Mr. Horn. Accordingly, the motions for summary judgment filed by Trustmark in each of the three pending adversary proceedings must be granted.

Having found that the cases are barred by the doctrine of res judicata, the court need not consider Trustmark's alternate claim that the cases are barred by collateral estoppel.

D. Conclusion

With respect to Adversary No. 93-0172, the cross-complaint filed by Mr. Freeman and Mr. Horn will be dismissed with prejudice. A cursory review of the complaint indicates that Trustmark may have already obtained the relief it sought against Mr. Freeman and Mr. Horn in this court's prior judgment. It appears that Trustmark's claims against C.E. Stone are still outstanding. If Trustmark seeks further relief from any of the defendants, it should file appropriate pleadings within 10 days of entry of this order. Failure to do so will result in dismissal of the entire adversary proceeding.

Mr. Horn's complaint filed in Adversary No. 98-0070 and Mr. Freeman's complaint filed in Adversary No. 98-0228 will be dismissed with prejudice.

New Orleans, Louisiana, December 3, 1998.

JERRY A. BROWN
BANKRUPTCY JUDGE

930172, 930173, 930174,
940059, & 940065

Original forwarded to Jackson, Mississippi

Ms. Lynne Stevens
U. S. Bankruptcy Court
P. O. Box 2448
Jackson, MS 39225-2448

Counsel for Freeman Horn, Inc., et al.
CARROLL INGRAM
INGRAM & ASSOCIATES
207 South 28th Avenue
P. O. Drawer 15039
Hattiesburg, MS 39404-5039

Counsel for Trustmark Nat'l. Bank
WILLIAM H. LEECH
SAMUEL KELLY
P. O. Drawer 1079
Jackson, MS 39215

THOMAS LILLY
MARCUS A. TREADAWAY, III
Suite 206
4273 I-55 North
Jackson, MS 39206

(av)

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TRUSTMARK NATIONAL BANK
DEFENDANTS

JUDGMENT

For the reasons assigned in the foregoing memorandum opinion,

IT IS ORDERED, ADJUDGED, AND DECREED that the cross-complaint filed by Carl D. Freeman, Jr. and Joseph A. Horn in Adversary No. 93-0172 is **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the case of *Joseph A. Horn v. Trustmark National* Bank, Adversary Proceeding No. 98-0070, is **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the case of *Carl Freeman v. Trustmark National* Bank, Adversary Proceeding No. 98-0228 is **DISMISSED WITH PREJUDICE.**

New Orleans, Louisiana, December 3, 1998.

JERRY A. BROWN
BANKRUPTCY JUDGE

930172, 930173, 930174,
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Original forwarded to Jackson, Mississippi

Ms. Lynne Stevens
U. S. Bankruptcy Court
P. O. Box 2448
Jackson, MS 39225-2448

Counsel for Freeman Horn, Inc., et al.
CARROLL INGRAM
INGRAM & ASSOCIATES
207 South 28th Avenue
P. O. Drawer 15039
Hattiesburg, MS 39404-5039

Counsel for Trustmark Nat'l. Bank
WILLIAM H. LEECH
SAMUEL KELLY
P. O. Drawer 1079
Jackson, MS 39215

THOMAS LILLY
MARCUS A. TREADAWAY, III
Suite 206
4273 I-55 North
Jackson, MS 39206

(av)