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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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U.S. BANKRUPTCY COURT
DIST. OF SOUTH CAROLINA

IN RE:

The Roof Doctor, Inc.,

Debtor.

C/A No. 97-01648-W

JUDGMENT

Chapter 11

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Debtor's objection to the proof of claim filed by Travelers Insurance Company is overruled and the claim is allowed as filed.

Columbia, South Carolina,
August 25, 1998.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

AUG 26 1994

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE
Hoffman US

LISA BAUCHMAN

Deputy Clerk

Bernstein

3 to chambers

ENTERED

AUG 26 1998

L.A.B.
DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at _____ O'clock & _____ min _____ M

AUG 25 1998

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (4)

IN RE:

The Roof Doctor, Inc.,

Debtor.

C/A No. 97-01648-W

ORDER

Chapter 11

THIS MATTER comes before the Court upon the Debtor's objection to the proof of claim filed by Travelers Insurance Company ("Travelers") in the amount of \$9,974.05. The proof of claim was based upon a judgment obtained by Travelers in a state court lawsuit. The Debtor ("Debtor" or "Roof Doctor") is now attempting to go behind the state court judgment through the bankruptcy claims objection process and re-litigate the merits of the state court lawsuit. The Travelers takes the position that the Debtor had a full and fair opportunity to litigate the claim in state court and therefore the determination of liability and the amount of the claim should be binding in the bankruptcy case. Based upon the presentations of counsel and upon the evidence submitted, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In 1995, Travelers filed a lawsuit in the Court of Common Pleas for the State of South Carolina ("state court"), against the Roof Doctor to collect a debt, case number 95-CP-10-4817. Michael J. McEachern ("Mr. McEachern"), the president of the Roof Doctor, filed an answer on behalf of the Roof Doctor to the state court complaint. Travelers then filed a motion to strike the answer of the Roof Doctor because it was not filed by a licensed attorney. Rather than hire an attorney in accordance with the law, Mr. McEachern continued to represent the Roof Doctor and following a hearing on the motion to strike the answer, on April 11, 1996, the state court judge

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issued a five (5) page order striking the Roof Doctor's answer. The Roof Doctor did not then retain an attorney or do anything else in the state court litigation and over a month later, on May 22, 1996 an order of default and judgment was entered against the Roof Doctor.

Mr. McEachern, still without the aid of counsel, then filed an appeal of the order striking the answer. On January 31, 1997, the Court of Appeals for the State of South Carolina issued an order dismissing the appeal which had the affect of affirming the striking of the answer and the entry of the default judgment. This order provided in full as follows:

The Travelers Insurance Company (Travelers) filed this action to collect on an account. The President of The Roof Doctor, Inc. submitted an answer on behalf of The Roof Doctor, Inc. The trial judge struck the answer as the President is not an attorney and the action of filing the answer constituted the unauthorized practice of law. The Roof Doctor, Inc. made no further appearance and in a subsequent order, the trial judge entered an order of default and judgment for Travelers. The President of The Roof Doctor, Inc. appeals on behalf of The Roof Doctor, Inc.

This Court notified The Roof Doctor, Inc. that a corporation may not be represented by a non-lawyer individual under In re: Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992), and requested The Roof Doctor, Inc. notify this Court regarding who would represent them for this appeal. Travelers filed a motion to dismiss the appeal as the President's purported representation of The Roof Doctor, Inc. is in violation of South Carolina law. The President responded arguing the requirement to obtain a lawyer to litigate this matter was tantamount to dismissing the appeal.

In State v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939), *modified by* In re: Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992), the Supreme Court held the appearance of an insurance adjuster before the South Carolina Industrial Commission on behalf of his company constituted the unauthorized practice of law. The adjuster argued that a person is authorized to represent himself, and a corporation acts through its agents, thus a corporation should be able to represent itself through

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one of its agents. The Supreme Court rejected this argument stating "A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys." State v. Wells, 191 S.C. at 480, 5 S.E.2d at 186 (citation omitted).

This rule was modified in In re: Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992) to allow a non-lawyer, officer, agent, or employee to represent a business entity under South Carolina Code Ann § 40-5-80 (1986) in civil magistrate's court proceedings. The President's actions in this case constitute the unauthorized practice of law. Accordingly, the motion to dismiss the appeal is GRANTED.

IT IS SO ORDERED.

The January 31, 1997 order of the South Carolina Court of Appeals was not appealed and became a final order. On February 25, 1997, the Roof Doctor filed its Chapter 11 petition.

CONCLUSIONS OF LAW

As stated by the Fourth Circuit Court of Appeals, res judicata or claim preclusion is applicable in bankruptcy cases.

Under res judicata principles, a prior judgment between the same parties can preclude subsequent litigation on those matters actually and necessarily resolved in the first adjudication. See Restatement (Second) of Judgments, §§ 13 et seq (1982); Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980); Federal Deposit Ins. Corp. v. Jones, 846 F.2d 221, 234-35 (4th Cir.1988). The doctrine encompasses two concepts: claim preclusion and issue preclusion, or collateral estoppel. Allen, 449 U.S. at 94, 101 S.Ct. at 414. Rules of claim preclusion provide that if the later litigation arises from the same cause of action as the first, then the judgment bars litigation not only of every matter actually adjudicated in the earlier case, but also of every claim that might have been presented. Nevada v. United States, 463 U.S. 110, 129-30, 103 S.Ct. 2906, 2917-18, 77 L.Ed.2d 509 (1983);



Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.), 898 F.2d 1544, 1549 n. 3 (11th Cir.), cert. denied, 498 U.S. 959, 111 S.Ct. 387, 112 L.Ed.2d 398 (1990). Issue preclusion is more narrow and applies when the later litigation arises from a different cause of action. Nevada, 463 U.S. at 130 n. 11, 103 S.Ct. at 2918 n. 11. It operates to bar subsequent litigation of those legal and factual issues common to both actions that were "actually and necessarily determined by a court of competent jurisdiction" in the first litigation. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979); Combs v. Richardson, 838 F.2d 112, 114 (4th Cir.1988).

In re Varat Enterprises, Inc., 81 F.3d 1310 (4th Cir. 1996). In applying principals of res judicata and collateral estoppel, the Court must apply South Carolina law.

To determine the preclusive effect of a state court judgment, "federal courts must, as a matter of full faith and credit, apply the forum state's law of collateral estoppel." Pahlavi v. Ansari (In re Ansari), 113 F.3d 17, 19 (4th Cir.1997) (citations omitted). Accordingly, federal courts give preclusive effect to state court judgments "whenever the courts of the State from which the judgments emerged would do so." *Id.*

In re Schriver, 218 B.R. 797 (Bkrtcy.E.D.Va. 1998).

In applying South Carolina law, the Fourth Circuit Court of Appeals has stated the conditions that must be present to apply res judicata.

Generally, claim preclusion occurs when three conditions are satisfied: 1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and, 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding. Kenny v. Quigg, 820 F.2d 665, 669 (4th Cir 1987); see also Justice Oaks, 898 F.2d at 1550 (listing same criteria as four elements).

In re Varat Enterprises, Inc., 81 F.3d at 1315. Also see Crestwood Golf Club, Inc. v. Potter, 493 S.E.2d 826, 328 S.C. 201 (S.C. 1997). In the matter before the Court, the prior judgment of the



South Carolina Court of Appeals was a final judgment rendered by a court of competent jurisdiction. Even if the filing of the Chapter 11 petition was within the time period to file an appeal of the order of the South Carolina Court of Appeals, the extension of this period pursuant to 11 U.S.C. § 108 has long expired. Additionally, the parties before the South Carolina Court of Appeals were the identical parties to the within claims objection proceeding. And finally, the issues currently before the Court are the same issues that were the subject of the previous litigation.

The Roof Doctor takes the position that the issues are different because once the default judgment was entered in state court, the merits of its defenses to the Travelers complaint were never addressed and it should therefore be given the opportunity to address those issues by objecting to the Traveler's proof of claim. The Court disagrees. While the issues determined by the South Carolina Court of Appeals were related to whether or not Mr. McEachern could represent the Roof Doctor, the issues raised in the pleadings are the same issues raised herein and as stated by the Fourth Circuit Court of Appeals, "[r]ules of claim preclusion provide that if the later litigation arises from the same cause of action as the first, then the judgment bars litigation not only of every matter actually adjudicated in the earlier case, but also of every claim that might have been presented". In re Varat Enterprises, Inc., 81 F.3d at 1315 citing Nevada v. United States, 463 U.S. 110, 129-30, 103 S.Ct. 2906, 2917-18, 77 L.Ed.2d 509 (1983) and Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.), 898 F.2d 1544, 1549 n. 3 (11th Cir.), cert. denied, 498 U.S. 959, 111 S.Ct. 387, 112 L.Ed.2d 398 (1990). Unlike collateral estoppel, for purposes of res judicata, issues that could have been raised and litigated in a previous lawsuit are barred.

Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940); 1B J. Moore, Federal Practice ¶ 0.405[1] (2d ed. 1974). Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205 (1979). The Roof Doctor asserts in objecting to the Traveler's proof of claim that it was not aware of changes in its worker's compensation insurance policy and therefore should not be liable for the additional worker's compensation insurance premiums which was the basis of the state court collection complaint. As this was the same defense that was available in the state court lawsuit, res judicata bars the re-litigation of those issues in the bankruptcy case. The Roof Doctor had a full and fair opportunity to litigate the matters raised in the state court and the Travelers should not now be penalized for the inactions of the Roof Doctor.

In addition to the Debtor's multiple opportunities to raise these same defenses to Travelers' claim in the state court action and despite Travelers filing its proof of claim with a copy of the state court judgment on June 16, 1997 and the confirmation of the Debtor's plan of reorganization on April 15, 1998, the Debtor did not file this objection to Travelers' claim until June 4, 1998, more than 2 years from the Debtor's first opportunity to assert these defenses. Therefore, even if the objection to the Traveler's proof of claim was not barred by res judicata, the principal of equitable estoppel should also bar the objection to the claim at this time.

The doctrine of equitable estoppel allows "a person's act, conduct or silence when it is his duty to speak," to preclude him from asserting a right he otherwise would have had against another who relied on that voluntary action. Black's Law Dictionary 538; see



also Jones, 846 F.2d 221 at 234 (quoting Dickerson v. Colgrove, 100 U.S. 578, 580, 25 L.Ed. 618 (1879)). The rule "is designed to protect any adversary who may be prejudiced by the attempted change of position." Guinness PLC v. Ward, 955 F.2d 875, 899 (4th Cir.1992). The doctrine applies in the bankruptcy context when four criteria are met: 1) the party estopped knew the relevant facts; 2) the party estopped intended for its conduct to be acted or relied upon, or the party acting had the right to believe the conduct was so intended; 3) the party acting was ignorant of the true facts; and, 4) the party acting relied on the conduct to its injury. Heritage Hotel, 160 B.R. at 378; In re Burkey Lumber Co. of Grand Junction, Colo., 149 B.R. 177, 180 (Bankr.D.Colo.1993); see also In re Momentum Manufacturing Corp., 25 F.3d 1132, 1136 (2nd Cir.1994).

In re Varat Enterprises, Inc., 81 F.3d at 1315.

For all of these reasons, it is the finding of this Court that the Roof Doctor was given the opportunity to actually litigate the issue of the underlying debt to Travelers and therefore res judicata bars the re-litigation of this issue in this Court. It is therefore,

ORDERED, that the Debtor's objection to the proof of claim filed by Travelers Insurance Company is overruled and the claim is allowed as filed.

AND IT IS SO ORDERED.

Columbia, South Carolina,
August 25, 1998.


UNITED STATES BANKRUPTCY JUDGE



CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

AUG 28 1998

Hoffman
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE *vs*

LISA BAUGHMAN

Deputy Clerk

Bernstein

3 to chambers