SO ORDERED,

Judge Selene D. Maddox

United States Bankruptcy Judge

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

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: ROBERT EDSELLE GRAMLING III **DEBTOR(S).**	**CASE NO.: 18-13020-SDM** **CHAPTER 11**
GREENWOOD LEFLORE HOSPITAL	**PLAINTIFF/CREDITOR**
V.	**ADV. PROC. NO. 19-01016-SDM**
ROBERT EDSELLE GRAMLING III	**DEFENDANT/DEBTOR**

SUA SPONTE ORDER GRANTING PARTIAL SUMMARY JUDGMENT

THIS CAUSE comes before the Court sua sponte. At the pre-trial conference in this adversary proceeding, the Court directed the parties to brief the issues of res judicata and claim preclusion as they apply to the question of whether the debt owed to the Plaintiff in this matter is nondischargeable. The Court has reviewed the briefs submitted and, on its own motion, now grants partial summary judgment to the Plaintiff/Creditor, Greenwood Leflore Hospital.

1. JURISDICTION.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. §157(a) and the Standing Order of Reference signed by Chief District Judge L.T. Senter and dated August 6, 1984. This is a "core proceeding" under 28 U.S.C. § 157(b)(2)(I)[1](matters concerning determinations of dischargeability).

II. FACTS AND PROCEDURAL HISTORY.

The Defendant in this adversary proceeding is Robert Edsel Gramling, III, who is the debtor in the underlying Chapter 11 bankruptcy proceedings. The Plaintiff is Greenwood-Leflore Hospital ("the Hospital"), which is one of Gramling's creditors. In 2007, the Hospital loaned Gramling money he used to attend nursing school, and he subsequently defaulted on his loan repayments.

On May 6, 2012, Gramling filed for Chapter 13 in Case No. 12-11836 ("*Gramling I*"). During the pendency of that case, the Hospital initiated an adversary proceeding (*Greenwood Leflore Hospital v. Gramling*, 12-01099-JDW or "*Gramling I AP*") against Gramling to determine the dischargeability of its judgment against him. That adversary proceeding terminated with Judge Woodard's entry of an *Amended Agreed Final Order Resolving Adversary Complaint* on May 1, 2013 ("the May 1, 2013 agreed order") which stated in relevant part:

> The Claim of Greenwood Leflore Hospital (Claim #16) in the amount of $21,153.87 is related to an Educational Tuition Loan Agreement and is therefore non-dischargable [sic]. The Court further finds the loan shall be paid in full through the plan plus 5% per annum interest. Upon Debtor's completion of the Chapter 13 plan the debt shall be deemed fully satisfied.
>
> IT IS THEREFORE ORDERED AND ADJUDGED that debt of $21,153.87 owed to Greenwood Leflore Hospital is nondischargeable pursuant to 11 U.S.C. § 523(a)(8). The Court further orders that upon payment of the debt plus

[1]Except where stated otherwise, all subsequent statutory references will be to Title 11 of the U.S. Code.

> 5% per annum interest, through the Chapter 13 plan, the debt will be deemed fully satisfied. The Creditor cannot seek any additional recovery after completion of the bankruptcy. The Chapter 13 Trustee is authorized to modify Debtor's Chapter 13 plan to comply with this Order, and amend Debtor's withholding as necessary.

Gramling I AP Dkt. *#15*. The adversary proceeding was officially closed on May 31, 2013. About seven months later, on January 6, 2014, Judge Woodard entered an order dismissing *Gramling I* for failure to make plan payments.

On August 8, 2018, Gramling filed for Chapter 11 bankruptcy in Case No. 18-13020 (hereinafter "*Gramling II*"), which is the case underlying this adversary proceeding. On September 5, 2018, Gramling filed *inter alia* his Schedule F, which listed the Hospital as an unsecured creditor. (*Gramling II* Dkt. #26). Notably, Gramling's entry for the Hospital does not identify the debt owed as a student loan but simply as an unspecified "Other."

On February 4, 2019, Gramling filed his Disclosure Statement and his Chapter 11 Plan of Reorganization (*Gramling II* Dkt. #62, 63). Neither of these documents referenced the Hospital or the debt owed to it specifically. Both the Disclosure Statement and the Plan proposed to pay all general unsecured creditors a pro rata share of Gramling's disposable monthly income, with any unpaid balances subject to discharge. In response, the Hospital filed the instant adversary proceeding ("*Gramling II AP*"), seeking a declaration reaffirming Judge Woodard's finding that the debt owed to the Hospital (now standing at $21,563.71 plus interest both accrued and accruing and future court costs) is nondischargeable. *Gramling II AP* Dkt. #1. The complaint also asked for an award of attorneys' fees pursuant to Fed. R. Bankr. P. 7008(b). *Id.* Gramling timely responded.

On July 1, 2019, a Scheduling Order (with Pre-Trial Conference) was entered in the adversary proceeding which set October 3, 2019 as the deadline for filing dispositive motions. *Gramling AP II* Dkt. #14. That deadline came and went without either party filing any summary judgment motions or other dispositive motions. After several continuances, the Court conducted a

Pre-Trial Conference hearing on March 25, 2020. At that time, the Court noted that up until that point, neither party had addressed the issues of claim preclusion and issue preclusion that were obviously raised by the May 1, 2013 agreed order in *Gramling AP I*. After some discussion, the Court directed the parties to brief those issues. That briefing is now complete, and on the basis of the parties' written arguments, the Court finds that partial summary judgment is appropriate.

III. DISCUSSION

A. Summary Judgment Standard.

A party is entitled to summary judgment "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting former Fed. R. Civ. P. 56(c)); see also Fed. R. Civ. P. 56(c)(1). The party seeking summary judgment bears the burden of demonstrating to the court the absence of a genuine issue of material fact. *Id.* at 323. "As to materiality, the Supreme Court has stated that '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). All reasonable doubt as to the existence of a genuine issue of material fact "must be resolved against the moving party." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980) (quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980)).

Rule 56 further provides:

> (e) If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
> . . . .
> (2) consider the fact undisputed for purposes of the motion;

> (3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it;
> . . . .

Fed. R. Civ. P. 56(e).

Furthermore, Rule 56(f) permits a court to issue a judgment independent of the motions filed, and after giving notice and a reasonable time to respond, the court may:

> (1) grant summary judgment for a nonmovant;
> (2) grant the motion on grounds not raised by a party; or
> (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Fed. R. Civ. P. 56(f).

The specific issue which the Court now considers sua sponte is a narrow one. Except for ancillary fact questions (such as matters pertaining to interest rates and attorneys' fees if the Hospital obtains a favorable outcome), the disposition of this case appears to turn entirely on the following disputed legal question: *Is the debt incurred by Gramling and owed to the Hospital dischargeable or nondischargeable?*

Or to put it more narrowly, at least with regard to this opinion: *Does the May 1, 2013 agreed order in Gramling AP I preclude discharge of the debt in the current bankruptcy case?* If the answer to this question is yes, then partial summary judgment in favor of the Hospital on the issue of dischargeability would be appropriate, with the ancillary matters mentioned above being the only issues left for the Court to consider. If the answer is no, then this adversary proceeding must proceed so that a new determination of dischargeability can be made by the Court.

B. Claim Preclusion, Issue Preclusion, and Judicial Estoppel in General.

Although the Court only directed the parties to brief the issues of claim preclusion (or res judicata) and issue preclusion (or collateral estoppel), the Hospital also briefly addressed the issue

of judicial estoppel. In the interests of completeness, all three doctrines will be considered by the Court.

Claim preclusion, also known as res judicata (Latin for "a matter decided"), is a legal doctrine which bars the relitigation of claims which either have previously been litigated in an earlier suit or which should have been raised in an earlier suit. *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999). There are four elements that must be present for claim preclusion to apply:

> (1) the parties are identical or in privity;
> (2) the judgment in the prior action was rendered by a court of competent jurisdiction;
> (3) the prior action was concluded by a final judgment on the merits; and
> (4) the same claim or cause of action was involved in both actions.

Southmark Corp., 163 F.3d at 934.

Issue preclusion, also referred to as collateral estoppel, is the legal principle stating that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties. *Restatement (Second) of Judgments* § 27 (1982). Issue preclusion applies if the following requirements are met:

> (1) the issue to be precluded must be identical to that involved in the prior action;
> (2) in the prior action the issue must have been actually litigated; and
> (3) the determination made of the issue in the prior action must have been necessary to the resulting judgment.

Southmark, 163 F.3d at 932.

Finally, judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999)(quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)). For judicial estoppel to apply, three elements must be met:

(1) The position of the party to be estopped is clearly inconsistent with the previous one;
(2) the court must have accepted the previous position; and
(3) the party's inconsistency must not have been inadvertent.

In re Supertrail Mfg. Co., Inc., 436 B.R. 381, 389 (Bankr. N.D. Miss. 2010).

C. Application of the three doctrines to the case *sub judice.*

With regard to claim preclusion, the Hospital argues that all four elements are met here, and the Court agrees. The parties are identical. The May 1, 2013 order was rendered by a court of competent jurisdiction. That order was a final judgment on the merits. And the same claim or cause of action (i.e. the nondischargeability of the debt) was involved in both actions.

The same holds true for issue preclusion. As the Hospital notes, the central questions in both *Gramling AP I* and *Gramling AP II* are exactly the same, i.e. whether the debt owed to the Hospital is a nondischargeable student loan. In the prior action, the issue was resolved through an adversary proceeding that culminated in an agreed order which was accepted and entered by Judge Woodard. Finally, the determination made of the issue in the prior action was not only necessary to the resulting judgment, it was effectively the entirety of the case.

With regard to judicial estoppel, the Hospital notes that Gramling's current position on the question of nondischargeability is clearly inconsistent with the position he took when he signed onto the May 1, 2013 agreed order, a position that Judge Woodard plainly accepted by entering said order. And obviously, this inconsistency was not the result of inadvertence.

The Court agrees with the Hospital's analysis that all three types of preclusion and/or estoppel seem to apply but will consider Gramling's arguments on rebuttal.

C. Gramling's Counterarguments.

1. <u>Is the Hospital's failure to affirmatively plead claim and issue preclusion fatal?</u>

Gramling first argues that the Hospital's failure to affirmatively plead claim and issue preclusion in its complaint bars it from raising such issues later. "Generally, res judicata is an affirmative defense that must be pleaded, not raised *sua sponte*." *Mowbray v. Cameron Cty., Tex.*, 274 F.3d 269, 281 (5th Cir. 2001). The Fifth Circuit, however, recognizes two exceptions to this general rule. *Mowbray*, 274 F.3d at 281. First, a court may consider claim preclusion even sua sponte in the interest of judicial economy where both actions were brought before the same court. *Id.* Second, the Fifth Circuit has held that:

> where all of the relevant facts are contained in the record before us and all are uncontroverted, we may not ignore their legal effect, nor may we decline to consider the application of controlling rules of law to dispositive facts, simply because neither party has seen fit to invite our attention by technically correct and exact pleadings.

Id.

This adversary proceeding marks the second time a court in the Northern District of Mississippi has been asked to adjudicate whether Gramling's debt to the Hospital is nondischargeable under § 523(a)(8). The uncontroverted record reflects that the question was answered affirmatively and decisively in an agreed order to which Gramling consented. The Court finds that the facts before it bring this matter within both exceptions recognized by the Fifth Circuit. Accordingly, consideration of claim preclusion and/or issue preclusion are allowed.

2. Was there an actual adjudication on the merits?

Gramling next argues that the prior adjudication of the debt's nondischargeability might not be binding upon this Court if there was not a "full adjudication on the facts." Gramling relies on Judge Houston's decision in *In re McLemore*, 94 B.R. 903 (Bankr. N.D. Miss. 1988). In that case, a creditor sought to have a state court judgment for punitive damages obtained against the debtor declared nondischargeable on the grounds that it was the result of a "willful and malicious"

action under § 523(a)(6). *McLemore*, 94 B.R.at 905. Upon review of the trial record, however, Judge Houston noted that the question of willfulness and maliciousness had not been specifically litigated, as the state court jury instructions permitted the jury to award punitive damages merely for "reckless disregard for the plaintiff's rights," a lower standard which would not support a finding of § 523(a)(6) liability. *Id.*

Consequently, Judge Houston declined to apply issue preclusion to resolve the dispute, although he indicated that he *would* have done so had the record satisfied the "willful and malicious" standard. *Id* at 905, 907 ("If the record of a prior proceeding clearly reveals that punitive damages were awarded based on a willful and malicious standard, collateral estoppel will apply to bar relitigation of whether the conduct was 'willful and malicious' in a subsequent bankruptcy dischargeability action.")

Gramling's reliance on *McLemore* is misplaced. In that case, Judge Houston was forced to look behind an ambiguous trial record in a state court proceeding to determine whether the jury verdict supported a finding of "willful and malicious" conduct. But there is no such ambiguity in the May 1, 2013 agreed order, which states clearly that the Hospital's claim "is related to an Educational Tuition Loan Agreement and is therefore nondischargeable [under § 523(a)(8)]."

Gramling next directs the Court's attention to *Matter of Pancake*, 106 F.3d 1242 (5th Cir. 1997) and Judge Woodard's opinion in *In re Blake*, 516 B.R. 352 (Bankr. N.D. Miss. 2014). The Court is somewhat baffled by this reliance, as both of these are cases in which the purportedly nondischargeable debt arose from a state court default judgment, with nothing in the record to show that the requirements for nondischargeability had been met or were even considered by the state court.

In *Pancake*, the Fifth Circuit affirmed the District Court's reversal of the Bankruptcy Court's finding of nondischargeability where the state court struck the defendant-debtor's answer before awarding a default judgment to the plaintiff-creditor. *Pancake*, 106 F.3d at 1244–45. In doing so, the Fifth Circuit noted that issue preclusion requires that the issue to be precluded must be one actually litigated in the prior action:

> For purposes of collateral estoppel, however, the critical inquiry is not directed at the nature of the default judgment but, rather, one must focus on whether an issue was fully and fairly litigated. Thus, even though Pancake's answer was struck, if Reliance can produce record evidence demonstrating that the state court conducted a hearing in which Reliance was put to its evidentiary burden, collateral estoppel may be found to be appropriate. All of that remains to be determined and we express no opinion thereon.

Id (noting that claim preclusion might still apply on remand if creditor came forth with record evidence that it had met its evidentiary burden for proving nondischargeability).

Similarly, in *Blake*, Judge Woodard was asked to determine the nondischargeability of a debt that arose from a default judgment obtained against a debtor ("Blake") who, while represented by counsel, did not respond to or defend the District Court suit of which he had notice. *Blake*, 516 B.R. at 355-56. Despite the default nature of the judgment, Judge Woodard concluded that the issue had been fully litigated for purposes of claim preclusion analysis because the District Court, after reviewing affidavits, depositions, and other evidence submitted by the plaintiff-creditor, specifically found that Blake had willfully and maliciously converted property of the plaintiff-creditor. *Id*. at 358-59. As Judge Woodard noted, "[t]he failure of a defendant to attend the trial does not prevent issue preclusion in a subsequent action, so long as the prior action was actually litigated in the defendant's absence." *Id.* at 358 (quoting *In re Evans*, 252 B.R. 366, 369 (Bankr. N.D. Miss.2000)).

The Court thinks that if a default judgment can satisfy the "actual litigation" element in subsequent proceedings even without the debtor's participation, then an adversary proceeding in which both parties fully participated before resolving the proceeding with an agreed consent judgment certainly can. Case law supports this view:

> The "actual litigation" element is of particular concern when a consent judgment is involved. A consent judgment is usually entered before the conclusion of the fact-finding process of a trial. It is a stipulated agreement, approved by the court and designed to end the costs and uncertainties of "actual litigation." The lack of actual litigation does not mean, however, that issue preclusion does not apply in cases involving consent judgments, at least under the federal law of preclusion. Consent judgments are given preclusive effect "where the factual findings necessary to a judgment are incorporated" into the consent judgment or "where parties have 'indicated clearly the intention that the decree to be entered shall ... determine finally certain issues.' " *People Who Care*, 68 F.3d at 178, n. 5 (*citing Klingman v. Levinson*, 831 F.2d 1292, 1296 (7th Cir.1987)). The intent to give conclusive effect is gleaned from the language of the consent judgment. *See Klingman*, 831 F.2d at 1296 (from a reading of the subject consent judgment's language, the Court stated, "[i]t is certainly reasonable to conclude that the parties understood the conclusive effect of their stipulation in a future bankruptcy proceeding."). If the satisfactory intent is shown, the actual litigation component of issue preclusion is satisfied. *See In re Austin*, 138 B.R. 898, 908 n. 2 (Bankr.N.D.Ill.1992). The existence of clear intent that the consent judgment has conclusive effect likewise satisfies the requirement that the determination was essential to the final judgment. *Id.* (citing *In re Halpern*, 810 F.2d 1061, 1064 (11th Cir.1987)).

In re Kmart Corp., 362 B.R. 361, 383–84 (Bankr. N.D. Ill. 2007).

In the case at bar, the May 1, 2013 agreed order contained the factual findings necessary to support a finding of claim preclusion. The order explicitly identified the Hospital's loan to Gramling as being made pursuant to an Educational Tuition Loan Agreement and is therefore nondischargeable under § 523(a)(8). Applying Judge Woodard's analysis from *Blake*, the Court concludes that, for issue preclusion purposes, the matter of nondischargeability was actually litigated.

3. The effect of dismissal.

Finally, Gramling argues that the dismissal of *Gramling I* without a discharge somehow negates the preclusive effect of the March 1, 2013 order. Gramling begins by citing to the general rule that dismissal of an underlying bankruptcy case will, in most cases, result in the dismissal of any pending adversary proceedings. *See generally Matter of Querner*, 7 F.3d 1199 (5th Cir. 1993) *and Un-Common Carrier Corp. v. Oglesby*, 98 B.R. 751 (Bankr. S.D. Miss. 1989).

Both cases are distinguishable because the adversary proceeding at issue in each case was still pending at the time of dismissal. In this case, the adversary proceeding had been fully resolved and closed for over seven months when the underlying bankruptcy case was dismissed. It does violence to the very idea of judicial finality to suggest, as Gramling does, that dismissal of a bankruptcy case effectively undoes the outcome of every agreed order, every resolved adversary proceeding, and every judicial finding that was entered during the case's pendency.

Finally, Gramling directs the Court's attention to *In re Pacher*, 553 B.R. 294 (Bankr. S.D. Miss. 2016), which Gramling says "does not help the Plaintiff." In fact, it helps the Hospital a great deal. First of all, in his brief, Gramling misstates the holding of *Pacher*, stating

> There, Judge Samson declined to give preclusive effect to a prior agreed judgment of nondischargeability in a case that had been dismissed for non-payment of a Chapter 13 plan payment before the debtor in the subsequent bankruptcy case was discharged.

Gramling Response Brief at pg. 7. In fact, Judge Samson did give preclusive effect to the prior agreed judgment of nondischargeability in *Pacher*. 553 B.R. at 296-97.

> The principles of res judicata apply if the following conditions are met: "(1) the parties must be identical in the two actions; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same cause of action must be involved in both cases." These conditions are met here, and res judicata applies to the prior judgment of nondischargeability. Pacher has not met her burden to show that the prior judgment should not be enforced.

Id. Indeed, Judge Samson's opinion in *Pacher* goes further:

> "In general, a determination of nondischargeability in one bankruptcy case bars redetermination of that issue in a subsequent bankruptcy case." *Bankr. Recovery Network v. Garcia (In re Garcia),* 313 B.R. 307, 310 (9th Cir. BAP 2004); *see also Swate v. Hartwell (In re Swate),* 99 F.3d 1282, 1287–88 (5th Cir.1996) (holding that where nature of obligation has not changed from one bankruptcy to the next, res judicata bars relitigation of obligation's nondischargeability); *Royal Am. Oil & Gas Co. v. Szafranski (In re Szafranski),* 147 B.R. 976, 989 (Bankr.N.D.Okla.1992) (holding that debtor could not lead "his creditor into the tangle of multiple bankruptcies, and ... use successive discharges so as to close a trap on the tired and unwary but basically innocent creditor").

Id. at 296.

In other words, far from supporting Gramling's position, *Pacher* holds that once a debt has been deemed nondischargeable, even by an agreed order resolving an adversary proceeding—as was the case in *Pacher* as well as here—claim preclusion bars relitigation of the issue and places the burden on the debtor to show that the nature of the obligation has changed. *Id.* at 296-97 ("[T]he burden is on the debtor to show that these debts may become dischargeable in the later case. Pacher has not met that burden.")

Thus far, Gramling has not suggested at any point that the nature of his debt to the Hospital has changed in character, nor has he presented any arguments that repaying this student loan now represents an undue hardship that might be grounds for discharge under § 523(a)(8). Applying the reasoning of *Pacher*, this Court concludes that the May 1, 2013 agreed order precludes relitigation of the nondischargeability of Gramling's student loan debt in his present Chapter 11 proceedings.

IV. CONCLUSION

Based on the foregoing analysis, the Court hereby grants sua sponte partial summary judgment to the Hospital on the issue of nondischargeability. Gramling is hereby precluded from

relitigating that issue. The parties are directed to submit a final pretrial order which outlines what remaining issues, if any, are still disputed by the parties within 30 days of the entry of this order.

It is so **ORDERED**.

##END OF ORDER##