

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:

TIMOTHY RAY WAUGH

Debtor

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BANKRUPTCY NO. 07-21511

O R D E R

The Court takes judicial notice that on February 3, 2009 Peoples Bank filed its Motion to Withdraw Objection by Creditor, Peoples Bank, relative to Objection by Debtor to Claim No. 1-1 and Objection to Confirmation of Plan.

The Court was not apprised of the filing of the above Motion when its signed Findings of Fact, Conclusions of Law, and Decision on February 5, 2009. A copy of this Decision was not entered of record in light of the Motion by Peoples. A copy of said Proposed Decision is attached hereto as Attachment A and is self-explanatory.

In that Decision, the Court concluded that if, in fact, Peoples Bank had obtained a prepetition Summary Judgment in the State Court wherein it was awarded \$3000.00 in Attorney's Fees, the Court would have to give res judicata effect and full faith, and credit thereto and allow the same, even if erroneous.

Fed. R. Bk. P. 3006 provides that a creditor may withdraw a claim as of right by filing a notice of withdrawal. However, if an objection the Claim is filed, the creditor may not withdraw the claim except on Order of the Court after hearing or notice.

In addition, N. D. Ind. L.B.R. B-3006-1(a), Withdrawal of Claim, provides that a Court may allow a claim that has been objected to be withdrawn without further notice and hearing if no objection or response is filed within twenty (20) days after the date of the request to withdraw.

It may well be that the Debtor will not object to the Withdrawal of the Claim for Attorney's Fees by Peoples Bank. However, one of the primary purposes of the Plan of the Debtor is to cure all prepetition arrears to Peoples Bank by the end of the Plan term.

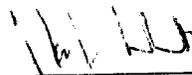
The Debtor's Plan provides that it will cure a prepetition arrears to Peoples Bank in the sum of \$11,876.00. The amount is not itemized.

The Objection to Confirmation by Peoples Bank asserts that the correct prepetition arrears is \$15,417.14. However, although the Claim by Peoples Bank asserts a prepetition arrears of \$15,417.14, the attachment to the Claim includes \$3,000.00 in the balance due and owing on the Petition date in the sum of \$62,417.14 as "other fees" and not as "attorney's fees", rather than as a part of the prepetition arrears. If the \$3000.00 in "other fees" is not included in prepetition arrears, these fees need not be paid over the life of the Plan.

Accordingly, in Order to determine how this case should be properly administered the Court shall hold a Status Conference on February 25, 2009 at 3:40 o'clock P.M.

SO ORDERED.

February 25, 2009



JUDGE, U. S. BANKRUPTCY COURT

Distribution:
Debtor
Attorney Casas
Attorney DeGuilio
Trustee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
TIMOTHY RAY WAUGH)
) BANKRUPTCY NO. 07-21511
)
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FINDINGS OF FACT
CONCLUSIONS OF LAW AND DECISION

I

Statement of Proceedings

This Chapter 13 case is before the Court on an Objection filed by the Debtor on November 15, 2008 (“Objection”) to the Claim No. 1-1 (“Claim”) filed by Peoples Bank (“Peoples”) on June 25, 2007.

The Objection asserts that the Claim by Peoples alleging that the prepetition Mortgage arrears owed by the Debtor to Peoples in the sum of \$15,168.00 does not itemize how that sum was arrived at. The Objection also asserts that the correct amount of the prepetition arrears is \$11,876.00, as calculated and as set out in the summary of the Debtor’s Plan at Paragraph No. 13 filed on July 9, 2007.

The Attachment to the Claim by Peoples alleges that included in the prepetition balance of \$62,417.14 owed by the Debtor to Peoples is the sum of \$3,572.20 incurred by Peoples, which is denominated by it generally as “other fees”. There was no further supporting itemization in the Claim as to how the sum of \$3,572.20 was arrived at, or what those “other fees” were. The section of the attachment to the Claim relating to “Attorneys Fees” was left blank. These alleged “other fees” were not included in the prepetition arrears Claim of Peoples, which was in the sum of \$15,168.00, but in the prepetition balance due.

The Response to said Objection filed by Peoples on December 5, 2007, stated that on or about November 7, 2007 Peoples provided Debtor’s Counsel with an itemization of the prepetition Mortgage

Attachment "A"

arrears allegedly due and owing by the Debtor to Peoples, attaching thereto as Exhibit "A", a document that is apparently a partial, computer, print-out of the loan history of the Debtor's Mortgage maintained by Peoples.

Exhibit "A" is not an itemization of the legal services rendered and attorney's fees incurred by Peoples, and merely contains two entries of \$1,000.00 and \$2,000.00 for attorney's fees and \$150.00 for Title work. Exhibit "A" does not state when the fees were incurred, to whom the fees were incurred, or whether any such fees were actually paid by Peoples to an attorney for legal services rendered to it in prosecuting its Secured Claim prepetition.

A Prehearing Conference was held on said Objection on January 29, 2008 and the parties stipulated that counsel for Peoples is an in-house counsel who is paid a salary, and who does not bill Peoples separately for the legal services rendered by him to Peoples in prosecuting Peoples' Secured Claim versus the Debtor. The parties further stipulated that the threshold legal issue to be decided is whether Peoples may recover prepetition reasonable attorney's fees in prosecuting its Secured Claim versus the Debtor when its in-house counsel is paid solely based upon a fixed salary. The parties were then ordered to file list of legal authorities in support of their respective positions.

Peoples filed its Memorandum of Law in Support of Reimbursement of Attorney Fees on February 29, 2008, while the Debtor on March 3, 2008 filed a "Motion to Cite Case".

II

Subject Matter Jurisdiction and Core Proceedings

No objections were made by the parties to the subject-matter jurisdiction of the Court. The Court finds subject-matter jurisdiction to be present, pursuant to 28 U.S.C. §1334(b). The Court also finds this contested matter is a Core Proceeding pursuant to 28 U.S.C. §157(b)(2)(B).

Although a claim versus a bankruptcy estate must arise out of a substantive obligation based on state law, or federal nonbankruptcy law, it is well established that the allowance or disallowance of a claim against a bankruptcy estate is expressly stated to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B). See In re Conejo Enterprises, Inc., 96 F.3d 346, 353 (9th Cir. 1996); Matter of U.S. Abatement, 79 F.3d 393, 398 + n. 9 (5th Cir. 1996).

III

The Position of Peoples

The Memorandum filed by Peoples states that \$3,000.00 in attorney's fees arose out of legal services rendered by Peoples' in-house counsel in filing and prosecuting a First Mortgage Loan Foreclosure and obtaining a Summary Judgment versus the Debtor in the State Court on January 9, 2007, and that the State Court awarded Peoples \$3,000.00 in attorney's fees.¹

Peoples' counsel noted that while in-house counsel is paid solely a salary, time expended in the prosecution of legal matters, and the fees collected are not irrelevant in determining the salary paid to in-house counsel.

Peoples stated that it located no Indiana cases or statutes that prohibit or limit the collection of attorney's fees by a mortgagee in prosecuting the foreclosure of a first mortgage on real estate by its salaried, in-house counsel, and only one Indiana case was found that is somewhat analogous to the threshold legal issue before the Court. This is the case of Streets v. M.G.I.C. Mortgage Corp., 378 N.E.2d 915 (Ind. App. 1978).

In Streets, the Court interpreted I.C. 24-4.5-3-404 of the Indiana Consumer Credit Code, which prohibits an agreement for the payment of attorney's fees for a "salaried employee of the lender" in the

¹ The first time the Court was apprised that there allegedly was a prepetition Summary Judgment entered versus the Debtor wherein the State Court awarded Peoples \$3,000.00 in attorney's fees was in this Memorandum. The Summary Judgment was not set out in Peoples' Claim.

case of a "consumer loan". The Court in Streets held that a First Mortgage Loan on a home was not a "consumer loan" for the purpose of the Indiana Uniform Consumer Credit Code. Id. 378 N.E.2d at 918.

IV

The Position of the Debtor

The Debtor merely cited one case, without discussion, in support of his position. The Debtor cited the case of Crum v. AVCO Financial Services, "552 N.E.2d §23" (SIC) (552 N.E.2d 823 (Ind. App. 1990)), as authority for the legal principle that a real estate mortgagee can only collect attorney's fees if they were actually incurred in the foreclosure proceeding. The Crum case was of no assistance in resolving the stipulated threshold issue as the Court in Crum merely held that when awarding attorney's fees, the Trial Court is empowered to exercise its sound discretion. Id. 553 N.E.2d at 831-32.

V

Conclusions of Law and Discussion

In order to file a claim cognizable in bankruptcy, a creditor must possess a debt based on state or federal law creating a substantive obligation independent of bankruptcy law. In Matter of Chicago, Milwaukee, St. Paul and Pacific Ry. Co., 878 F.2d 182, 184 (7th Cir 1989), (citing, Vanston Committee v. Green, 329 U.S. 156, 170, 67 S. Ct. 237, 243, 91 L.Ed. 162 (1946) (Frankfurter, J., concurring)).

The validity of a creditor's claim is determined by rules of State law, which as expansively used, includes all nonbankruptcy law that creates substantive claims. Grogan v. Garner, 489 U.S. 279, 111 S. Ct. 654, 657 + n. 9, 112 L.Ed.2d 754 (1991) (citing, Vanston Bondholders Protective Comm. V. Green, 329 U.S. 156, 161, 67 S. Ct. 237, 239, 91 L.Ed. 162 (1946)); Raleigh v. Illinois Department of Revenue, 530 U.S. 15, 120 S. Ct. 1951, 1955, 147 L.Ed.2d 13 (2000) (creditor's entitlements in

bankruptcy arise in the first instance from the underlying law creating the debtor's obligations subject to any qualifying or contrary provisions of the bankruptcy code. The "basic federal Rule" in bankruptcy is that State Law governs the substance of claims) (citing, Butner v. United States; 99 S. Ct. 914 (1979) and Vanston Bondholders Protective Committee v. Green, 67 S. Ct. 237); Travelers Cas. & Surety Co., of America v. Pacific Gas & Elec. Co., ___ U.S. ___, 127 S. Ct. 1199, 1205, 167 L.Ed.2d 178 (2007) "[w]hen the Bankruptcy Code uses the word 'claim' - which the Code itself defines as a 'right to payment', 11 U.S.C. §101(5)(A) - it is usually referring to a right to payment recognized under State law").

A federal court when adjudicating a claim based on state law is ordinarily required to apply the choice of law principles of the state in which it sits, i.e., the law of the forum state. Matter of Stoecker, 5 F.3d 1022, 1029 (7th Cir. 1993); In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 644 F.2d 633, 637 (7th Cir. 1981); Coldwell Banker & Co. v. Karlock, 686 F.2d 596, 600 (7th cir. 1982).

Where neither party has offered evidence of the applicable state law or asked the Court to take judicial notice thereof, an Indiana Court will apply the law of the forum, i.e., Indiana. See, e.g., Suyemasa v. Myers, 420 N.E.2d 1334, 1342 (Ind. App. 1981). In addition, it was held in Gonzalez v. Volvo of America Corporation, 752 F.2d 295, 299 (7th Cir. 1985), that where the parties fail to raise a possible conflict of substantive laws, the better rule is that the law of the forum controls. See also, Wood v. Mid-Valley, Inc., 942 F.2d at 425, 426 (7th Cir. 1991) (The operative rule is when neither party raises a conflict of law issue in a diversity case, the federal court simply applies the law of the state in which the federal court sits).

However, when the parties to a contract do agree on the law which should control, the Indiana Courts will give effect to that Agreement. Interurban Industries v. Twin States Publishing Co., Inc., 638 N.E.2d 882, 883 (Ind. App. 1994), (citing, Homer v. Guzulataitis, 567 N.E.2d 153,156 (Ind. App.

1991)). It was held in Paulansky v. Polish Roman Catholic Union of America, 219 Ind. 441, 39 N.E.2d 440, 447 (Ind. 1942) that an express choice-of-law provision will be given effect in the absence of “exceptional circumstances showing a purpose to commit a fraud on the law.”

Here, Paragraph 16 of the Mortgage expressly provides, in part, that “This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the property is located. All rights and obligations contained in this Security Instrument are subject to any requirements or limitations of applicable law.” In that the Real Estate as set out in the Mortgage is located in Indiana, the Court will apply the law of Indiana to Peoples’ Claim and the Debtor’s Objection thereto.

As to attorney’s fees, the “American Rule” denies attorney fees to a litigant in a federal court in the absence of a contract, applicable statute, or other exceptional circumstances. Alaska Pipeline Co. V. Wilderness Society, 421 U. S. 240 95 S. Ct. 1612, 44 L.Ed2d 141 (1975). Generally in Indiana, each party must pay his own counsel fees in the absence of a statute or agreement providing otherwise. Thor Electric Inc., v. Oberle & Associates, 741 N.E.2d 371, 382 (Ind. App. 2000); Barrington Mfg. Co. V. Draper Family Ltd. Partnership, 695 N.E.2d 135, 142 ((Ind. App. 1998); Trotcky v. Van Sickle, 227 Ind. 441, 85 N.E.2d 638 (1949); St. Joseph’s College, et. al. V. Morrison, Inc., 158 Ind. App. 272, 302 N.E.2d 865, 870 (1973); Parrish v. Terre Haute Sav. Bank, 438 N.E.2d 1, 3 (Ind. App. 4th Dist. 1982).

Paragraphs 14, 19, and 22 of the Mortgage and Paragraph 6(E) of the Note recorded by the Mortgagor, contain Agreements by the Debtor to pay attorney’s fees incurred by Peoples in enforcing its Rights created by the Mortgage upon default by the Debtor.

Paragraph 14 of the Real Estate Mortgage attached as Exhibit to Peoples’ Claim, Loan Charges, provides in part, as follows:

Lender may charge Borrower for services performed in connection with Borrower’s default for the purpose of protecting Lender’s interest in the Property and rights under tis Security Instrument, including, but not limited to, attorneys’ fees, property inspection, and valuation fees.

Paragraph 19 of said Real Estate Mortgage, Borrowers Right to Reinstate After Acceleration, provides, in part, as follows:

If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument,...

Paragraph 22 of said Real Estate Mortgage, Acceleration: Remedies., provides, in part, as follows:

If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

Finally, the Note by the Debtor to Peoples, which is secured by the Real Estate Mortgage, and attached as an Exhibit to People's Claim, provides at Paragraph 6(E), Payment of Note Holder's Costs and Expenses, provides as follows:

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

In the process of determining how to decide this contested matter, the Court has come to the conclusion that the initial stipulation of the parties that the threshold issue was whether attorney's fees could be awarded to Peoples when represented by in-house counsel was not correct.

The Claim does not set out the prepetition Summary Judgment alleged to have been entered versus the Debtor and in favor of Peoples by the State court in which the sum of \$3,000.00 in attorney's fees was awarded to Peoples. This was first brought to the Court's attention in Peoples' Memorandum of Law filed on February 29, 2008. Assuming, that said Summary Judgment was entered as alleged by Peoples, the correct issue is whether the Court should give res judicata or claim preclusion effect to any such Summary Judgment in deciding this contested matter.

This Court in In re Harper, 146 B.R. 438 (Bankr. N.D. Ind. 1992), discussed the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion), and the extent to which a State Court Judgment entered prior to the date of the Debtor's Petition had a preclusive effect as to issues subsequently raised between the parties to the State Court Judgment in the Bankruptcy Court. The Court wrote:

This Court has had occasion to address the issue of the res judicata (claim preclusive), or collateral estoppel (issue preclusion) effect of a prepetition, state court judgment in a subsequent bankruptcy proceeding on several occasions. Quite often these issues arise in the context of 11 U.S.C. §523, and require the application of Brown v. Felsen, 442 U.S. 127, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1969), and Grogan v. Garner, -- U.S. --, 111 S. Ct. 654, 658, N. 11 (1991). See, In re McHenry, 131 B.R. 669 (Bankr. N.D. Ind. 1989); In re Hart, 130 B.R. 817 (Bankr. N.D. Ind. 1991); In re Diaz, 120 B.R. 967 (Bankr. N.D. Ind. 1989); In re Tomsic, 104 B.R. 22 (Bankr. N.D. Ind. 1987); In re Rudd, 104 B.R. 8 (Bankr. N.D. Ind. 1987); and In re Guy, 101 B.R. 961 (Bankr. N.D. Ind. 1988); In re Schlotman, Case No. 89-60856 (Schlotman v. Affeld, Adv. Pro. No. 89-6117) (J. Lindquist, unpub. opin.) (Bankr. N.D. Ind., April 26, 1990); In re Cifaldi, Case No. 92-61076, (J. Lindquist, unpub. opin.) (Bankr. N.D. Ind., June 25, 1992).

When a bankruptcy court must generally give claim preclusive effect to a prior state court judgment was discussed in some detail in the case of In re Tomsic, 104 B.R. at 22, supra, where the Court stated:

The Supreme Court in examining the "full faith and credit clause" and 28 U.S.C. §1738 has stated, "a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered". Migra v. Warren City School District Board of Education, 465 U.S. 75, 80, 104 S. Ct. 892, 896, 79 L. Ed. 2d 56, 63 (1984). See also, Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985); McDonald v. West Branch, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984); Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

In Marrese the Court noted:

The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings, "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. §1738. This statute directs a federal court to refer to the preclusion law of the state in which judgment was rendered.

Marrese v. Academy of Orthopaedic Surgeons, 470 U.S. at 380, 105 S. Ct. 1327, 1331-32, 84 L. Ed. 2d 274.

* * * *

The Supreme Court in Allen v. McCurry, 449 U.S. 90, 96, 101 S. Ct. 411, 415, 66 L. Ed. 2d 308, 314 (1980), indicated that only a clear congressional intent contrary to 28 U.S.C. §1738 will permit a federal court to deny the preclusive effect of a state court judgment. In Kremer v. Chemical Construction Corp., 456 U.S. 461, 467, 102 S. Ct. at 1890, 72 L. Ed. 2d at 271, the Supreme Court stated, "an exception to §1738 will not be recognized unless a later statute contains an express or implied partial repeal... Repeals by implication are not favored." The Court gave as an example of clear intent the federal habeas corpus statute, 28 U.S.C. §2254. The Court in Kremer also stated, "§1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept rules chosen by the state from which the judgment is taken". Id. 456 U.S. at 481, 102 S. Ct. at 1898, 72 L. Ed. 2d at 280.

Id., 104 B.R. at 33.

Accordingly, as a general rule, a bankruptcy court must apply the doctrines of claim preclusion (res judicata), and issue preclusion (collateral estoppel) to prepetition state court judgments in accordance with the principles of the Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1 and 28 U.S.C. §1738. See e.g., In re Comer, 723 F.2d 737, 739 (9th Cir. 1984); Kapp Naturelle, Inc., 611 F.2d 703, 707-08 (8th Cir. 1979); Matter of Branch, 56 B.R. 954, 958-59 (Bankr. E.D. Mich. 1986); In re Morton, 43 B.R. 215, 217-18 (Bankr. E.D.N.Y. 1984); In re Eagson, 37 B.R. 471, 476-77 + N. 23 (Bankr. E.D. Pa. 1984); In re Novak, 37 B.R. 31, 32-33 (Bankr. D. Conn. 1983); Matter of Bloomer, 32 B.R. 25, 26 (Bankr. W.D. Mich. 1983); In re Sapphire Investments, 27 B.R. 56, 58 (Bankr. D. Ariz. 1983); In re KDI Corp., 14 B.R. 350, 352-54 (Bankr. S.D. Ohio 1981).

Id., 146 B.R. at 441-42. See also, Gouveia v. Tazbir, 37 F.3d 295, 300 (7th Cir. 1994) (The powers granted to the bankruptcy court under §105 are subject to the Full Faith and Credit Clause of the Constitution, and 28 U.S.C. §1738. The bankruptcy court must afford full faith and credit to a valid State Court judgment to the same extent as the rendering state). (Citing, In re Holiday Interval, Inc., 114 B.R. 177 (Bankr. W.D. Mo. 1989)); Majeske v. Fraternal Order of Police, Lodge No. 7, 94 F.3d 307, 312 (7th Cir. 1996) (28 U.S.C. §1738 “Thus directs all courts treat a state court judgment with the same respect it would receive in the court of the rendering state”) (citing, Matsushita Electric Industrial Co. v. Epstein, ___ U.S. ___, ___, 116 S. Ct. 873, 877, 134 L. Ed. 2d 6 (1996)) (quoting, Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-82, 102 S. Ct. 1883, 1897-98, 72 L. Ed.2d 262 (1982)). In re Dollie’s Playhouse Inc., 481 F.3d 998, 1000-01 (7th Cir. 2007) (“the doctrine of res judicata applies in the Bankruptcy context”) (quoting, Crop-Maker Soil Services, Inc., v Fairmont State Bank, 881 F.2d 436, 439 (7th Cir. 1989) (citing, Brown v. Felsen, 99 S. Ct. 2205 (1979))).

As noted by the Court in In re Bulic, 997 F.2d 299 (7th Cir. 1993), there are a few exceptions to the preclusion principles that State Court judgments be given full faith and credit in federal courts as they would in the State that issued them. Id., 997 F.2d at 304. These exceptions are applicable when the purported judgment is not a judgment because of want of jurisdiction of the court which rendered it over the persons of the parties or the subject matter of the suit, or because it was procured by fraud. Id., 997 F.2d at 304 + N. 7 (Citing, Heiser v. Woodruff, 327 U.S. 726, 736, 66 S. Ct. 853, 857, 90 L. Ed. 2d 970 (1946), and Browning v. Navarro, 826 F.2d 335 (5th Cir. 1987)). See also, In the Matter of Brady, Texas, Municipal Gas Corporation, 936 F.2d 212, 218 (5th Cir. 1991) (Collecting cases); Kapp v. Naturelle, Inc., 611 F.2d 703, 707-08 (8th Cir. 1979).

As this Court noted in In re Harper, 146 B.R. 438 (Bankr. N. D. Ind. 1992):

In Heiser v. Woodruff, [327 U.S. 726, 66 S. Ct. 853 (1946)], the Supreme Court recognized the general equitable powers of a bankruptcy court, and the two specific grounds on which a proof of claims based upon a prior judgment could be challenged. The two grounds are (1) want of jurisdiction of the Court which rendered it over the person or the parties or the subject matter of the suit; and (2) procurement of the judgment by fraud. Id., 327 U.S. at 736, 66 S. Ct. at 858. While Heiser recognized these two equitable grounds upon which a prior judgment could be challenged in a bankruptcy court it also expressly held that the bankruptcy court was still bound by the principles of res judicata. Id., 327 U.S. at 737, 66 S. Ct. at 858. See, Kapp v. Naturelle, Inc., 611 F.2d 703, 708 (8th Cir. 1979) (Default Judgment, collecting cases); In re Morton, 43 B.R. 215, 217-18 (Bankr. E.D.N.Y. 1984).

Thus, if the creditor's claim is predicated upon a pre-petition, state court judgment the claim may be attacked as invalid in the bankruptcy court on the grounds that the court rendering the judgment did not have jurisdiction over the parties or the subject matter of the suit or that the judgment was the product of fraud, collusion or duress, see In re Fazio, 41 B.R. 865, 867 (Bankr. E.D. Pa. 1984), and cases cited therein. However, if the prepetition state court judgment based on a contract claim is otherwise valid, the court will be bound under the principles of full faith and credit and res judicata to allow the judgment to stand.

Id., 146 B.R. at 440. See also, In re Shaner, 96 B.R. 132, 134.35 (Bankr. S. D. Ohio 1989); In re Garafano, 99 B.R. 624, 629-31 (Bankr. E. D. Pa. 1989); In re Hillsborough Holdings Corp., 218 B.R. 6127, 619-20 (Bankr. M.D. Fla. 1991).

Without this Court so deciding, the State Court may or may not have erred in awarding attorney's fees in the sum of \$3000.00, when counsel for Peoples was in-house counsel on a salary if, as Peoples asserts, the State Court did so when it entered a Summary Judgment versus the Debtor.

However, if the State Court Summary Judgment was erroneous as to attorney's fees, this would not change this Courts decision as in Indiana, mere errors of law do not deprive a court of its jurisdiction or open its judgment to collateral attack; such a judgment is voidable and not void, and can only be corrected by direct appeal. In re Canganeli, 132 B.R. at 369, 387 n. 4 (Bankr. N. D. Ind. 1991), (citing, In re Marriage of Truax, 522 N.E. 2d 402, 405 (Ind. App. 1988)); D.L.M. v. V.E.M., 438 N.E. 2d 1023, 1028, 31 A.L.R. 4th 336 (Ind. App. 1982); Town of St. John v. Homebuilders Ass'n. of

Northern Indiana, Inc., 428 N.E. 2d 1299, 1302 (Ind. App. 1981); Kricke v. Farmers and Merchants Bank of Boswell, 151 Ind. App. 7, 279 N.E. 2d 254, 260-61 (Ind. App. 1972), Cushman v. Warren-Sharf Asphalt Paving Co., 220 F. 857, 862 (7th Cir. 1915), cert. den. 238 U.S. 621, 35 S. Ct. 603, 59 L. Ed. 1493)). Where a court has jurisdiction of the subject matter and of the person, and renders a judgment not in excess of the jurisdictional power of the court, no judgment it may render within the issues is void, however erroneous it may be. State of Indiana v. Dorsett, 368 N.E. 2d 259, 262 (Ind. App. 1st Dist. 1977).

As observed by the United States Supreme Court in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), the res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. Id., 452 U.S. at 398, 101 S. Ct. at 2428. See In re McHenry, 131 B.R. 669, 673 (Bankr. N.D. Ind. 1989). And as the United States Supreme Court explained in Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325, 47 S. Ct. 600, 604, 71 L. Ed. 2d 1069 (1927), an “erroneous conclusion” reached by the court in the first suit does not deprive the defendants in the second action “of their right to rely upon the plea of res judicata A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action].” See also, Aircraft Brokering Systems Corp. v. Local 856, International Union, etc., 97 F.3d 155, 161 (6th Cir. 1996) (Collateral estoppel provides that “a fact, question, or right distinctly adjudged in the original actions cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view”) (Citing, Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979)) (Quoting, United States v. Moser, 266 U.S. 236, 242, 45 S. Ct. 66, 67, 69 L. Ed. 2d 262 (1924)).

Thus, in the context of this contested matter, as to the issues raised by the parties relating to the Objection by the Debtor to Claim, which do not implicate §523(a), this Court must determine if it must give full faith and credit and res judicata or claim preclusion effect to the alleged State Court Summary Judgment rendered by the Court prior to the date of the Debtor's Petition, pursuant to the Full Faith and Credit Act. 28 U.S.C. §1738, assuming Peoples can provide evidence that such a Judgment was entered. Matter of Bulic, 997 F.2d 299, 304-05 + N. 6 (7th Cir. 1993) (Bankruptcy Court was required to give the State Court Judgment the same preclusive effect that an Indiana State Court would give it. Since 28 U.S.C. §1738 calls for giving judgments the full faith and credit that the State that issued them would, the Court must look to Indiana rather than federal law) (Citing, Marrese v. Academy of Orthopaedic Surgeons, 470 U.S. 373, 380, 105 S. Ct. 1327, 1331, 84 L. Ed. 2d, 274 (1985); Bicknell v. Stanley, 118 B.R. 652, 659 (S.D. Ind. 1990)).

Indiana law provides two separate doctrines under which a prior judgment bars litigation in a subsequent case: claim preclusion and issue preclusion. Starzenski v. City of Elkhart, 87 F.3d 872, 877 (7th Cir. 1996) (Citing, Watson Rural Water Co. v. Indiana Cities Water Corp., 540 N.E.2d 131, 134 (Ind. Ct. App. 1989). Claim preclusion bars “a subsequent action on the same claim between the same parties or those in privity with them”. Id., 87 F.3d at 871 (quoting, In re Marriage of Moser, 469 N.E.2d 762, 765 (Ind. Ct. App. 1984)).

Thus, the Court will look to the law of res judicata or claim preclusion of the State of Indiana in determining whether the alleged prepetition State Court Summary Judgment versus the Debtor and in favor of Peoples in which Peoples has alleged that the State Court awarded it \$3000.00 in attorney's fees, has preclusive effect in this contested matter.

Under Indiana law, the doctrine of res judicata, or claim preclusion applies when:

1. The former judgment was issued by a court with jurisdiction;

2. The matter now in issue was or might have been determined in the former suit;
3. The parties (or their privies) are identical; and,
4. There was a judgment on the merits.

Yellow Cab of Bloomington, Inc. v. Williams, 583 N.E. 2d 774, 777 (Ind. App. 1991); State Exchange Bank of Culver v. Teague, 495 N.E.2d 262, 266 (Ind. App. 1986) (collecting cases).

In Indiana, the entry of a Summary Judgment is a judgment on the merits, and merges or bars the action for res judicata purpose. Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1286 (Ind. 1994) rehrg. den.; Foshee v. Shoney's, 637 N.E.2d 1277, 1280 (Ind. 1994); Albright v. Pyle, 637 N.E. 2d 1360, 1363 (Ind. App. 4th Dist. 1994); Richards v. Franklin Bank & Trust Co., 381 N.E. 2d 115, 118 (Ind. App. 1978); Blake v. Blake, 391 N.E. 2d 848, 855 (1979).

Accordingly, based on the foregoing analysis, as an interim or interlocutory Order, it is hereby,

ORDERED, that on or before February 20, 2009, Peoples shall file a Certified copy of the State Court Summary Judgment versus Debtor and in favor of Peoples and serve counsel for the Debtor. And it is further,

ORDERED, That a Status Conference as to said Objection shall be held on Monday 3, 2009 at 11:10 o'clock A. M. February 3, 2009

[Handwritten Signature]

JUDGE, U. S. BANKRUPTCY COURT

Debtor
 Attorney Casas
 Attorney DeGulio
 Trustee
 U. S. Trustee