UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS LYNN SCOTT, Debtor.	Case No. 92-5-7165-MM **MEMORANDUM OPINION AND ORDER THEREON**

INTRODUCTION

Before the court is the debtor's objection to the claim of David and Margaret Rios. For the reasons that follow, the debtor's objection is overruled, and the claim of the Rios' is allowed in the amount of $30,550.17.

FACTS

On May 3, 1989, the debtor, Thomas Lynn Scott, executed a promissory note in the amount of $265,000 made payable to David and Margaret Rios as consideration for a loan. The proceeds of the loan was for the purchase of a single family residence located at 7470 Bayliss Court, San Jose. A note to the Rios' was secured by a second deed of trust in the Bayliss Court property.

After the debtor defaulted under the first deed of trust, the holder of the first trust deed foreclosed on the property, wiping out the Rios' interest. At the time of the foreclosure, Scott was in default on both mortgages, and a balance of $57,000 remained on the note to the Rios'. In March 1990, the Rios' filed a suit in the Superior Court for Santa Clara County against Scott for breach of contract under the promissory note and for other relief. In April 1991, the court entered against Scott a default judgment for the principal amount of $57,000.00, interest of $13,192.77, $416.50 in

costs, and $4,379.00 in attorneys' fees, totalling $74,988.27.

In July 1992, Scott filed a motion in the Superior Court to set aside or to vacate the default judgment. The court denied the motion by order entered on August 26, 1992. Scott did not appeal the court's order.

Scott filed a chapter 13 petition on October 13, 1992. The Rios' filed a proof of secured claim for $86,044.17 in November 1992 and later amended their claim to include attorneys' fees for a claim in the total amount of $89,954.67. The Rios' claim is based on the default judgment entered against the debtor in April 1991 in the Superior Court for Santa Clara County and on an abstract of judgment recorded in November 1991. The debtor objects to the Rios' claim, arguing that recovery is prohibited under the California anti-deficiency statute, Cal. Civ. Code § 580b, and that they waived their security by failing to protect it against foreclosure by a senior lienholder, and thereby, waived their right to enforce the note under the "one-action rule".

DISCUSSION

A. Res Judicata Applies to Claims Objections

As a general rule, in allowing and disallowing claims of creditors, bankruptcy courts are required to give res judicata effect to prior judgments of non-bankruptcy courts. Kapp v. Naturelle, Inc., 611 F.2d 703, 708 (8th Cir. 1979)(citing Heiser v. Woodruff, 327 U.S. 726, 733 (1946)). Res judicata prevents relitigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in a prior proceeding. Brown v. Felsen, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979). Matters previously adjudicated between the same parties by a court of competent jurisdiction may not be relitigated in the bankruptcy court. Kapp v. Naturelle, 611 F.2d at 708.

B. California Preclusion Law Bars Relitigation Of Debtor's Defenses

To determine whether res judicata or collateral estoppel applies, a federal court applies the preclusion law of the state which issued the prior judgment. Kremer v. Chemical Construction Corp., 456 U.S. 461, 482 (1982). Under California law, res judicata and collateral estoppel apply only to

judgments and orders that are final. Service Employees Int'l Union v. Hollywood Park, Inc., 197 Cal. Rptr. 316 (Cal. Ct. App. 1983). The order denying the debtor's motion to vacate the default judgment is a final appealable order which the debtor elected not to appeal. Tunis v. Barrow, 184 Cal. App. 3d 1069, 1074, 229 Cal. Rptr. 389, 391 (Cal. Ct. App. 1986). Relief from an order must be sought from the court that rendered the underlying judgment. Rocovich v. United States, 933 F.2d 991, 995 (D.C. Cir. 1991)(construing Fed. R. Civ. P. 60(b)). The debtor has already sought relief in that forum by way of the motion to set aside default or to vacate judgment.

Res judicata bars not only the reopening of the original controversy but also subsequent litigation of all issues which were or could have been raised in the original suit. Torrey Pines Bank v. Superior Court (White), 216 Cal. App. 3d 813, 821, 265 Cal. Rptr. 217, 221 (Cal. Ct. App. 1989). The protection against a deficiency judgment is an affirmative defense that must be raised by the defendant or it is waived. Palm v. Schilling, 199 Cal. App. 3d 63, 67 fn. 3, 244 Cal. Rptr. 600 (Cal. Ct. App. 1988)(dicta). Cf. Doney v. Tambouratgis, 23 Cal. 3d 91, 151 Cal. Rptr. 347 (1979)(defendant's failure to plead and prove affirmative defense, except by motion for nonsuit and post-trial motions for new trial and for judgment notwithstanding the verdict, precludes him from raising matter on appeal). The debtor had ample opportunity to raise the anti-deficiency and one-action rule defenses before the Superior Court. It is not entitled to a new trial in this forum because res judicata precludes the belated assertion of defenses to causes of action finally adjudicated in the state court. Kapp v. Naturelle, 611 F.2d at 708.

C. Default Judgment Has Res Judicata Effect

Under California law, a default judgment is res judicata as to the issues tendered by the complaint, and the defendant is estopped from denying in a subsequent action any allegation contained in the former complaint. Ely v. Gray, 224 Cal. App. 3d 1257, 274 Cal. Rptr. 536, 539 (Cal. Ct. App. 1990); Flood v. Simpson, 119 Cal. Rptr. 675, 680 (Cal. Ct. App. 1975). If entered by a court having jurisdiction of the parties and subject matter, and absent fraud or collusion, even a default judgment operates as res judicata and is conclusive of whatever is essential to support the judgment. Kapp v. Naturelle, Inc., 611 F.2d at 707. Although the claimant has the ultimate burden of persuasion, the burden of going forward with the evidence to overcome the prima facie effect

established by a proof of claim is on the objecting party. In re Fullmer, 962 F.2d 1463 (10th Cir. 1992). Accord In re Estrada's Market, 222 F. Supp. 253 (S.D. Cal. 1963). The debtor has made no allegations of fraud or collusion in connection with the default judgment in the Superior Court, so res judicata applies to this proceeeding.

In the Kapp case, the debtor objected to the proofs of claim filed by thirteen judgment creditors who had obtained pre-petition default judgments against both the debtor's corporation and the debtor individually. The claiming creditors argued that res judicata precluded the bankruptcy court from reconsidering the debtor's personal liability for the corporate debts. The district court affirmed the bankruptcy judge's ruling that the claims be disallowed and that the debts were corporate debts for which the individual debtor, Kapp, was not liable. However, the circuit court reversed the holdings of the lower courts; the judgments finally and conclusively established the validity and amounts of the claims against Kapp notwithstanding that they were obtained by default because the defense was clearly available to Kapp at the time of the state proceedings.

CONCLUSION

Based on the foregoing reasons, the claim of David and Margaret Rios is allowed in the amount of $30,550.17 after applying a credit for a postpetition payment in the amount of $44,438.10 made by the debtor's sister. The doctrine of res judicata precludes the relitigation of the Rios' claim. Accordingly, the debtor's objection based on the anti-deficiency statute and the one-action rule is overruled.

Good cause appearing, it is SO ORDERED.