THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	CASE NO. 99-51578
ROBERT ANDREW ZOVODNY,	)	
Debtor	)	CHAPTER 7
	)	
	)	
	)	
JOHN R. SHORT,	)	ADV. NO. 99-5132
Plaintiff	)	
	)	JUDGE MARILYN SHEA-STONUM
v.	)	
	)	**ORDER GRANTING**
ROBERT ANDREW ZOVODNY	)	**PLAINTIFF'S MOTION FOR**
Defendant	)	**SUMMARY JUDGMENT**

This matter is before the Court on cross motions for summary judgment filed by plaintiff, John Short ("Plaintiff"), and defendant-debtor, Robert Zovodny ("Defendant"). Pursuant to the Court's request at a pre-trial conference in this matter, the parties filed supplemental pleadings regarding a specific issue raised by the cross motions for summary judgment. (Plaintiff's supplemental pleading and his motion for summary judgment shall hereinafter be collectively referred to as "Plaintiff's Motion" and Defendant's supplemental pleading and his motion for summary judgment shall hereinafter be collectively referred to as "Defendant's Motion"). The matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28

U.S.C. §157(b)(2)(I) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

A. BACKGROUND

On August 11, 1998, Plaintiff filed a complaint against Defendant in the Common Pleas Court of Summit County, Ohio (the "Ohio Complaint") alleging that Defendant caused injury to commercial real property owned by Plaintiff and being rented by Defendant (the "Property"). (The Ohio Complaint, together with all other pleadings filed in response and actions taken in relation to the Ohio Complaint will hereinafter be referred to as the "Ohio Litigation"). On December 15, 1998, the common pleas court entered an "Order Referring Case to Arbitration and Appointing Arbitrators." That referral order states, in part, that "[i]t appears to the Court that all interrogatories and answers thereto have been filed, all motions have been ruled upon, and the issues are joined, and the case is ready for trial." The "trial" referenced by the referral order was a hearing before a panel of arbitrators at which each party was allotted one and one-half hours to present their respective cases.

On February 25, 1999, the arbitrators filed a "Report and Award of Arbitrators." That report certifies that the arbitrators "heard the evidence and allegations of the parties, and have justly and equitably tried all the matters in controversy, and do therefore make the following award: to Plaintiff for Seventeen Thousand and 00/100 ($17,000)." No appeal of the arbitrators' award was taken and, on April 14, 1999, the common pleas court entered a "Final Judgment Entry" whereby it incorporated the arbitrators' award into a final judgment of the court.

On May 25, 1999, Defendant filed a voluntary chapter 7 bankruptcy petition. Listed, among others, on Defendant's Schedule F - Creditors Holding Unsecured

Nonpriority Claims was Plaintiff, for a judgment in the amount of $17,000.00. On September 10, 1999, Plaintiff filed a complaint (the "Adversary Complaint") alleging that the amount owed to him by Defendant was not dischargeable in his chapter 7 bankruptcy pursuant to 11 U.S.C. §523(a)(6).

Thereafter, the parties filed their respective cross motions for summary judgment and their supplemental pleadings. In Plaintiff's Motion, Plaintiff contends that entry of judgment against Defendant in the Ohio Litigation should collaterally estop Defendant from relitigating the issues raised in the Adversary Complaint and that summary judgment should, therefore, be entered in Plaintiff's favor. In Defendant's Motion, Defendant contends that, because the judgment against Defendant in the Ohio Litigation merely established liability and made no independent findings of fact, the doctrine of collateral estoppel should not apply in this case.[1] Based upon a review of the pleadings and for the reasons set forth below, the Court determines that Plaintiff's Motion should be granted.

B. STANDARD OF REVIEW

A court shall grant a party's motion for summary judgment "if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th

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[1] In Defendant's Motion, Defendant also states that because the Adversary Complaint pleads only that the judgment in the Ohio Litigation should be given preclusive effect, "Plaintiff is not entitled to an independent determination by this Court regarding the nature of the debt owed to him." This conclusory statement, which is wholly unsupported in Defendant's Motion, is without merit and will not be addressed any further in this Order.

Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992).

C. DISCUSSION

The doctrine of collateral estoppel applies to bankruptcy proceedings and can be invoked in a nondischargeability action to prevent the relitigation of issues already decided by a state court. *Grogan v. Garner*, 498 U.S. 279 (1991). When applying the collateral estoppel doctrine, the principles of the Full Faith and Credit Statute (28 U.S.C. §1738) require a bankruptcy court to "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." *Rally Hill Productions, Inc. v. Bursack (In re Bursack)*, 65 F.3d 51, 53 (6th Cir. 1995), *citing Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). *See also Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6th Cir. 1997). Accordingly, this Court must look to Ohio substantive law to determine whether the judgment in the Ohio Litigation should have any preclusive effect in this adversary proceeding.

Pursuant to Ohio law, the doctrine of collateral estoppel bars the relitigation of an issue if: (1) the issue is identical to an issue decided in the prior litigation; (2) the issue was necessarily decided in the prior litigation; (3) the parties had a full and fair opportunity to litigate the issue in the prior litigation and the judgment rendered in that prior litigation is final and on the merits; (4) the issue was actually litigated in the prior litigation; and (5) the party against whom preclusion is sought is the same as, or in privity with, the party to the prior litigation. *See Cashelmara Villas Limited Partnership v. DiBenedetto*, 623

N.E.2d 213, 215, 87 Ohio App. 3d 809, 813-14 (Ohio Ct. App. 1993). In their respective cross-motions for summary judgment and supplemental pleadings, the parties do not raise as an issue whether factors four and five of the foregoing list are met in this case. Accordingly, the Court will only address factors one, two and three.

(1) Whether the issue in the Adversary Complaint is identical to that decided in the Ohio Litigation: Pursuant to §523(a)(6) of the Bankruptcy Code, a chapter 7 discharge will not discharge an individual debtor from any debt "for willful and malicious injury by debtor to another entity or to the property of another entity." *See* 11 U.S.C. §523(a)(6). A "willful and malicious injury" for purposes of §523(a)(6) is an injury that an actor intended to occur as a result of some deliberate act and not merely an injury that happened to occur because an intentional act was taken. *Kawaauhau v. Geiger,* 523 U.S. 57, 118 U.S. 974 (1998). Debts arising from recklessly or negligently inflicted injuries do not fall within the compass of §523(a)(6). *Id*. Therefore, the issue that Plaintiff is trying to preclude from being relitigated in this adversary proceeding is whether Defendant's actions and any resulting harm to the Property because of those actions were deliberate and intentional.

The Ohio Complaint set forth only one cause of action and alleged, in pertinent part, the following:

> 3. Defendant willfully, wantonly and purposely caused major damage and destruction of [the Property] . . . in the amount of Twenty-two Thousand Seven Hundred Fifty Dollars ($22,750.00).
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> 4. Plaintiff further states that additional damage was done to the rear exit door of [the Property] . . . purposely with malice and intentionally in the amount of One Thousand Dollars ($1,000.00).
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> 5. In the months preceding the termination of Defendant's lease, Defendant purposely and maliciously and with the purpose of causing the Plaintiff additional expenses turned on the lights of [the Property] . . . and allowed

water to run.

6. Plaintiff further states that the Defendant took without permission, two (2) chairs from the lobby of [the Property] . . . causing Plaintiff to be damaged in the amount of Seven Hundred Sixty-six Dollars ($766.00).

7. Plaintiff further states that the Defendant not only negligently, but purposely, willfully, and with the purpose of destroying Plaintiff's property, caused extensive damage to [the Property] . . . in removing equipment owned by Defendant.

8. Defendant further willfully, wantonly, purposefully and with evil motive removed lighting fixtures, switch fixtures, door locks and other items from [the Property] without permission or authority.

Based upon such alleged misdeeds, Plaintiff prayed for judgment against Defendant "for compensatory damages in the amount of Thirty-five Thousand Dollars ($35,000) and for punitive damages in the amount of Five Hundred Thousand Dollars ($500,000)."

In Defendant's Motion, Defendant argues that the issue raised in the Ohio Complaint is not identical to the issue in the case at bar because paragraph 7 of the Ohio Complaint constitutes an allegation that Defendant also acted negligently. *See* Defendant's motion for summary judgment at unnumbered pg. 6 ("Although most of [the Ohio Complaint] alleges that [Defendant's] actions in causing the damage were malicious, wanton and purposeful, and made with evil motive, Plaintiff also alleges that [Defendant] acted merely negligently"). This argument is without merit as the only facts alleged in the Ohio Complaint go to support a cause of action for an intentional tort.

An intentional tort is one in which the actor intends to produce the harm that ensues. *See Haller v. Borror Corp.*, 552 N.E.2d 207, 212, 50 Ohio St.3d 10, 16 (Ohio 1990). *See also Cincinnati & Suburban Bell Tel. Co. v. Eadler*, 61 N.E.2d 795, 75 Ohio App. 258 (Ohio Ct. App. 1944) (recognizing intentional tort for damage to another's

property).

> If the actor knows that the consequences are certain, or substantially certain, to result from his act, and he still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent and becomes mere recklessness . . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence . . . . All three have their important place in the law of torts, but the liability attached to them will differ.

Kunkler v. Goodyear Tire & Rubber Co., 522 N.E.2d 477, 481, 36 Ohio St. 3d 135, 139 (Ohio 1988) (*citing* Restatement (Second) of Torts §8A cmt. b (1965)). A cause of action for negligence requires a showing of a duty, a breach of that duty, and damage caused as a result of that breach. *See Mussivand v. David*, 544 N.E.2d 265, 45 Ohio St.3d 314 (Ohio 1989). In contrast to an action for an intentional tort, an action for negligence is not dependent upon whether a defendant intended to cause harm.

In the Ohio Complaint, the only cause given for the alleged property damage was Defendant's "willful," "purposeful," "malicious," and "wanton" action. *See* Ohio Complaint ¶¶ 3-8. That Complaint simply did not plead an alternative theory of negligence. Nowhere in the Ohio Complaint does Plaintiff allege that there existed a duty between the parties or contend that, because of a breach of that duty, the Property was damaged. Arguably, the Ohio Complaint could have been more artfully drafted. However, when viewed in its entirety, it is clear that the reference to "negligence" in paragraph 7 was made only to distinguish Defendant's intentional acts from negligence and not to allege any cause of action other than an intentional tort.

Based upon the foregoing, the Court finds that the allegations in the Ohio Complaint clearly set forth actions by Defendant which, if proven to be true, would provide the basis for a finding of "willful and malicious injury" as those terms are defined

in §523(a)(6). Thus, the issue of whether Defendant willfully and maliciously caused harm to the Property for purposes of this adversary proceeding is identical to the issue raised in the Ohio Litigation.[2]

(2) Whether the issue was necessarily decided in the Ohio Litigation: In Defendant's Motion, Defendant claims that the issue in this adversary proceeding was not "necessarily decided" in the Ohio Litigation because the judgment in that litigation only established liability and did not include specific findings that Defendant acted willfully and maliciously.

To support his contention Defendant relies on *In re Chapman*, 228 B.R. 899 (Bankr. N.D. Ohio 1998), in which a debtor-defendant was not collaterally estopped from relitigating a §523(a)(6) action against him despite a prior state court criminal conviction against debtor-defendant for felonious assault. In that case, the court determined that the doctrine of collateral estoppel did not apply because the *mens rea* standard required to sustain a conviction under Ohio's felonious assault statute is different from that which is used to determine dischargeability of a debt under §523(a)(6). *See In re Chapman*, 228

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[2] In Defendant's Motion he contends that the Federal Rules of Evidence would preclude Plaintiff from entering a copy of the Ohio Complaint into evidence at a trial of this matter and that, therefore, this Court's consideration of the Ohio Complaint in ruling on Plaintiff's Motion is impermissible. Apart from a cursory reference to the Federal Rules of Evidence, Defendant sets forth no analysis of how or why his contention is supported by those rules. Morevover, Defendant ignores case authority which holds that, unless highly prejudicial, all pleadings, opinions, journal entries, and orders in previous litigation should be reviewed by a court when determining whether issues argued and decided in that previous litigation are subject to the doctrine of collateral estoppel. *See, e.g. Combs v. Richardson*, 838 F.2d 112 (4th Cir. 1988); *Wheeler v. Laundani*, 783 F.2d 610 (6th Cir. 1986); *In re Ross*, 602 F.2d 604 (3d Cir. 1979). *See also, Roesch v. The Cleveland Trust Co.*, 230 N.E.2d 746, 749, 12 Ohio Misc. 239, 424 (Ohio Ct. C. P. 1967). Accordingly, this contention is without merit and will not be addressed further in this Order.

B.R. 899, 904-05 (Bankr. N.D. Ohio 1998) (discussing the distinction between "knowingly" and "willfully and maliciously"). Unlike the underlying judgment in the *Chapman* case, the judgment in the Ohio Litigation was based upon a one count complaint for an intentional tort that specifically alleged willful and malicious conduct by Defendant. Accordingly, Defendant's reliance on *Chapman* is misplaced.

The doctrine of collateral estoppel applies only to those factual issues that were necessary for a fact-finder to make a decision and non-essential findings or other remarks (i.e. dicta) are not subject to collateral estoppel effect. However, this does not mean that a court or arbitration panel must expressly declare each finding for the doctrine of collateral estoppel to apply. If the court or arbitration panel was required to consider an issue in determining that a claim was meritorious, then relitigation of that issue is precluded. *See, e.g., Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352 (11th Cir. 1985) (based upon arbitration panel's judgment that did not include specific findings but did award defendant debit balance and margin account interest, plaintiff was collaterally estopped from bringing subsequent RICO action against defendant). *See also Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1321 (9th Cir. 1992), *citing Ashe v. Swenson*, 397 U.S. 436, 444 (1970) ("When the issue for which preclusion is sought is the only rational one the fact finder could have found, then that issue is considered foreclosed, even if no explicit finding of that issue has been made"); *Nelson v. Swing-a-Way Mfg. Co.*, 266 F.2d 184, 187 (8th Cir. 1959) ("The doctrine of collateral estoppel applies to matters necessarily decided in the former judgment even if there is no specific finding or reference thereto").

The Ohio Complaint contained only one cause of action that clearly alleged willful and malicious conduct by Defendant. Thus, the arbitration panel that considered that Ohio

Complaint could only have found Defendant liable if it found that Defendant acted willfully and maliciously. Although the judgment in the Ohio Litigation contains no specific finding of willful and malicious conduct by Defendant, it is the only rational finding the arbitration panel could have reached in assigning liability to Defendant.[3] Accordingly, the Court finds that the issue of whether Defendant willfully and maliciously caused harm to the Property was necessarily decided in the Ohio Litigation.

(3) Whether the parties had a full and fair opportunity to litigate the issue in the Ohio Litigation and whether the judgment rendered therein was final and on the merits: Pursuant to Rule 15 of the Rules of Superintendence for the Courts of Ohio ("Sup. R."), judges of the courts of common pleas in the State of Ohio may adopt a plan for the mandatory arbitration of civil cases. *See* Sup. R. 15(A)(1). Pursuant to this provision, the Summit County Court of Common Pleas promulgated local rules ("S.C. Loc. R.") which provide, *inter alia*, that every civil case (except those dealing with title to real property) with an amount actually in controversy of $50,000.00 or less may be submitted to mandatory arbitration. *See* S.C. Loc. R. 10.02(A). Unless an arbitration award is timely appealed, that award becomes final and has the same attributes and legal effect as a court rendered verdict. *See* Sup. R. 15(A)(2)(c) and S.C. Loc. R. 10.17.

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[3] In the Ohio Complaint, Plaintiff prayed for compensatory damages in excess of those awarded by the arbitration panel, as well as punitive damages, none of which were awarded by the arbitration panel. In Defendant's Motion, he contends that because the full amount of damages were not awarded Defendant could not have been found liable for an intentional act. *See* Defendant's motion for summary judgment at unnumbered pg. 6 ("It is unlikely that a court, when making a finding against a defendant, would award less than the full value of the plaintiff's damages if it found that the defendant acted intentionally and with malice"). As liability and damage are distinct elements in any tort-based cause of action, this argument is without merit. Because the Ohio Complaint alleged only one basis for liability, this Court is not at liberty to redefine why liability was imposed in the judgment in the Ohio Litigation.

The parties do not dispute that the judgment in the Ohio Litigation was final and on the merits. Defendant does, however, contend that because the matter was referred to mandatory arbitration he was not given a full and fair opportunity to litigate the issue of whether his actions against the Property were willful and malicious. In determining whether a party had a full and fair opportunity to litigate a prior action for purposes of applying collateral estoppel, the issue is not whether a party to the prior proceeding fully prosecuted his case but whether that party had the opportunity to do so. *See Bank One, Akron, N.A. v. Atwater Enterprises, Inc.*, 96 Ohio App. 3d 59, 65, 644 N.E.2d 667, 670 (Ohio Ct. App. 1994); *Cashelmara Villas Limited Partnership v. DiBenedetto*, 623 N.E.2d 213, 215, 87 Ohio App. 3d 809, 813 (Ohio Ct. App. 1993).

In support of his claim that he was not afforded an opportunity to fully and fairly litigate his case, Defendant contends that he was provided with no alternative judicial forum in which to prosecute the Ohio Litigation. This contention is simply not correct. Had Defendant desired that the arbitration award not ripen into a final judgment he could have appealed that award and proceeded to a trial *de novo*. *See* Sup. R. 15(A)(2)(d) and S.C. Loc. R. 10.17. Instead, for reasons unexplained, Defendant allowed the arbitrators' decision to become final and thus assumed all the attendant consequences of his inaction. Defendant cannot now claim that this verdict is somehow entitled to less force and effect than one which would have been obtained if he had sought relief and proceeded to trial before a jury, especially in light of the clear and unambiguous language of Sup. R. 15(A)(2)(c) and S.C. Loc. R. 10.17.

Also in support of his claim that mandatory arbitration somehow denied him an opportunity to fully and fairly litigate his case, Defendant notes that, pursuant to the common pleas court's local rules, each party was given only one and one-half hours to

present his case. *See* S.C. Loc. R. 10.19(A)(1) and (2). Other than a general reference to this time constraint, Defendant fails to explain how it precluded him from adequately presenting his case to the arbitrators. Moreover, Defendant fails to explain why, if this time constraint did somehow preclude him from fully presenting his case, he did not seek an enlargement of time pursuant to Loc. R. 10.19(B).[4] As with his decision not to appeal the arbitrators' award, Defendant cannot now attempt to second guess his defense strategy by claiming that the prescribed but flexible time limits prohibited his from fully and fairly litigating his case.

Finally, Defendant claims that "Defendant. . .*may have not had* full incentive to litigate the intentional, malicious and willfulness issue, as evidenced by his admissions before the arbitration panel that he did indeed cause the damage to Plaintiff's property. . . . State of mind was more likely not as important to [Defendant] in the arbitration proceeding as was the amount of damages which potentially could be awarded to the Plaintiff." *See* Defendant's supplemental pleading at pg. 12 (emphasis added). Such claim is nothing but mere conjecture and does not support a finding that Defendant was denied an opportunity to fully and fairly litigate his case in arbitration.

Arbitration awards have the same collateral estoppel effect as court judgments unless the arbitration proceeding was unfair or the result unreliable, or unless giving the award preclusive effect would be incompatible with other legal or contractual policies. *See, e.g. Ivery v. United States*, 686 F.2d 410 (6th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983) (discussing both Federal and Michigan law). *See also Dorrance v. Lee*, 976 P.2d

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[4] Loc. R. 10.19(B) sets forth that "[f]or good cause shown . . . the time parameters set forth in Loc R. 10.19(A) may be altered, but only by the judge assigned to the case . . . ."

904, 907-08 (Haw. 1999) (and cases cited therein); Restatement (Second) of Judgments §84 (1992). In Defendant's Motion he sets forth nothing to support a conclusion that the arbitration award in the Ohio Litigation is not subject to application of the doctrine of collateral estoppel. Accordingly, the parties had a full and fair opportunity to litigate the issue in the Ohio Litigation and the judgment rendered therein was final and on the merits.

D. CONCLUSION

Based upon the foregoing, the Court finds that, as to the issue of whether Defendant's actions and any resulting harm to the Property because of those actions were willful and malicious pursuant to §523(a)(6), the doctrine of collateral estoppel applies to the judgment in the Ohio Litigation and Defendant is precluded from relitigating that issue in this adversary proceeding. Accordingly, there are no genuine issues as to any material facts in this case and Plaintiff is entitled to judgment as a matter of law. Plaintiff's Motion is, therefore, well taken and is hereby granted. Defendant's Motion is not well taken and is hereby denied. A final judgment consistent with this Order will be entered separately.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 2/25/00