IT IS SO ORDERED.

Dated: 10:42 AM February 14 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	CASE NO. 04-55022
ROGER LEE AND		
CHARLOTTE CHRISTINE THOMAS	)	
Debtors	)	CHAPTER 7
	)	
	)	
	)	
BILL AND LINDA DELONG,	)	ADV. NO. 04-5189
Plaintiffs	)	
	)	JUDGE MARILYN SHEA-STONUM
v.	)	
	)	
ROGER LEE AND		
CHARLOTTE CHRISTINE THOMAS		
	)	
Defendants	)	

MEMORANDUM OPINION
I.GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
II. DENYING DEFENDANTS' MOTIONS TO JOIN TRUSTEE AND ATTORNEY CEK AS PARTIES
III. DENYING DEFENDANTS' MOTION FOR A COPY OF PLAINTIFFS' VIDEOTAPE OF 1000 W. WATERLOO ROAD

This matter is before the Court on the motion for summary judgment (Docket #12) filed by plaintiffs, Bill and Linda Delong ("Plaintiffs"), and the reply to Plaintiffs' motion for summary judgment (Docket #13) by defendants-debtors, Roger Lee and Charlotte Christine Thomas ("Defendants"). After several pre-trial conferences and additional motions filed by Defendants,[1] 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 July 12, 2004, Plaintiffs recovered judgment against Defendants in the Common Pleas Court of Summit County, Ohio ("Common Pleas Court"), Case No. CV2003-08-4949, for the total sum of $19,070.68 plus interest and costs. (All pleadings and actions taken in relation to that case will be referred to as the "Ohio Litigation") The substance of the Ohio Litigation filed by Plaintiffs, lessors, against Defendants, lessees, involved unpaid rent and property damage to the rental premises at 1000 W. Waterloo Rd., Akron, Ohio.

Initially, the Ohio Litigation was heard on May 20, 2004, during a bench trial before

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In a motion dated June 9, 2005, Defendants requested that this court join Attorney Derek Cek, Defendants' bankruptcy counsel, and the chapter 7 Trustee as parties to the within adversary proceeding (Docket #16). In their motion, Defendants contend that they have a claim against Mr. Cek for his failure to warn them that Plaintiffs could successfully challenge their right to a discharge from the debt at issue. Regarding their request to join the chapter 7 Trustee, Defendants invoke Plaintiffs' alleged failure to abide by Ohio's Landlord Tenant Act Requirement that Plaintiffs provide a written accounting of the their $1,000 security deposit, and assert that this claim should be prosecuted by the chapter 7 Trustee. Also on June 9, 2005, Defendants filed a motion requesting a copy of Plaintiffs' videotape showing the damages to 1000 W. Waterloo Rd. (Docket #14), stating they are entitled to it under the "rules of discovery." This court will address these motions at the conclusion of this Opinion.

the Magistrate, who issued his decision on May 24, 2004. Defendants did not appear at trial, nor did they object to the Magistrate's Decision. On July 12, 2004, the Common Pleas Court issued a Final and Appealable Order adopting the Magistrate's Decision with its conclusions and findings and awarding judgment in favor of Plaintiffs.

On September 14, 2004, Defendants filed a voluntary chapter 7 bankruptcy petition. Listed, among others, on Defendants' Schedule F - Creditors Holding Unsecured Nonpriority Claims were Plaintiffs, for a judgment in the amount of $19,070.68. On December 13, 2004, Plaintiffs filed a complaint ("Adversary Complaint") alleging that the amount owed to them by Defendants was not dischargeable in their chapter 7 bankruptcy pursuant to 11 U.S.C. §523(a)(6).

Plaintiffs filed their motion for summary judgment pursuant to the Adversary Complaint on May 9, 2005. Defendants filed their reply to Plaintiffs' motion for summary judgment *pro se* on June 9, 2005, as well as a request for permission to file a Civ. R. 60(B) motion for relief from judgment (Docket #15) in the Ohio Litigation . During a hearing on July 6, 2005, this Court granted Defendants' request for leave to file their Civ. R. 60(B) motion. Subsequently, on July 11, 2005, Defendants filed their Civ. R. 60(B) motion in the Ohio Litigation, one day prior to the expiration of the one-year time period set forth in Civ. R. 60(B). Defendants asserted as a basis for relief that they were given erroneous instructions by their bankruptcy counsel regarding the outcome of the Ohio Litigation and its effect on the chapter 7 bankruptcy case, and that their reliance on this allegedly incorrect advice constituted excusable neglect pursuant to Civ. R. 60(B)(1).

On August 2, 2005, Defendants were granted a general discharge in their chapter 7

bankruptcy case under 11 U.S.C.§727. On September 13, 2005, the Common Pleas Court denied Defendants' Civ. R. 60(B) motion, finding that it was not timely filed, and that Defendants had asserted no basis for relief by any valid establishment of excusable neglect and/or viable defense to the Plaintiffs' claims addressed during the bench trial.

In their motion for summary judgment with respect to the Adversary Complaint, Plaintiffs contend that the debt owed to them by Defendants is not dischargeable pursuant to §523(a)(6) because it is the result of willful and malicious action as previously decided in the Ohio Litigation. They argue that there are no genuine issues as to any material fact, and that they are entitled to judgment as a matter of law on the basis of *res judicata*.[2]

Defendants respond in their reply to Plaintiffs' motion for summary judgment that the material facts *are* in dispute and that Plaintiffs are not entitled to judgment as a matter of law. They allege that the condition of the premises was poor and uninhabitable at the time they took possession, and that Plaintiffs are not entitled to have the premises effectively returned to them in a better state than when they leased it to Defendants through the satisfaction of the Common Pleas Court judgment. Defendants also restate the argument raised, and ultimately rejected by the Common Pleas Court, in their Civ. R. 60(B) motion for relief from judgment that their failure to appear at trial was a result of their reliance on

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The term *res judicata* is more appropriately titled "claim preclusion". "In *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1, the United States Supreme Court expressed its preference for the use of the terms 'issue preclusion' and 'claim preclusion' to refer to the preclusive effect of a judgment in foreclosing future litigation rather than the more traditionally utilized terms 'collateral estoppel' and 'res judicata'" *In re Fordu*, 201 F. 3d 693, 704(6th Cir. 1998). However, claim preclusion does not apply to claims of nondischargeability because no such claim exists until bankruptcy is filed. *Spilman v. Harley*, 656 F. 2d 224, 226(6th Cir. 1981); *In re Sweeney*, 276 B.R. 186, 196 (6th Cir. BAP 2002); *In re Wilcox*, 229 B.R. 411, 415 fn2, (Bankr. N.D. Ohio 1998). Therefore, because this adversary proceeding addresses the dischargeability of a debt in bankruptcy, the attempt by Plaintiffs' counsel to argue res judicata as to the effect of the Ohio Litigation will be deemed as referencing the doctrine of issue preclusion.

the faulty advice of their bankruptcy counsel.

B. DISCUSSION

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 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).

Nondischargeability

As previously noted, because the claim that the plaintiffs ask to be declared nondischargeable is based on the Final and Appealable Order in the Ohio Litigation, the matter properly framed before the Court in this proceeding is one of issue preclusion. When applying the doctrine of issue preclusion, 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 (6thCir. 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.

Ohio law recognizes issue preclusion as occurring when a fact or issue (1) was actually and necessarily litigated in the previous action, (2) was determined by a court of competent jurisdiction, and (3) involved the party against whom issue preclusion is presently asserted as a party (or in privity with a party) to the prior action. *In re Fordu*, 201 F. 3d. at 704 (*quoting Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1987)).

Defendants cannot and do not dispute the applicability of these factors. The Court will now consider their application to the procedural history of the litigation between these parties.

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 Plaintiffs are trying to preclude from being relitigated in this adversary proceeding is whether Defendants' actions and any resulting harm to the property because of those actions were deliberate and intentional.

The Common Pleas Court concluded by way of adoption of the Magistrate's Decision that the evidence presented at trial established "willful vandalism and destruction of the residential property on Waterloo Road." It further stated that the damages "can only be concluded as vandalism and willful destruction, not the result of any such accident." Based upon that determination by the Common Pleas Court, this Court finds that Defendants' actions provided the basis for a finding of "willful and malicious injury" as courts have defined those terms under §523(a)(6). Thus, the issue of whether Defendants willfully and maliciously caused harm to the rental premises for purposes of this adversary proceeding is identical to the issue raised and decided in the Ohio Litigation.

Defendants argue that their reliance on the allegedly faulty advice of bankruptcy counsel prevented them from appearing at trial and litigating the issue of whether or not their actions against the rental premises were willful and malicious. They further contend by way of an affidavit attached to their reply to Plaintiffs' motion for summary judgment that the evidence of damages set forth during trial was, instead, evidence of their good faith attempts to repair various defects that either existed at the commencement of the lease, or arose during their time of occupancy.

In determining whether Defendants had a full and fair opportunity to litigate the prior action for purposes of applying issue preclusion, the issue is not whether they fully prosecuted their case, but whether they 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).

The Common Pleas Court specifically found that Defendants "were duly noticed of the trial...and that their non-appearance is found to have been as a result of a willful and voluntary act to not appear to defend against the claim of the Plaintiffs. ... The pro se Defendants in this matter have been in that status for some extended period of time and full well have had explained to them the circumstances of their pro se representation."

Later, in its Order denying Defendants' Civ. R. 60(B) motion for relief from judgment, the Common Pleas Court concluded that Defendants failed to provide an explanation as to the substantial delay in filing their motion for relief from its Final and Appealable Order, or submit any other explanation in mitigation as to why they did not appear for the May 20, 2004 bench trial to present evidence in contravention of Plaintiffs' claims or address the Magistrate's Decision by way of filing objections. Further, the Common Pleas Court rejected Defendants' argument that their reliance on misinformation from their attorney constituted grounds for excusable neglect or any other basis for granting relief pursuant to Civ. R. 60(B).

For reasons unsatisfactory to the Common Pleas Court, Defendants allowed the Magistrate's Decision to become final, and thus assumed all the attendant consequences of their inaction. They cannot now claim that this judgment is somehow entitled to less force and effect than one which possibly would have been obtained if they had appeared to defend the allegations presented by Plaintiffs at trial. Therefore, this Court finds that Defendants in this matter had a full and fair opportunity to litigate the issue as to whether or not they willfully and maliciously inflicted damage to the rental premises, and that the judgment rendered therein was final and on the merits.

C. CONCLUSION

Based upon the foregoing, this Court finds that, as to the issue of whether Defendant's actions and any resulting harm to the rental premises because of those actions were willful and malicious pursuant to §523(a)(6), the doctrine of issue preclusion applies to the judgment in the Ohio Litigation and Defendants are precluded from relitigating that issue in this adversary proceeding. Accordingly, there are no genuine issues as to any material facts in this case with respect to the nature of Defendants' conduct. Plaintiff's motion for summary judgment is, therefore, well-taken and hereby granted ***in part.***

Regarding the liquidation of the damages in the amount of $19,070.68 which were the subject of the Ohio Litigation, this Court is not prepared to conclude that there are no genuine issues as to any material facts in the context of Plaintiffs' nondischargeability claim in bankruptcy. To do so would be to give claims preclusive effect to the Ohio Litigation when it is not appropriate to do so.

"Claim preclusion has four elements in Ohio: (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. *In re Fordu*, 201 F. 3d at 704, 705, citing *Hapgood v. City of Warren*, 127 F. 3d 490, 493 (6th Cir.1997).

This Court turns its attention to item (3) of the foregoing elements. As previously discussed in footnote 2, *supra*, Plaintiffs' claim that the underlying debt is nondischargeable

in bankruptcy is not a claim which could have been litigated in the prior action because it did not arise until Defendants' bankruptcy case was filed. Therefore, to the extent that Plaintiffs' request for relief includes a determination that the underlying $19,070.68 debt is nondischargeable in bankruptcy, this Court is limited by the doctrine of claim preclusion from granting Plaintiffs' motion for summary judgment with respect to the liquidation of damages. The Court will consider this matter in a further pretrial conference.

This Court will now address the issues set forth in the additional June 9, 2005 motions filed by Defendants and discussed in footnote 1,*supra*, of this Order. In their motion for a copy of Plaintiffs' video tape of 1000 W. Waterloo Road, Defendants make cursory reference to "the rules of discovery recognized by this court." However, they do not cite any specific rules or set forth any analysis as to how or why their request is supported by those rules. Further, again, Defendants' request is one which they had a full and fair opportunity to raise in the Ohio Litigation. As previously discussed in this opinion, Defendants are therefore barred from challenging the judgment in the Ohio litigation on the basis of issues which could have been raised but for their voluntary non-appearance at trial. Defendants' motion for a copy of the videotape is, therefore, denied.

Regarding Defendants' motion to join the chapter 7 Trustee so as to allow him to prosecute their claim pursuant to the Ohio Landlord Tenant Act, we take note of Defendants' certification that they mailed a copy of their motion to the Trustee. Thus, the Trustee had opportunity to pursue this claim in the main bankruptcy case if he, in fact, deemed it valid. It is not necessary for this Court to join him in this action in order to allow initiation of the requested procedure. Accordingly, Defendants' motion to join the chapter 7 Trustee is

denied.

As pertains to Defendants' motion to join attorney Derek Cek, this Court find that this adversary proceeding is not the appropriate forum to seek the relief sought by Defendants. Since the Trustee has filed a no asset report in the main case and is deemed to have abandoned the estate's interest in that claim, Defendants, if they so desire, can pursue their alleged claim against Mr. Cek in State Court. Defendants' motion is hereby denied.

Based upon the foregoing, the Court hereby:

1. Grants in part Plaintiffs' motion for summary judgment;

2. Denies Defendants' motion to join the chapter 7 Trustee in this adversary proceeding;

3. Denies Defendants' motion to compel Plaintiff to produce a copy of a videotape of 1000 W. Waterloo Road; and

4. Schedules a further pretrial in this matter for **March 1, 2006 at 2:30 P.M.** in the Bankruptcy Courtroom, 2nd Floor, 2 S. Main Street, Akron, Ohio, at which counsel and/or the parties must appear in person.

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