IT IS SO ORDERED.

Dated: 02:04 PM March 26 2013

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 11-52252
	)	
Darlene F. Ewing,	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
----------	)	ADVERSARY NO. 11-5154
	)	
Rebekah Rasor,	)	JUDGE MARILYN SHEA-STONUM
	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
Darlene Faye Ewing.	)	
	)	
DEFENDANT.	)	

This matter is before the Court on the Complaint of Plaintiff, Rebekah A. Rasor, seeking a determination that the debt owed to her by the Debtor, Darlene Faye Ewing, is not dischargeable pursuant to 11 U.S.C. § 523(a)(6).

The Court conducted a trial in this adversary proceeding on September 20. 2012 and October 15, 2012. During the trial the Court heard testimony from the Debtor, the Plaintiff, and Aaron Hammer, the Plaintiff's son/Debtor's husband. The Court also received evidence in the form of exhibits and stipulations.

JURISDICTION

This proceeding arises in a case referred to this Court by Order No. 2012-7 entered in this District on April 4, 2012. It is determined to be a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the parties stipulations (the "Stipulations") [docket # 20], the testimony and the other evidence presented at trial, the arguments of counsel, the pleadings and pursuant to Fed. R. Bankr. P. 7052, the Court determines that the debt the Debtor owes Plaintiff is non-dischargeable. The Court makes the following findings of fact and conclusions of law:

In December 2008, the Debtor/Defendant, though she was married to Raymond Ewing,[1] moved in with Aaron Hammer, the Plaintiff's son. The Debtor/Defendant was living with Mr. Hammer when, at some point in 2009, Plaintiff became so ill that she needed to be hospitalized. At that point the Plaintiff was not able to manage her financial affairs. In August 2009, the Debtor/Defendant found a "power of attorney form" on-line and printed it for Mr. Hammer. On

[1] The Debtor married Raymond R. Ewing, Jr. in October 1985. In 2008, a divorce case was commenced in the Summit County, Ohio Court of Common Pleas Domestic Relations Division between Darlene Ewing and Raymond Ewing. On November 13, 2009, the Summit County Ohio Court of Common Pleas entered a Final Decree of Divorce which incorporated the parties' Separation Agreement. In November, 2011 the Defendant married Mr. Hammer, the Plaintiff's son.

or about August 19, 2009, while Plaintiff was hospitalized, Defendant and Mr. Hammer presented the Plaintiff with the Power of Attorney the Defendant had found on line. The Plaintiff signed the Power of Attorney. See Joint Exhibit XIV. Paragraph 3 of the POA says that Plaintiff appoints Aaron Hammer to act as her attorney in fact. Paragraph 5 of the POA says that the attorney in fact **may not** delegate any authority granted under this document. [emph. added]. The Debtor/Defendant, Darlene Ewing, did not possess a Power of Attorney from Plaintiff, Rebekah A. Rasor, at any time. See Stipulation 23.

While the Plaintiff was in the hospital, the Defendant and Mr. Hammer had access to the Plaintiff's mail and her residence. At some point between February and April 2010, the Plaintiff was released from the hospital and moved in with Mr. Hammer and the Debtor/Defendant.

Although the Debtor/Defendant did not hold a power of attorney from the Plaintiff, during 2009 and 2010, the Defendant endorsed her name to checks made payable to the Plaintiff and deposited those checks into her own bank account. She also issued checks drawn on the Plaintiff's account which Defendant made payable to herself and deposited those checks into her bank account no. 32309-03. The Debtor/Defendant also issued checks drawn on the Plaintiff's account which Defendant made payable to herself and deposited those checks into her bank account no. 254253. The Debtor/Defendant also issued a check drawn on the Plaintiff's account in the amount of $750.00 made payable to David Beyer for a condominium rental for the Defendant. Specific examples of these activities were presented during the trial.

Checks Made Payable to Plaintiff, Endorsed by Defendant and Deposited into Defendant's Account No. 32309-03

On June 16, 2009, the Defendant endorsed her name to a redemption check from T. Rowe Price made payable to Rebekah Rasor in the amount of $7,174.03, and deposited the check into an account in Defendant's name bearing account no. 32309-03 at Telecommunity Credit Union. See Stipulation 9 and Joint Exhibit I.

In addition, on or about June 16, 2009 (the parties stipulation says June 6, 2009, but the check is dated June 16, 2009), Defendant endorsed her name to a redemption check from T. Rowe Price made payable to Rebekah Rasor in the amount of $6,021.63 and deposited the check into an account in Defendant's name bearing account No. 32309-03. See Stipulation 10 and Joint Exhibit II

On or about September 18, 2009, Defendant endorsed her name to a check from Great-West Life & Annuity Insurance Company made payable to Rebekah Rasor in the amount of $33,660.64 and deposited the check in the Defendant's account bearing account No. 32309-03. See Stipulation 11 and Joint Exhibit III.

On or about July 9, 2010, Defendant endorsed her name to a check from United States Treasury Social Security Administration made payable to Rebekah A. Rasor in the amount of $11,788 and deposited the check into the Defendant's account bearing account No. 32309-03. See Stipulation 12 and Joint Exhibit IV.[2]

[2] On March 31, 2011, Plaintiff filed a complaint against Darlene F. Ewing in the Summit County, Ohio Court of Common Pleas seeking a judgment for "money had and received on a quasi contract and unjust enrichment". Defendant's Exhibit 1. The state court complaint appears to have included the checks and funds referenced in Joint Exhibits IV through XIV. The Debtor/Defendant did not appear in that litigation and did not defend against the complaint. On June 3, 2011, the Summit County Court of Common Pleas awarded judgment by default against Ms. Ewing and in favor of Ms. Rasor in the amount of $27,862.67 plus interest and costs. No appeal was taken from the judgment.

Checks Drawn on the Plaintiff's Account which Defendant Made Payable to Herself and Deposited into Defendant's Bank Account No. 32309-03.

On or about September 21, 2009, Defendant issued a check made payable to herself in the amount of $2,200 from the account of Rebekah A. Rasor, endorsed the check and deposited the check into the Defendant's account in her name bearing account No. 32309-03. See Stipulation 13 and Joint Exhibit V.

On or about October 17, 2009, Defendant issued a check made payable to herself in the amount $750.00 from the account of Rebekah A. Rasor, endorsed the check and deposited it into the Defendant's account in her name bearing account no. 32309-03 (although the handwritten notation on the check says account 32903-03). See Stipulation 14 and Joint Exhibit VI.

On or about November 13, 2009, Defendant issued a check made payable to herself in the amount of $735.00 from the account of Rebekah A. Rasor, endorsed the check and deposited it into the Defendant's account no. 32309-03. See Stipulation 15 and Joint Exhibit VII

On or about December 15, 2009, Defendant issued a check made payable to herself in the amount of $750.00 from the account of Rebekah A. Rasor, endorsed the check, and then deposited the check into the Defendant's account No. 32309-03. See Stipulation 16 and Joint Exhibit VIII.

On or about April 12, 2010, Defendant issued a check made payable to herself in the amount of $750.00 from the account of Rebekah A. Rasor, endorsed the check and then deposited the check into the Defendant's account no. 32309-03. See Stipulation 17 and Joint

Exhibit XII.

On or about June 9, 2010, Defendant issued a check made payable to herself in the amount of $750 from the account of Rebekah A. Rasor, endorsed the check and then deposited the check into the Defendant's account no. 32309-03. See Stipulation 18 and Joint Exhibit XIV.

Checks Drawn on the Plaintiff's Account which Defendant Made Payable to Herself and Deposited into Defendant's Bank Account No. 254253.

On January 13, 2010, the Defendant issued a check made payable to herself in the amount of $750.00 from the account of Rebekah A. Rasor, endorsed the check, and then deposited the check into the Defendant's account No. 254253. See Stipulation 19 and Joint Exhibit IX.

On February 16, 2010, the Defendant issued a check made payable to herself in the amount of $750 from the account of Rebekah A. Rasor, endorsed the check and deposited it into the Defendant's account No. 254253. See Stipulation 20 and Joint Exhibit X.

On March 10, 2010, Defendant issued a check to herself in the amount of $750.00 from the account of Rebekah A. Rasor, endorsed the check and deposited it into the Defendant's account no. 254253. See Stipulation 21 and Joint Exhibit XI.

Checks Drawn on the Plaintiff's account Which Were Issued by the Defendant and Made Payable to Third Party for the Benefit of Defendant.

The Defendant also issued a check drawn on the Plaintiff's account in the amount of $750.00 made payable to David Beyer for a condominium rental for the Defendant. See Stipulation 22 and Joint Exhibit XII.

How Was the Money Used?

As a result of the Defendant's action in depositing money into two different accounts, commingling the funds taken from Plaintiff with other funds in Defendant's bank accounts, and transferring the money to sub accounts and back again, sometimes in the same day, it is difficult to tell exactly what the Defendant did with the money. What is clear to the Court, however, is that the Defendant did not use the money for the care and welfare of Plaintiff. At trial, the testimony showed that Ms. Ewing spent $10,500 on the purchase of a vehicle for Mr. Hammer. Defense Exhibit 6. $7,000 was spent on the purchase of a Yamaha motorcycle for Mr. Hammer. Defense Exhibit 5. In addition, funds were used to pay the tax and title fees related to the purchase of the Yamaha. Mortgage payments were made on Mr. Hammer's house in September 2009, November, 2009 and December 2009 . A boat and a snowmobile were purchased. In addition, the Defendant used some of the funds to make a payment to her ex-spouse required by their separation agreement.

Also, in July 2009, the Plaintiff testified that she believed she had co-signed with the Defendant for the purchase of a Ford Explorer. As reflected on Plaintiff's Exhibits A and B, Plaintiff was the sole obligor on the vehicle and title owner of the vehicle. Following the purchase of the vehicle, the monthly payments were made from the Defendant's bank account which contained the Plaintiff's funds. See, e.g., Defendant's Exhibit 12, p. 23 showing a debit on 11/25/2009 for GMAC in the amount of $460.54. In October 2010, the Defendant moved out of

Mr. Hammer's residence where Plaintiff was also living. The Plaintiff reported the vehicle as stolen. No further payments were made on the vehicle and it was repossessed by the financing company. Eventually, the vehicle was sold and Plaintiff received notice of a deficiency balance in the amount of Truck. See Plaintiff's Exhibits C, D and E. Following the disposition of the Truck, a deficiency balance in the amount of $2,922.67 remained. See Plaintiff's Exhibit F.[3]

The Debtor/Defendant's testimony that she did what she did at the direction of Aaron Hammer and that she did not understand that what she was doing was wrong is not credited by the Court. Further, Defendant argues that Defendant's Exhibit 3 shows the funds were expended for the benefit of the Plaintiff. Only a very limited portion of Exhibit 3 was discussed during the trial of this matter and only those portions of Exhibit 3 directly discussed during trial have been admitted. The Defendant's failed to show that the funds were used for the Plaintiff's benefit. Exhibit 3 was not clear and the testimony about the exhibit at trial was sparse. Debtor defendant did not establish the amount of money allegedly spent on the construction of a mother in law suite in Mr. Hammer's house, which has now been foreclosed upon and sold to the bank.

In addition, the Court finds the Defendant not to be credible. She has engaged in attempts to confuse and mislead. One example of this is the production of Defendant's Exhibit 2 consisting of Bank Statements that failed to identify the account owner and that were not ordered chronologically by account. In addition, the Court finds that the Defendant appears to have made inadequate disclosures in her prior bankruptcy cases.

[3] The deficiency balance in the amount of 2,922.67 was part of the State Court Complaint. The State Court Judgment on the count seeking recovery of the deficiency balance awarded $4,422.67 plus interest without explanation of how the court calculated the total amount.

Prior Bankruptcy Proceedings

The Defendant/Debtor has filed several voluntary petitions for relief under Title 11 of the United States Code before this Court in the last ten years. She was the debtor in Case Nos. 93-50928, Case No. 09-54357, and in Case No. 11-52252, the main case to which this adversary proceeding is related.

The 2009 case was commenced on September 25, 2009 by the filing of a joint voluntary petition, with her now ex-spouse Raymond Ewing, seeking relief under chapter 7 of the Bankruptcy Code. Her voluntary petition did not list the funds Defendant had deposited into her accounts from Rebekah A. Rasor. Schedule B listed only two bank accounts – one at Fifth Third and one a Telecommunity. Docket #1 and Docket #20. The balance of the Fifth Third account was listed as $200. The balance of the Telecommunity account was listed as $500. The Debtor did not list any property held for another person in her Statement of Financial Affairs. See Docket 1, answer to SOFA, question 14. She did not list the $33,660 deposit she made within the one week prior to filing her petition into her account 32309-03. On January 25, 2010, the Debtor's 2009 case was dismissed pursuant to an Agreed Order granting the Motion of the UST to Dismiss the case for abuse. Case No. 09-54375, Docket #25. Defendant's suggestion that she did not understand the questions or the need to disclose the many accounts into which she was placing the Plaintiff's funds is not credited by the Court. The Defendant appears to the Court to be a fairly intelligent person capable of reading and understanding the questions in the statement of financial affairs. The Defendant is not unfamiliar with finances and tracking them as a result of her job of 26 years with Goodyear.

Conclusions of Law

The Plaintiff seeks to have the Court determine that the judgment is not dischargeable and to have the Court determine that the other funds of Ms. Rasor taken by the Debtor/Defendant

are not dischargeable either. Section 523(a)(6) provides that a debt for willful and malicious injury by the debtor to another entity or to the property of another entity is not dischargeable. The Plaintiff bears the burden of proving, by a preponderance of the evidence, that § 523(a)(6) applies. To be successful, plaintiff must establish the existence of both components – willful and malicious. *South Atlanta Neurology & Pain Clinic, P.C. v. Lupo (In re Lupo)*, 353 B.R. 534, 550 (Bankr. N.D. Ohio 2006).

To establish the willful component, the Plaintiff must prove that the debt arises from a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. *Kawaauhau v. Geiger, 523 U.S. 57 (1998).* The Sixth Circuit has interpreted this to mean, the actor must either desire to cause the consequences of his act, or believe that those consequences are substantially certain to result from it. *Markowitz v. Campbell*, 190 F.3d 455, 464 (6th Cir. 1999). A person's acts are willful, for the purposes of § 523(a)(6) when that person acts with the intent to cause injury or is substantially certain injury will occur. No specific intent to harm is required. Rather, a person's knowledge that the act will necessarily result in the harm is sufficient. In other words acts done with the intent to cause injury – and not merely acts done intentionally – rise to the level of willful and malicious injury for purposes of satisfying §523(a)(6). *In re Kennedy*, 249 F.3d 576, 581 (6th Cir. 2001).

When determining whether the debtor's conduct was willful, "[i]n addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *In re Sicroff*, 401 F.3d 1101, 1106 (9th Cir.2005) (quoting *In re Su*, 290 F.3d 1140, 1146 n. 6 (9th Cir.2002)); *In re Wood*, 309 B.R. 745, 753 (Bankr.W.D.Tenn.2004) ("To find that a

debtor intended to cause the consequences of his act or believed that the consequences were substantially certain to result from his act, it is necessary to look into the debtor's mind, subjectively.").

To satisfy the malicious component, the plaintiff must show that the debtor acted in conscious disregard of his duties or without just cause or excuse. *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 923 (6th Cir. BAP 2000); *In re Heyne*, 277 B.R. 364, 368 (Bankr. N.D. Ohio 2002).

Considering all of the evidence presented in this case, I find the Debtor/Defendant caused willful and malicious injury to the Plaintiff. The Debtor/Defendant knew she did not hold a power of attorney for the Plaintiff. The Debtor/Defendant knew she, not the Plaintiff, was benefitting from the use Plaintiff's assets. Using these assets other than for the care of Ms. Rasor harmed Ms. Rasor by depleting her finances. The Court rejects the Debtor/Defendant's argument that her actions were not willful or malicious because she was only using the funds in the manner Mr. Hammer directed. The funds were not mistakenly deposited into the Debtor/Defendant's account. They were purposefully placed there and moved around from account to account, the Court believes, in an attempt to make determining what happened to the funds more difficult. This attempt to obfuscate appears to have continued up through the date of trial, as counsel produced an exhibit consisting of bank statements that did not identify the owner of the account and made it difficult to determine in which account the listed transaction took place. On the second day of trial, a new exhibit consisting of bank accounts more adequately identified the owner of each account and in which account the listed transaction took place. What seems clear is that the Debtor/Defendant is the one who orchestrated the movement of

funds into and out of various accounts, which appear to have not been disclosed in her prior bankruptcy cases. She did not segregate the Plaintiff's funds. She comingled them in her various bank accounts. The Court finds that the Debtor/Defendant acted with a specific intent to complicate any tracking of the Plaintiff's funds. The Debtor/Defendant knew what the Power of Attorney said. She knew she had no right to use the Plaintiff's funds, but she did anyway to the detriment of Plaintiff. The Debtor caused willful and malicious injury to the Plaintiff. *See* Ewers v. Cottingham (In re Cottingham), 473 B.R. 703 (B.A.P. 6th Cir. 2012); *Haemonetics Corp. v. Dupre*, 238 B.R. 224, 229 (D. Mass. 1999) (wife's knowing use of embezzled funds to support extravagant lifestyle constituted conversion which was sufficient to support a nondischargeability complaint under 523(a)(6).

Conclusion

Therefore, the Court finds Plaintiff's prepetition claims against the Defendant, including the previously granted judgment entered by the Summit County Court of Common Pleas, are excepted from the Defendant's discharge pursuant to 11 U.S.C. § 523(a)(6).

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cc: (via electronic mail)

Gary Axner	*as counsel for*	Rebekah Rasor
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