UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 11-53125
	)	
TRACY LEE ROBINSON,	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
--	)	ADVERSARY NO. 11-5214
	)	
ASSURECARE RISK MANAGEMENT, INC.	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	
PLAINTIFFS,	)	MEMORANDUM OPINION
	)	RE: DISCHARGE OF A DEBT
v.	)	
	)	
TRACY LEE ROBINSON.	)	
	)	
DEFENDANT.	)	

This matter comes before the Court on the complaint of AssureCare Risk Management Inc., seeking a determination that the final arbitration award against Tracy Lee Robinson is non-dischargeable under 11 U.S.C. § 523(a)(6). Due to medical issues the trial was held by affidavit. Closing arguments were held on September 28, 2013, and the matter was taken under advisement.

FINDINGS OF FACT

1. Plaintiff, AssureCare Risk Management Inc. ("Plaintiff" or "AssureCare")[1], is a corporation, which assumed the "AssureCare family of companies." At all times relevant herein AssureCare was engaged in the business of providing services as a third-party administrator of its clients' employee benefit plans. [Dkt. #48, *Joint Stipulations of Fact and Documentary Evidence* (hereafter "Joint Stipulations") at ¶1].

2. During 2009, AssureCare was facing significant financial problems. [Dkt. #63, *Affidavit of Richard Agar* (herafter "the Agar Affidavit") at ¶8]. These financial problems led to Plaintiff laying off employees, closing offices, and stretching out payments to vendors. [Dkt. #67, *Plaintiffs Sworn Response to Cross-Examination*, (hereafter "Agar Cross-Examination") at ¶1.b].

3. At all times relevant herein, Betty Reich ("Reich") was the officer manager/billing manager for AssureCare, Richard Agar ("Agar") was the President of AssureCare, and Craig Mell ("Mell") was the CFO of the AssureCare. [Joint Stipulations ¶3; Agar Aff. ¶5].

4. Defendant, Tracy Lee Robinson ("Defendant"), commenced his employment with AssureCare on or about 2002. [Joint Stipulations ¶2]. Defendant worked for AssureCare Ohio in

[1] AssureCare Risk Management, Inc. was created as part of the ultimate agreement of between Plaintiff and Defendant. In this agreement, the "AssureCare family of companies" were assumed by AssureCare Risk Management, Inc. As the corporate status of the entity is irrelevant to this case we will refer to both as "AssureCare" or "Plaintiff."

Client services. At some time in early 2009 Defendant informed Reich that he had a ten million dollar medical malpractice settlement of which he would use two million dollars to invest in AssureCare, assisting it through the economic downturn. [Joint Stipulations ¶3]. Defendant had no pending settlement and misrepresented his ability to invest in AssurCare. [Dkt. 64, *Affidavit of Tracy Robinson* (hereafter the "Robinson Affidavit") at ¶18].

5. Early in 2009, Mell and Reich indicated Defendant's interest in becoming an equity investor in AssureCare to Agar. [Agar Aff. ¶10]. Mell and Agar discussed such an investment with Defendant between February 2009 and April 7, 2009. [*Id*. ¶¶ 10–11 ; Agar's Cross Examination ¶3]. These discussions included almost daily phone calls with Defendant and one or two personal meetings. [Agar's Cross-Examination ¶3].

6. Defendant and Agar, through continued conversations, reached a general understanding of Defendant's intent to invest in AssureCare. On April 7, 2009, Plaintiff's attorney Michael Ryan ("Ryan") drafted a Non-Binding Letter of Intent and sent it to Defendant. [Non-Binding Letter of Intent ("Joint Exhibit 1") at 1]. On or before May 22, 2009 Defendant and Plaintiff entered into a final Non-Binding Letter of Intent. [Joint Stipulations ¶4]. The Letter of Intent provided for the formation of a new holding company, AssureCare Risk Management, Inc., of which Defendant would purchase 20% of the capital stock for a purchase price of two million dollars. [Joint Ex. 1 at 1-2; 4].

7. In discussing the agreement, Defendant sought benefits for himself and his significant other, David Ferko ("Ferko"). On April 20, 2009, Agar announced Defendant's promotion to Vice President of Client Services. [Joint Ex. 4]. The announcement stated that such a promotion was based on Defendant's "ability to listen and respond to our clients needs" and that such a promotion was "well earned." *Id.* Defendant argues that his promotion was due only to his

capabilities and performance at AssureCare. [Robinson Aff. at ¶5]. Agar claims that it was Defendant's expectation that he would be given a greater voice in the company in anticipation of investing in the company. [Agar Aff. at ¶15]. Agar also states that the promotion of Ferko, who also worked for the company, was similarly part of the deal. [Agar Aff. ¶15]. Defendant's emails indicate that he was seeking a greater voice in the executive decisions of the company.[Pl.'s Ex. A, B, D, E, H]. Specifically, Defendant indicates in his email to Mell on April 21, 2009, after the April 7 Letter of Intent, that Mell "go ahead with the e-mail announcing the upcoming changes." [Pl.'s Ex. A]. He indicated that his only concern was that "the Michigan office will be supervised by [Ferko] and that his title would change to become the Director of Operations for the Mid-Eastern Division." [*Id.*] A month later when discussing the deal he indicates "…things were promised that aren't done, Michigan, David's raise…David and I have no more control over issues in this office than we did when we first started." [Pl.'s Ex. D]. Two weeks later, when discussing potentially backing out of the deal Defendant states: "I do understand if you and Rich would like to forget this all together. I as well as David understand…we have no issues with removing the titles from our name." [Pl.'s Ex. E]. These evidence a *quid pro quo*, Defendant clearly understood his new position and raise, as well as the raise and title change of David Ferko to be a part of the deal with AssureCare.[2]

8. Between April 20, and August 7, 2009, there were numerous e-mail exchanges concerning the transaction. The e-mails indicate a willingness of Defendant to enter into the transaction with Plaintiff. [Pl.'s Ex. A, B, C, E, H, I, J, L, M]. The Defendant continually referenced his investment in these communications, indicating that it was coming and that he was actively engaged in getting it. [Pl.'s Ex. B, C, E, J, L]. Defendant never states that the

[2] We note that the final agreement between the parties did not include Defendant or Ferko's pay raises or their new positions. However, this case involves fraud in the inducement, and therefore the parol evidence rule does not apply to the admission of this evidence. *See Glazer v. Lehman Bros., Inc.*, 394 F.3d. 444, 455 (6th Cir. 2005).

settlement was uncertain; instead he treated the settlement as done, indicating that mere procedural matters stood in the way of Defendant's possession of the money.

9. On August 7, 2009, Defendant and Plaintiff entered into a Contract for the Purchase and Sale of Unregistered, Restricted Securities. [Joint Exhibit 3 (hereafter the "Contract")]. Prior to entering the Contract, Plaintiff and its agents had no knowledge that Defendant's settlement was a fabrication. [Agar Aff. ¶24]. In fact, prior to the execution of the Contract, Debtor represented to AssureCare that his attorney had possession of the settlement check enabling him to complete the proposed investment. [Joint Stipulations ¶9].

10. The Contract provided for the purchase of 20% of the issued stock of AssureCare Management, Inc. for an investment by Defendant of two million dollars. [Contract ¶2.b]. Closing of the Contract was to take place as soon as the two million dollar investment was paid by Defendant, which the Contract anticipated between July 24, and July 31, 2009. [Contract ¶3]. While the Contract was signed outside the anticipated closing date, Agar received reassurances from Defendant that the investment would be funded by August 28, 2009, and then subsequently by the end of the year. [Agar Aff. ¶17; Pl.'s Ex. R, T, U].

11. The Contract also provided that any disputes by the parties were to be resolved by binding alternative dispute resolution by the American Arbitration Association in Minneapolis, MN. [Contract ¶14].

12. The Contract provided for the acquisition of the "AssureCare family of companies" by Plaintiff. Plaintiff was to use up to $1.6 million of Defendant's investment to meet its obligations under the Asset Purchase Agreements and Stock Purchase Agreements [Contract ¶5]. Thus, Defendant's investment was to be used to pay off "all outstanding monetary obligations" of AssureCare. [Contract at p.9 ¶4].

13. The Contract was signed by Defendant, including the August 27, 2009 addendum. [*Id*. at pp. 3, 31, 36, 39, 74].

14. Prior to signing the Contract Defendant was aware of the poor financial situation of the company. Defendant states in an email in June 2009 "…I know we have no money." [Pl.'s Ex. D]. Defendant also stated: "Downsizing was already taking place and would have happened with or without an investment." [Dkt. 68, *Answering Questions of Assurecare Risk Management, Inc.*, (hearafter "Robinson Cross-Examination") at ¶16]. Defendant also indicates that he was told "offices would be closed and people would lose their jobs unless I committed money to AssureCare." [Robinson Aff. ¶17]. In fact, Defendant provides the reason for his misrepresentation, to help his coworkers by saving their jobs. [Robinson Aff. ¶18]. Defendant also negotiated with Plaintiff about investing in the company, and ultimately warranted that he had "done his due diligence and is satisfied that he has been provided answers to his questions...[and had been] provided all documentation he has requested to his satisfaction." [Contract at 3 ¶9]. Clearly at this time Defendant was aware of the financial situation of the company.

15. After signing the Contract, Defendant engaged in a yearlong series of communications about difficultly in procuring his settlement. He created numerous excuses for his delay in the investment while constantly stating that the funding would arrive shortly. [Joint Stipulations ¶11]. From June 4, 2009 through July 2010, Defendant sent over thirty emails reassuring Plaintiff's executive staff of his intention to invest. [Pl.'s Ex. C, E, J, L, U, V, W, X, BB, CC, DD, EE, KK, LL, NN, OO, PP, RR, VV, WW, XX, FFF, HHH, III, JJJ, MMM, QQQ, RRR, VVV, XXX, BBBB]. Furthermore, for each of these emails there were subsequent telephone

calls and personal meetings in which Defendant would reassure Agar of the investment. [Agar Aff. ¶24].

16. Ryan began seeking to contact Defendant's attorney about the settlement directly in October. [Pl.'s Ex. W]. Ryan also sought clarity on the terms of the supposed settlement and documentation to provide investors. [Pl.'s Ex. AA, CC]. In late November, Defendant indicated that his attorney was drafting a "legal document" which could be given to investors to assure them of the pending investment. [Pl.'s Ex. EE]. No document was ever produced. In February, Ryan finally began sending letters to Defendant informing him of the dire nature of Plaintiff's financial situation and the need for an immediate investment. [Pl's Ex. NN, QQ, SS]. Defendant continued to reassure Plaintiff even after receiving this information that the money was on its way.

17. Defendant indicated the existence of a wrongfully obtained garnishment lien which prevented his investment in the company. [Pl.'s Ex. U, PP, XX]. Defendant was in fact the correct "Tracy Robison," against whom the garnishment had been filed, and AssureCare ultimately paid $2,800 to settle the case and $2,500 in attorney fees. [Agar Aff. ¶25(a)]. When asked about why Defendant lied about this garnishment, he indicated that he believed that Plaintiff would not pay the garnishment unless he believed it was holding up the settlement. [Robinson Cross-Examination ¶2].

18. Defendant directly informed certain creditors of AssurCare that the debts would be paid once his settlement came through. [Joint Stipulations ¶14; Pl.'s Ex. TT, VV, WW].

19. Plaintiff did not learn that the settlement was fabricated until September 2010. [Joint Stipulations ¶17]. However, prior to discovering this, Defendant continued to send reassuring emails, from May until August, indicating that family problems were delaying him from signing

necessary documents and materials. [Pl.'s Ex. MMM, OOO, QQQ, RRR, SSS, VVV, XXX]. Defendant indicated "I should be notified to pick the settlement up sometime[sic], no later than the week of May 3, 2010." [Pl.'s Ex. FFF]. In May Defendant actually began stating that the settlement was finally on its way. [Pl.'s Ex. JJJ]. Finally, Defendant took medical leave and did not return to the company. The Company ultimately discovered Defendant had initiated employment at another company.

20. Plaintiff submitted Defendant's breach of contract to arbitration, pursuant to the Contract, with the American Arbitration Association. [Joint Stipulations ¶18]. A hearing was held on May 15, 2011. [*Id*.]. The arbitration panel entered a Final Award of Arbitrators, (Joint Exhibit 6 (hereafter "the Final Award") on June 15, 2011. [Joint Stipulations ¶19]. Defendant was found to have breached his contract and committed fraud in the inducement through his false statements to Plaintiff. The Panel awarded Plaintiff $1.7 million in damages for breach of contract and fraud in the inducement as well as attorney's fees of $17,920, and fees and expenses of $25,626.58. [Final Award at 5].

21. Defendant commenced the within Chapter 7 bankruptcy proceeding on August 12, 2011. [Joint Stipulations ¶20].

22. Plaintiff filed this Adversary Proceeding on December 2, 2011, seeking a determination that its claim against the Defendant is non-dischargeable in bankruptcy under 11 U.S.C. § 523(a)(6). [Dkt. 1].

JURISDICTION

This court has jurisdiction over this bankruptcy case. 28 U.S.C. § 1334. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(I) (determinations regarding dischargeability of a debt). As this is a core proceeding, this Court is constitutional authorized to enter a final order on the issue. *Johnston v. Middletown (In re Johnston)*, 484 B.R. 698, 707 (Bankr. S.D. Ohio 2012) *citing Waldman v. Stone*, 698 F.3d 910, 917 (6th Cir. 2012) *cert. denied*, 133 S. Ct. 1604, 185 L. Ed. 2d 581 (2013); *see also In re Maas*, 497 B.R. 863, 864 (Bankr. W.D. Mich. 2013). This opinion constitutes the court's findings of fact and conclusions of law in accordance with Fed. R. Bankr.P. 7052.

ANYLSIS

Plaintiff seeks a determination that the final arbitration award against Defendant is non-dischargeable under 11 U.S.C. § 523(a)(6).

The Plaintiff must establish the elements of their nondischargeability claims by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287–88, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). As exceptions to discharge are limits on a debtor's ability to obtain a "fresh start" in bankruptcy, they are to be narrowly construed. *Simmons Capital Advisors, Ltd. v. Bachinski (In re Bachinski)*, 393 B.R. 522, 532–33 (Bankr.S.D.Ohio 2008), *citing Rembert v. AT & T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir.1998).

Section 523(a)(6) provides that a discharge will not be effective as to any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6).

Plaintiffs claim is based on the Final Award received in arbitration, where Defendant was found liable for breach of contract and fraud in the inducement, as well as for attorney's fees and expenses. Final Award at 5.

Plaintiff must prove by a preponderance of the evidence that Defendants breach of contract and fraud in the inducement were both willful and malicious. *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998); *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir.1999); *In re Kennedy*, 249 F.3d 576, 580 (6th Cir.2001). Although the "willful" and "malicious" requirements will be found concurrently in most cases, the terms are distinct, and both requirements must be met under § 523(a)(6). *In re Martin*, 321 B.R. 437, 440 (Bankr.N.D.Ohio 2004); *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 167 (Bankr.N.D.Ohio 2003).

A. Defendant's Breach of Contract and Fraud in the Inducement were "Willful" under § 523(a)(6).

The Supreme Court has held that in §523(a)(6) the word "willful" modifies the word "injury," indicating "that nondischargeability takes a deliberate or intentional injury, not merely…a deliberate or intentional act that leads to injury." *Geiger*, 523 U.S. at 57; *see also In re Markowitz*, 190 F.3d at 464. Therefore, an act will be deemed "willful" only if it was undertaken with the actual intent to cause injury. *In re Fox,* 370 B.R. 104, 119 (B.A.P. 6th Cir. 2007) *citing In re Markowitz*, 190 F.3d at 464. The intent to cause injury exists when the debtor "desires to cause [the] consequences of his act, or ... believes that the consequences are substantially certain to result from it." *In re Markowitz*, 190 F.3d 455, 464 (6th Cir.1999). *See also In re Kennedy*, 249 F.3d at 580; *In re Moffitt*, 252 B.R. 916, 922 (6th Cir. BAP 2000); *In re Lupo*, 353 B.R. 534, 550 (Bankr. N.D. Ohio 2006).

Defendant argues that he did not intend to cause harm to Plaintiff. This argument is not supported. In *South Atlanta Neurology and Pain Clinic P.C., v. Lupo (In re Lupo)*, the principal of a corporation engaged in a scheme of misconduct, entering into an agreement for the sale of an MRI machine, when the principal knew he did not have the assets to acquire the machine. 353

B.R. 534, 541–543 (Bankr. N.D. Ohio 2006). At trial the principal admitted that the company was undercapitalized, insolvent, and unable to purchase the machine. *Id.* at 543. The Court held that the principal's actions of allowing an agent to enter into an agreement when he knew that they lacked the financial resources was indicative of fraud and that his conduct evidenced he intended the result of his actions, and thus the debt was nondischargeable under 523(a)(6). *Id.*at at 544, 551.

In this case Defendant knew under his contract he had an obligation to pay Plaintiff two million dollars. Defendant was well aware of the financial situation of the company. [*See supra* ¶14]. Defendant engaged in months of negotiations with Plaintiff and admitted he was told that "offices would be closed and people would lose their jobs unless I committed money to AssureCare." [Robinson Affidavit ¶17]. Meanwhile, Defendant asked for and received raise for himself and his significant other [see *supra* ¶7], and legal support in his garnishment battle [see *supra* ¶17]. This evidence, as in *Lupo*, indicates that he intended the results of his actions, Defendant sought a higher salary for Ferko and himself all while the Company continued to struggle financially.

Furthermore, Defendant knew that the financial losses of the company, were substantially certain to occur. As stated above, Defendant was aware of the financial situation of the company. Plaintiff specifically delayed numerous cost cutting measures, because its agents were constantly reassured by Plaintiff of the upcoming investment. [Agar Aff. ¶18]. Then, in February, Defendant was advised that the company could no longer continue operations without the promised investment. [Pl. Ex. NN, QQ]. However, Defendant continued to reassure Plaintiff of the imminent arrival of the settlement money. [Pl. Ex. RR]. He even informed creditors of the settlement to ensure continued operations. [Joint Stipulations ¶14; Pl.'s Ex. TT, VV, WW].

Defendant knew that there was no settlement, but he failed to inform Plaintiff even when he knew it could result in dire financial problems.

Therefore, the Defendant acted to benefit himself at the expense of Plaintiff and knew with substantial certainty the consequences of his action. Thus, his breach of contract and fraudulent inducement were “willful” under § 523(a)(6). *See Monsanto Co. v. Trantham,* 304 B.R. 298, 308 (6th Cir.BAP2004) (holding that a debtor must know of the financial harm to a party where the gain sought can only come at the other parties expense); *Humility of Mary Health Partners v. Garritano, (In re Garritano)*, 427 B.R. 602 (Bankr. N.D. Ohio 2009) (holding that a debtor who entered into a contract and then failed to perform knew by withholding payment he was substantially certain to cause harm to the other party).

B. Defendant’s Breach of Contract and Fraud in the Inducement were both Malicious under § 523(a)(6).

An act is “malicious” if is it is undertaken “in conscious disregard of one's duties or without just cause or excuse.” *In re Fox,* 370 B.R. 104, 109 *citing Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir.1986); *see also In re Martin,* 321 B.R. 437, 441–42 (Bankr. N.D. Ohio 2004)..

Defendant stated that he did not intend “harm” to come to Plaintiff or Agar. [Robinson Affidavit ¶14]. However, “malicious” acts do “not require ill-will or specific intent to do harm.” *In re Fox*, 370 B.R. at 109 *citing Wheeler v. Laudani*, 783 F.2d at 615. Defendant knowingly breached his contract and lied to his supervisors about the existence of the settlement. Such an action was in conscious disregard for his duties under the contract he had signed. And Defendant’s admission that his purpose in breaching the contract was to protect his friends and his job provides no adequate excuse for his actions.

Therefore, Defendant’s actions were both willful and malicious, and thus this debt is nondischargeable under § 523(a)(6).

C. Declaring the Final Award Nondischargeable under § 523(a)(6) Serves the Policy of the Bankruptcy Code.

One of the fundamental policies of bankruptcy law is to give a fresh start only to the "honest but unfortunate debtor." *Petralia v. Jercich, (In re Jercich),* 238 F.3d 1202, 1205–06 (9th Cir. 2001) *citing Grogan v. Garner,* 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (noting that while the "fresh start" is "a central purpose of the [Bankruptcy] Code," this opportunity is limited to the " 'honest but unfortunate debtor'"); *see also O'Brien v. Sintobin (In re Sintobin),* 253 B.R. 826, 831 (Bankr.N.D.Ohio 2000).

Section 523(a)(6) serves as a cornerstone of this policy by excepting from discharge any debt which is shown to have arisen as the result of a debtor's "willful and malicious" conduct. *In re Gurzynski,* 443 B.R. 777, 779 (Bankr. N.D. Ohio 2010). Normally, a knowing breach of contract is insufficient to satisfy the malicious element of § 523(a)(6). However, such a breach may be sufficient with "some aggravating circumstance evidencing conduct so reprehensible as to warrant denial of the fresh start to which the honest but unfortunate debtor would normally be entitled under the Bankruptcy Code." *In re Khafaga,* 419 B.R. 539, 550 (Bankr. E.D.N.Y. 2009) *citing Novartis Corp. v. Luppino (In Re Luppino),* 221 B.R. 693, 700 (Bankr. S.D.N.Y. 1998); *see also Barclays Amer./Bus. Credit, Inc. v. Long (In re Long),* 774 F.2d 875, 881 (8th Cir.1985); *Traditional Indus. v. Ketaner (In re Ketaner),* 149 B.R. 395, 396 (Bankr.E.D.Va.1992) (intentional breach of non-compete clause may constitute willful and malicious injury).

In this case, Defendant's action constituted such reprehensible conduct. Defendant actively engaged in a continued fraud against his employer. He used his potential investment as a weapon, seeking greater control of the decisions of the company [see *supra* ¶7], a raise for both his significant other and himself [*Id.*] and received legal support on matters unrelated to his employment [see *supra* ¶17]. And he admitted openly to using this to protect his job and the jobs of his friends. [Robinson Affidavit ¶18]. The level of ongoing duplicity by Defendant disqualifies him from being treated as an “honest and unfortunate debtor” who is entitled to a fresh start with respect to this claim.

D. The Attorney Fees and Costs are also Nondischargeable.

Courts have held that attorney fees and costs flowing from a nondischargeable debt are also excepted from discharge when such fees were awarded in the judgment giving rise to the nondischargeable debt. *In re McCoy*, 189 B.R. 129, 135-36 (Bankr. N.D. Ohio 1995) *citing In Re Harper*, 117 B.R. 306, 313 (Bankr.N.D.Ohio 1990); *In Re Horowitz*, 103 B.R. 786, 790 (Bankr.N.D.Miss.1989); In Re Valentine, 104 B.R. 67, 72 (Bankr.S.D.Ind.1988). As the damages awarded in the underlying arbitration were nondischargeable, the fees and costs are also nondischargeable.

CONCLUSION

Defendant willfully and maliciously breached his contract with Plaintiff. He lied to induce the contract and to perpetuate his position and benefits he received for both himself and his significant other. Therefore, Plaintiffs claim, based upon the Final Award in the arbitration of $1.7 million in damages for fraud in the inducement and breach of contract is nondischargeable. Furthermore the attorney fees of $17,920 and costs of arbitration of $25,626.58 are also nondischargable under § 523(a)(6).

# # #

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