THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 97-15835
	)	
NWABUEZE OKOCHA,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
ELAINE FEHRENBACHER, et al.,	)	Adversary Proceeding No. 97-1360
	)	
Plaintiffs,	)	
	)	
v.	)	**MEMORANDUM OF OPINION REGARDING CROSS MOTIONS FOR SUMMARY JUDGMENT**
	)	
NWABUEZE OKOCHA,	)	
	)	
Defendant.	)	

Elaine Fehrenbacher seeks summary judgment[1] on the questions of whether a state court judgment in her favor and against Defendant-Debtor Nwabueze Okocha is a non-dischargeable debt under 11 U.S.C. § 523 and whether that judgment bars Mr. Okocha's counterclaim for legal fees. Mr. Okocha both opposes that request and moves for summary judgment in his favor.[2]

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[1] While the Complaint in this Adversary Proceeding was filed in the names of Dan and Elaine Fehrenbacher, the Amended Complaint is in the name of Elaine Fehrenbacher only.

[2] The parties filed these documents in support of their positions: Motion by Plaintiff Elaine Fehrenbacher for Summary Judgment against Defendant Nwabueze V. Okocha and brief in support (Docket 12); Affidavit of Elaine Fehrenbacher in support of Motion for Summary Judgment (Docket 13); Affidavit of John P. Tremsyn, Esq. in Support of Motion for Summary Judgment (Docket 14); Motion by Defendant Nwabueze V. Okocha for Summary Judgment, with brief in support (Docket 15); Amended Motion for Summary Judgment by Defendant Nwabueze V. Okocha (Docket 16); Brief/Memorandum by Plaintiff Elaine Fehrenbacher in Opposition to Amended Motion for Summary Judgment (Docket 17); Affidavit in Support of

(footnote continued on next page)

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

ISSUE

What is the preclusive effect, if any, of the state court judgment on the Amended Complaint and the Counterclaim in this Adversary Proceeding?

FACTS

These are the undisputed material facts:

Mr. Okocha agreed to provide legal representation to Elaine and Dan Fehrenbacher in a dispute with Southwest General Hospital (the "Hospital") that grew out of Ms. Fehrenbacher's employment. Okocha & Associates Co. L.P.A. ("Okocha & Associates") and the Fehrenbachers entered into a written fee agreement under which the Fehrenbachers agreed to pay a "non-refundable retainer fee" of $12,000 together with 40% of "the amount of money received."

Brief in Opposition to Defendant's Motion for Summary Judgment by Elaine Fehrenbacher (Docket 18); Brief/Memorandum by Defendant Nwabueze V. Okocha in Opposition to Motion for Summary Judgment by Elaine Fehrenbacher (Docket 20); Motion by Plaintiff Elaine Fehrenbacher to Strike Defendant's Amended Motion for Summary Judgment, or in the Alternative, Plaintiff's Brief in Opposition to Defendant's Amended Motion for Summary Judgment (Docket 23); Affidavit of John P. Tremsyn, Esq. in Support of Motion to Strike Defendant's Amended Motion for Summary Judgment (Docket 24); Amended Opposition Brief/Memorandum to Plaintiff Elaine Fehrenbacher's Motion for Summary Judgment (Docket 27); Motion by Plaintiff Elaine Fehrenbacher to Strike Defendant's Amended Brief in Opposition (Docket 28); Affidavit of Nwabueze V. Okocha (Docket 29); Defendant Nwabueze V. Okocha's Reply Brief (30). The parties also filed a number of documents on related topics. The Court read and considered each document filed, whether or not it is cited in this Memorandum of Opinion.

(Affidavit of Nwabueze V. Okocha, Exh. E). Of this, the Fehrenbachers paid $6,000 toward the retainer.

After some negotiations, the Fehrenbachers and the Hospital agreed to settle their dispute for $5,945.23. At a meeting attended by the Fehrenbachers, Mr. Okocha, and the Hospital's attorney, the Fehrenbachers signed a Release. The Hospital's attorney had with him the settlement check in the agreed amount, payable to "Elaine Fehrenbacher." The check was not turned over at that meeting because Mr. Okocha asked the Hospital's attorney to add him as a payee on the check. (Okocha Aff. ¶ 43). The parties dispute whether Mr. Okocha made this request secretly or in front of Ms. Fehrenbacher. (Okocha Aff. ¶ 43; Affidavit of Elaine Fehrenbacher ¶ 3). The Fehrenbachers fired Mr. Okocha later that day. (Fehrenbacher Aff. ¶ 3; Okocha Aff. ¶ 45).

Within a day or so, the Hospital's counsel gave Mr. Okocha a check in the amount of $5,945.23, payable to "Elaine Fehrenbacher and Nwabueze Okocha, Esq.," in settlement of the claims. Mr. Okocha negotiated the check without Ms. Fehrenbacher's endorsement, applied all of the proceeds to his legal fees, and demanded that the Fehrenbachers pay him an additional $2,487.71. They refused.

Mr. Okocha, personally, sued the Fehrenbachers in the Cuyahoga County Court of Common Pleas in a case titled *Nwabueze V. Okocha v. Elaine Fehrenbacher, et al.*, No. 222643 to recover the balance of legal fees he claimed were owed to him. (Okocha Aff., Exh. AA). The Fehrenbachers filed a counterclaim against Mr. Okocha and a third party complaint against Okocha & Associates and others. Of the counts in the counterclaim and third party complaint, these six were filed against Mr. Okocha personally: violation of the Ohio Consumer Sales

Practices Act, breach of contract, fraud and deceit, professional negligence, conversion, and negligent infliction of emotional harm. (Okocha Aff., Exh. AB).

The case was tried to a jury. At the close of Mr. Okocha's case, the state court judge directed a verdict in favor of the Fehrenbachers on Mr. Okocha's complaint. The judge did so because he found that (a) the real party in interest to the fee agreement was not Mr. Okocha but Okocha & Associates; and (b) Mr. Okocha had not proven the "reasonableness of the fees or the reasonable value of the fees for legal services sought to be recovered from [the Fehrenbachers]." (Okocha Aff., Exh. AM). He also dismissed the Fehrenbachers' professional negligence count against Mr. Okocha because it was barred by the statute of limitations. (Okocha Aff. ¶ 68). The judge then charged the jury on conversion, infliction of emotional harm, and punitive damages. (Okocha Aff., Exh. AJ).

The jury returned a general verdict in favor of Ms. Fehrenbacher in the amount of $5,945.23 against both Mr. Okocha and Okocha & Associates and recommended that punitive damages be awarded. The court set a hearing on that issue for May 3, 1993. (Okocha Aff., Exh. AD; entry of 4/20/93). In the meantime, Ms. Fehrenbacher filed a Motion for Attorneys' Fees. (Okocha Aff., Exh. AD, entry of 4/22/93). Mr. Okocha did not file a response to that Motion or appear at the May 3, 1993 hearing. (Okocha Aff. ¶ 76 and Exh. AD, see absence of entry of such a filing). The state court judge then entered a judgment in favor of Ms. Fehrenbacher and against Mr. Okocha and Okocha & Associates for compensatory damages in the amount of $5,945.23 and pre-judgment interest, punitive damages in the amount of $50,000, attorney fees in the amount of $17,500 and costs, and dismissing Mr. Okocha's complaint for fees for the reasons previously stated. (Okocha Aff. ¶ 78, Exh. AM) (the "Judgment").

Mr. Okocha appealed to the Eighth District Court of Appeals for Ohio, which affirmed the Judgment as against Mr. Okocha and in favor of Ms. Fehrenbacher in its entirety. (Okocha Aff., Exh. AU).[3] Mr. Okocha next filed a complaint in mandamus and prohibition with the Ohio Supreme Court naming as defendants the three appellate judges who joined in the order affirming the Judgment, the Eighth District Court of Appeals, both of the trial judges, and the Court of Common Pleas of Cuyahoga County. The complaint alleged that the jurists erred in carrying out their duties and had in the process violated Mr. Okocha's rights under the Ohio Constitution and the United States Constitution. The Supreme Court dismissed the complaint sua sponte. (Affidavit of John P. Tremsyn ¶ 12, Exhs. H (see, for example, ¶¶ 77, 99) and I).

In 1994, the Ohio Supreme Court indefinitely suspended Mr. Okocha's license to practice law, based in part on his representation of the Fehrenbachers. (Okocha Aff. ¶ 89; Tremsyn Aff., Exh. K).

The balance owed under the Judgment is $5,945.23 plus interest at the rate of 10% per annum from October 24, 1990 forward, plus $50,000 in punitive damages, plus $17,500 in attorney fees, plus interest on the punitive damage and attorney fee awards at the rate of 10% per annum from May 4, 1993, less credits of $3,500 and $11,907.44 for funds received from third party sources and applied to the Judgment (the "Debt"). (Tremsyn Aff. ¶ 17).

The Chapter 7 Trustee has abandoned any interest the estate may have in Mr. Okocha's Counterclaim in this Adversary Proceeding. (Docket 60).

Additional facts are set forth below.

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[3] The Court of Appeals reversed the Judgment with respect to third-party State Farm.

DISCUSSION

I.

Summary Judgment Standard

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7056; *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party must oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *See Celotex Corp. v. Catrett,* 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). However, "[n]ot every factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit." *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prod., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998), quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992).

II.

The Parties' Arguments

A Chapter 7 debtor is discharged from all debts which arose before the date of the order for bankruptcy relief, with certain exceptions that are set out in § 523 of the Bankruptcy Code. 11 U.S.C. § 727(b). Ms. Fehrenbacher seeks to invoke two of those exceptions. Her Amended Complaint asserts that the Debt owed by Mr. Okocha is non-dischargeable under 11 U.S.C. § 523 because it is either a debt for embezzlement or larceny under (a)(4) or a debt for willful and malicious injury under (a)(6). Mr. Okocha's Counterclaim requests judgment for his legal fees under the parties' fee agreement, a determination that the Judgment is void, and an award of fees and costs under § 523.

Ms. Fehrenbacher moves for summary judgment both on her Amended Complaint and also on the Counterclaim for fees based on the Judgment in her favor. She argues that the principles of res judicata and collateral estoppel bar re-litigation of these disputes. Her theory on the Amended Complaint is that the jury found Mr. Okocha liable for conversion; in doing so, it necessarily found that his taking of the settlement funds was wrongful and without consent so as to establish embezzlement or larceny under (a)(4) or a willful and malicious injury under (a)(6). She also argues that the jury's award of punitive damages and the judge's award of attorney fees was based on a finding of malice. [4] (Tremsyn Aff. ¶¶ 20, 24; Plaintiff's Motion for Summary Judgment at 10). Using the principle of res judicata, she claims that Mr. Okocha's request for

[4] Although Ms. Fehrenbacher initially argued that the Judgment included a fraud claim, she withdrew that argument. (Docket 45, 46).

additional legal fees under the fee agreement was already determined in her favor by the Judgment.

In opposition to Ms. Fehrenbacher's Motion for Summary Judgment on the fee issue in the Counterclaim, and in support of his own Motion, Mr. Okocha argues that:

(1) there is an inconsistency among Ms. Fehrenbacher's state court trial testimony, her state court deposition testimony, and the affidavit she offered in this case with respect to the terms of the fee agreement, as a result of which summary judgment should be denied to Ms. Fehrenbacher; and

(2) the Judgment on the fee issue is void because the state court lacked jurisdiction to take the issue away from the jury, as a result of which summary judgment should be granted in his favor.

Mr. Okocha's arguments against Ms. Fehrenbacher's Motion for Summary Judgment on her Complaint, and again in support of his own Motion, are, in essence:

(1) any debt owed by him arose from legal malpractice. The statute of limitations has run on that claim, making the Judgment is void;

(2) any debt arose from a malpractice action and it is, therefore, automatically discharged under United States Supreme Court and Sixth Circuit authority;

(3) the doctrines of res judicata and collateral estoppel do not apply to the Judgment because it is invalid; res judicata in the sense of claim preclusion does not apply to a dischargeability proceeding; and collateral estoppel does not apply here because the relevant issues were not actually litigated in the state court;

(4) the Judgment is not final, and if final it is void because Mr. Okocha was not given a fair opportunity to litigate in the state court; and

(5) Mr. Okocha was denied equal protection under the law by the state courts.

(Defendant's Amended Brief in Opposition to Plaintiff Elaine Fehrenbacher's Motion for Summary Judgment; Defendant's Amended Motion for Summary Judgment). (Docket 27, 16).[5]

III.

Full Faith and Credit

The Full Faith and Credit statute provides that "judicial proceedings [of any state court] shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. In order to qualify for full faith and credit, a judgment must be a valid, final judgment on the merits by a court of competent jurisdiction. *Alabama v. Engler*, 85 F.3d 1205, 1209 (6th Cir. 1996). A final judgment is one that is not subject to modification. *Hooks v. Hooks*, 771 F.2d 935, 948 (6th Cir. 1985). State law determines whether a judgment is on the merits. *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550 (6th Cir. 1983), aff'd 470 U.S. 532 (1985).

As this statute has been interpreted, a federal court is required to give a state court judgment the same preclusive effect that a court sitting in that state would give it, unless Congress has created an exception. *Marrese v. Ame. Academy of Orthopedic Surgeons*, 470 U.S. 373 (1985). The full faith and credit principle applies in dischargeability proceedings. *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315 (6th Cir. 1997); *Rally Hill Prod., Inc. v. Bursack (In re Bursack)*, 65 F.3d 51 (6th Cir. 1995). The relevant inquiry, then, is what preclusive effect, if any, would an Ohio court give to the Judgment?

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[5] Given the cross-motions and the number of briefs filed, the arguments of the parties are scattered throughout their filings. The summary above is the Court's understanding of how the parties view their positions on the merits, regardless of where in the briefing the argument was raised.

Ohio Law of Preclusion

Ohio law recognizes that the doctrine of res judicata consists of two principles: claim preclusion and issue preclusion. *Fort Frye Teachers Ass'n. v. State Employment Relations Bd.*, 81 Ohio St. 3d 392, 692 N.E.2d 140 (1998). See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77, n. 1 (1984); *Heyliger v. State Univ. and Community College Sys. of Tennessee*, 126 F.3d 849, 851-852 (6th Cir. 1997), *cert. denied* 118 S.Ct. 1054 (1998). The "claim preclusion concept holds that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Fort Frye Teachers Ass'n.*, 81 Ohio St. 3d at 395, 692 N.E.2d at 144, *citing with approval Grava v. Parkman Township*, 73 Ohio St. 3d 379, 653 N.E.2d 226 (1995). The concept of issue preclusion, or collateral estoppel, provides that "a prior judgment estops a party . . . from subsequently relitigating the identical issue raised in the prior action." *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193; 443 N.E.2d 978, 979 (1983). The Ohio Supreme Court has further explained that:

> [t]he doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties . . ., whether the cause of action in the two actions be identical or different . . . While the merger and bar aspects of res judicata have the effect of precluding the relitigation of the same cause of action, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action. (Citations omitted).

Fort Frye Teachers Ass'n., 81 Ohio St. 3d at 144, 692 N.E.2d at 395. Collateral estoppel applies in dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279 (1991). In such an action, a party may rely on collateral estoppel " in certain circumstances to bar relitigation of issues

relevant to dischargeability, although the bankruptcy court retains jurisdiction to ultimately determine the dischargeability of the debt." *Gober v. Terra & Corp. (In re Gober)*, 100 F.3d 1195, 1201 (5th Cir. 1996). Collateral estoppel applies with respect to determinations of liability. *National City Bank v. Plechaty (In re Plechaty)*, 213 B.R. 119 (B.A.P. 6th Cir. 1997). Res judicata in the sense of claim preclusion does not, however, apply in determining the dischargeability of debts. *Brown v. Felsen*, 442 U.S. 127 (1979). This is because the "considerations material to discharge are irrelevant to the ordinary collection proceeding", and other state law causes of action. *Id.* at 134.

A judgment that is void is not, of course, entitled to any preclusive effect. Under Ohio law, "the circumstances under which judgments are declared to be void are rare. A judgment is void only where the court lacks jurisdiction of the subject matter or of the parties or where the court acts in a manner contrary to due process." *Rondy v. Rondy*, 13 Ohio App. 3d 19, 22, 468 N.E.2d 81, 84 (1983). *See State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). Just as Ohio law requires that court proceedings satisfy due process, so too does a federal court look to see that parties have been given a full and fair opportunity to litigate their dispute in the state court before a state judgment may be given preclusive effect. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982). This constitutional requirement is satisfied where the state court proceedings met minimal procedural requirements of due process. *Id.*

The Judgment determined two matters: (1) Mr. Okocha's claim for fees; and (2) Ms. Fehrenbacher's claims against Mr. Okocha. The parties disagree as to the preclusive effect to be given to these matters, although neither has analyzed the issue under Ohio law.

A. The Counterclaim

1. The claim for legal fees under the fee agreement and request to find the Judgment void.

Ms. Fehrenbacher argues that the Judgment bars Mr. Okocha's Counterclaim for fees based on res judicata, which she uses in the sense of claim preclusion.[6] Mr. Okocha denies this, citing inconsistencies in Ms. Fehrenbacher's state court testimony, state court deposition testimony, and the affidavit she has offered in this proceeding with respect to the terms of their fee agreement. He also asserts that the fee issue was not litigated in state court; the state court did not have jurisdiction over the fee issue; and res judicata and collateral estoppel do not apply because the judgment is void. He urges that summary judgment be granted in his favor.

For purposes of claim preclusion, the first question is whether Mr. Okocha's complaint was decided on the merits. It clearly was when the state court entered a judgment that Mr. Okocha had not proven the reasonableness of his fees. See Ohio R. Civ. Pro. 41(B). Mr. Okocha's argument that the fee dispute was not actually litigated is both irrelevant and contrary to the record. He filed the state court complaint to recover fees and took it to trial; the fact that he lost on a directed verdict does not mean that the claim was not tried.

Mr. Okocha states that the Judgment is not final. The Judgment is, however, unquestionably final, all appeals having been exhausted.[7]

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[6] Res judicata in the sense of claim preclusion is potentially applicable to the fee issue because it is not a dischargeability proceeding; it is, instead, a counterclaim where the debtor is attempting to recover funds from the creditor. Claim preclusion may, therefore, bar the Counterclaim.

[7] An Ohio judgment may be final even before appeals are exhausted. *Ashley v. Ashley*, 118 Ohio App. 155, 193 N.E.2d 535 (1962). That point is not in debate here because all appeals were, in fact, exhausted.

Mr. Okocha next argues that the Judgment against him on the fee issue is void because the state court lacked subject matter jurisdiction. He argues that Ohio Revised Code § 2311.04 gives him a right to trial by jury on his fee claim, a right that cannot ever be taken away from him unless he waives it. He concludes from this that the state court judge lacked jurisdiction to direct a verdict against him. (Defendant's Amended Motion for Summary Judgment at 18). (Docket 16). This is an incorrect reading of Ohio law. The trial judge has jurisdiction to determine whether a party has failed as a matter of law to present an issue for decision by the jury. "If [the court] should conclude that reasonable minds could come to but one conclusion and that there is no question of fact for the jury, then . . . the question for review will be solely whether the trial court erred as a matter of law in its ruling." *The Carter-Jones Lumber Co. v. Eblen*, 167 Ohio St. 189, 207-208, 147 N.E.2d 486, 497 (1958). If the court is incorrect, it is an error in judgment and not a deprivation of a right to trial by jury. *Keller v. Stark Elec. Ry. Co.*, 102 Ohio St. 114, 130 N.E. 508 (1921).

In a further effort to avoid claim preclusion, Mr. Okocha points to inconsistencies in Ms. Fehrenbacher's testimony and statements. These statements, however, are immaterial to this determination and do not establish the existence of a fact which must be tried in this Court.

In sum, the state court had jurisdiction over the parties and the dispute; in fact, Mr. Okocha invoked that jurisdiction by filing his complaint. The Judgment included a decision on the merits that Mr. Okocha failed to meet his burden of proving the reasonableness of his fees. The state court judge did not act outside of his jurisdiction in directing a verdict against Mr. Okocha on his complaint. The Judgment is final. As a result, the Judgment is a valid, final

judgment rendered on the merits on the question of whether Mr. Okocha is entitled to recover any fees from Ms. Fehrenbacher and an Ohio court would give it preclusive effect. Mr. Okocha has not identified any exception that would prevent this result.

When the portion of the Judgment denying Mr. Okocha's claim for fees is given preclusive effect in this second action, it bars Mr. Okocha from relitigating the fee issue. Summary judgment will, therefore, be granted in favor of Ms. Fehrenbacher on the Counterclaim, insofar as it requests fees under the parties' agreement and a determination that the Judgment is void.[8] Conversely, Mr. Okocha's request for summary judgment on these issues is denied.

2. The claim for fees and costs under § 523.

Mr. Okocha also moves for summary judgment on his request in the Counterclaim that fees and costs be awarded to him under 11 U.S.C. § 523. He does not specify any particular part of that section in support of the request. The only reference to a potential fee award appears in § 523(d). That section applies where a creditor unsuccessfully challenges a discharge of a consumer debt under 11 U.S.C. § 523(a)(2). Ms. Fehrenbacher's Amended Complaint is brought under (a)(4) and (a)(6). There is, therefore, no support in the statute for the request for fees and the motion for summary judgment on this issue is denied.

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[8] Mr. Okocha's filings seem to go beyond making the argument that the Judgment is void and therefore cannot be given preclusive effect, to arguing that this Court should declare the Judgment void so as to nullify it in the state courts. To the extent that Mr. Okocha is asking this Court to review and correct the alleged errors of the state court, there would not appear to be jurisdiction to do so. "[T]he Rooker-Feldman doctrine . . . stands for the simple (yet nonetheless confusing) proposition that lower federal courts do not have jurisdiction to review a case litigated and decided in state court; only the United States Supreme Court has jurisdiction to correct state court judgments." *Gottfried v. Med. Planning Serv., Inc.*, 142 F.3d 326, 330 (6th Cir. 1998).

B. The Amended Complaint

Ms. Fehrenbacher asserts that the Judgment granting her an award on her state court complaint is not dischargeable under 11 U.S.C. § 523(a)(4) and (a)(6) and she is entitled to summary judgment on her Amended Complaint as a matter of law. Her burden of proof under these sections is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). She argues that res judicata (again used in the sense of claim preclusion) and collateral estoppel bar relitigation of this claim. Mr. Okocha counters that the Judgment is void and res judicata and collateral estoppel do not apply in any event, such that he is entitled to judgment.

Is the Judgment Granting Ms. Fehrenbacher an Award of Damages Void?

Mr. Okocha's argument that this part of the Judgment is void is based on errors allegedly committed by the state trial and appellate courts. His grievances appear to fall into two categories: allegations that the state courts incorrectly applied the law and allegations that he did not receive due process in the state courts. Although Mr. Okocha did not distinguish between these two groups, each will be discussed separately.

Mr. Okocha contends that the state court judge incorrectly decided that some of the claims against him were not barred by the statute of limitations; the trial judge gave an incorrect jury charge; there is no record of Ms. Fehrenbacher's trial attorney having been directed to prepare a journal entry; the trial court lacked authority to dismiss various third parties; the state appellate court followed the wrong law; the appellate court should not have decided any issues against him, using as a reason that he did not provide a full trial transcript to support his assignments of error in that court; and similar alleged errors of law. Even if Mr. Okocha is correct that there were legal errors, and this Court is not so finding, that would not help his case

under either Ohio or federal law. To the contrary, Ohio recognizes that even an incorrect judgment is given preclusive effect. *LaBarbera v. Batsch*, 10 Ohio St. 2d 106, 227 N.E.2d 55 (1967). And a federal court will not find a judgment to be void based on errors of law by the state court. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

Mr. Okocha also points to various events in the state court that arguably raise procedural due process issues on their face. They include that: he was deprived of his right to a trial by jury; Okocha & Associates was denied due process; the court did not conduct a hearing required by Ohio Rule of Civil Procedure 37(A)(4) before granting pretrial sanctions against him; and the judge did not give him notice of the hearing at which the Court awarded attorney fees against him, as required by Ohio Revised Code § 2323.51. The evidence offered by Mr. Okocha, however, does not establish a violation of procedural due process of law. In particular:

- Mr. Okocha was not deprived of his right to a trial by jury because the state court had jurisdiction to direct a verdict against him on his fee claim, as discussed above;

- Okocha & Associates is not a party to this Adversary Proceeding and any grievances it may have are outside of the scope of this case;

- The question of whether the state court acted properly in awarding pretrial sanctions against Mr. Okocha for discovery abuses is irrelevant to this proceeding because Ms. Fehrenbacher is not asking that those sanctions be declared non-dischargeable; and

- Ohio law, as found by the Court of Appeals in this case, only requires a hearing before attorney fees are awarded when the award is under Ohio Revised Code § 2323.51, the frivolous conduct statute. That was not the basis for the award in this case. (Okocha Aff., Exh. AU at 14). The record shows that Mr. Okocha did get notice of the hearing held on May 3, 1993.[9]

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[9] Moreover, not every deviation from state procedures can be viewed as a federal constitutional violation. *See Bills v. Henderson*, 631 F.2d 1287, 1298-99 (6th Cir. 1980).

Mr. Okocha also states that he was denied equal protection under the law. This argument is not developed either factually or legally and does not provide a basis for finding that the Judgment is void.

To the extent that Mr. Okocha opposes Ms. Fehrenbacher's request for summary judgment on her Amended Complaint because the Judgment is void, he has failed to show the existence of a disputed material fact that must be tried. And to the extent that Mr. Okocha moves for summary judgment on that basis, he has not demonstrated that he is entitled to judgment as a matter of law. The Judgment is not void.

11 U.S.C. § 523

Given that the Judgment is valid, the issue remains whether it is entitled to preclusive effect in this action. To decide that, the state court Judgment must be compared to the requirements of 11 U.S.C. § 523.

11 U.S.C. § 523(a)(4)

Ms. Fehrenbacher asserts Mr. Okocha's Debt is based on both embezzlement and larceny. Section 523(a)(4) of the Bankruptcy Code provides that a discharge under 11 U.S.C. § 727 does not discharge a debtor from a debt for embezzlement or larceny. Embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud." (Citations omitted). *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). "Larceny is the wrongful taking and carrying away of property of another with intent to convert said property to one's use

without the consent of the owner." *Werner v. Hofmann (In re Hofmann)*, 144 B.R. 459, 464 (Bankr. D. N.D. 1992), *aff'd* 161 B.R. 998 (D. N.D. 1993), *aff'd* 5 F.3d 1170 (8th Cir. 1993).

11 U.S.C. § 523(a)(6)

Under § 523(a)(6) of the Bankruptcy Code, a discharge under 11 U.S.C. § 727 does not discharge a debtor from a debt for "willful and malicious injury by the debtor to another entity or to the property of another entity." The United States Supreme Court recently held that a debt must result from "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998); see *Salem Bend Condominium Assoc. v. Bullock-Williams (In re Bullock-Williams)*, 220 B.R. 345 (B.A.P. 6th Cir. 1998).

The Judgment Under Ohio Law

Ms. Fehrenbacher argues that the Judgment is based on conversion and that the conversion finding, when combined with the award of punitive damages and attorney fees, establishes a willful and malicious injury. Conversion under Ohio law "is generally defined as the wrongful assuming of unauthorized control over the personal property of another, whether it is done purposefully or not." *Fulks v. Fulks*, 95 Ohio App. 515, 518, 121 N.E.2d 180, 182 (1953). The tort of conversion is not necessarily a fraudulent or an intentional tort; and a judgment based on it does not necessarily preclude relitigation of dischargeability under the cited sections. "[N]ot every tort judgment for conversion is exempt from discharge. Negligent or reckless acts . . . do not suffice to establish that the resulting injury is 'willful and malicious'." *Kawaauhau* at 978 quoting *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332 (1934).

The critical point is to establish what issues were actually and necessarily litigated and determined by the jury. The jury was not required to answer interrogatories under Rule 49, Ohio Rules of Civil Procedure, so there is no evidence of the specific basis for their decision. The Judgment itself is similarly silent. To see what issues were actually determined, therefore, it is appropriate to review the jury instructions. Although Ms. Fehrenbacher originally stated a number of causes of action against Mr. Okocha, by the time the trial judge charged the jury, the issues had been narrowed to these:

> The duty of an attorney to his client is to be ordinarily and reasonably diligent, careful and prudent in charging for his services.
>
> A lawyer shall not enter into an agreement for or charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence will be left with a definite and firm conviction that the fee is in excess of a reasonable fee.[10]
>
> An attorney, absent an express authority from his client, has no authority to negotiate or cash a settlement check. If you find by a preponderance of the evidence that Mr. Okocha and Okocha & Associates negotiated and cashed the settlement check without the consent of Mrs. Fehrenbacher, your verdict must be for Mrs. Fehrenbacher.
>
> If you find from the evidence that Elaine Fehrenbacher had a vested interest in the proceeds of the settlement check from Southwest General Hospital, and was deprived of any interest by an unauthorized act of Nwabueze V. Okocha and Nwabueze Okocha & Associates Company, L.P.A., by the exercise of domain over the check inconsistent with the right and possession of Elaine Fehrenbacher, it is a conversion of the settlement check. Any distinct act of dominion wrongfully exerted over one's property is a denial of his right or interest and is a conversion.
>
> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. If you find by a preponderance of the evidence that Mr. Okocha and Okocha Company [sic], by extreme and outrageous conduct, intentionally and recklessly caused severe emotional distress to Mrs. Fehrenbacher, you must return a verdict for Mrs. Fehrenbacher.

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[10] It is unclear why the trial court included instructions with respect to unreasonable attorney fees, because the court had already directed a verdict in favor of the Fehrenbachers on Mr. Okocha's complaint for fees.

With respect to punitive damages, the jury was instructed that:

> You will also decide whether Nwabueze Okocha and Nwabueze Okocha & Associates Company, L.P.A. shall be liable for punitive damages in addition to any other damage you may award Elaine Fehrenbacher. The purpose of punitive damages is to punish the offending party and to make the offending party the example to discourage others from similar conduct . . . You may decide that Nwabueze V. Okocha and Nwabueze V. Okocha & Associates Company are liable for punitive damages if you find by clear and convincing evidence that they acted with a conscious disregard for the rights and safety of Elaine Fehrenbacher that had a great probability of causing substantial harm.

(Okocha Aff., Exh. AJ).

In order to establish that this portion of the Judgment is entitled to preclusive effect, Ms. Fehrenbacher must show that the Judgment is based on the same elements that are used to determine whether a debt is non-dischargeable. More specifically, she must prove that the Judgment is based on the elements needed to prove that the debt is one for: (1) embezzlement or larceny within the meaning of § 523(a)(4); or (2) an intentional tort within the meaning of § 523(a)(6).

Ms. Fehrenbacher's argument assumes that the Judgment is based solely on conversion. (Tremsyn Aff. ¶ 24). It is not, however, possible to arrive at that conclusion with any certainty because, as noted, the jury was charged with alternative theories of liability. Moreover, regardless of the theory on which the jury found Mr. Okocha to be liable, the instructions did not require the jury to find that Mr. Okocha deliberately or intentionally injured Ms. Fehrenbacher in order to reach a verdict in her favor, a finding which is critical to a determination under § 523(a)(6). Additionally, the elements of embezzlement and larceny under § 523(a)(4) are quite

different than the elements of conversion and infliction of emotional harm as identified by the state judge in the jury charge.

The fact that the jury recommended an award of punitive damages does not supply the missing elements. There may be cases in which a punitive damage award based on an appropriate state law jury charge would establish the required intent under § 523(a)(6). *See Preston v. Murty,* 32 Ohio St. 3d 334, 512 N.E.2d 1174 (1987); Ohio Revised Code § 2315.21. The jury charge in this case did not accomplish that. The jury was not required to find that Mr. Okocha deliberately or intentionally injured Ms. Fehrenbacher before recommending an award of punitive damages.[11] In the absence of such facts, Ms. Fehrenbacher has not established that the portion of the Judgment that found in her favor on her counterclaim is entitled to preclusive effect on the issue of dischargeability. As the Judgment does not collaterally estop Mr. Okocha from litigating the issue of dischargeability, Ms. Fehrenbacher's request for summary judgment on this issue is denied.

The next question is whether Mr. Okocha is entitled to a summary judgment that this Debt is dischargeable. Ms. Fehrenbacher's Affidavit and exhibits in support of her briefs establish that there is a genuine issue of material fact as to whether Mr. Okocha willfully and maliciously injured Ms. Fehrenbacher and also whether the Debt is one for embezzlement or larceny. As a result, this Court is required to make an independent determination as to whether Mr. Okocha's actions fall within the terms of 11 U.S.C.§ 523. Mr. Okocha's request for summary judgment on the Amended Complaint is, therefore, denied.

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[11] Ms. Fehrenbacher's argument about the significance of the attorney fee award is not developed in the record or the briefing.

The Debt

The amount of Mr. Okocha's Debt to Ms. Fehrenbacher arising from the actions which are the basis for this dischargeability action was determined at the trial level and upheld on appeal in the state court proceedings. As this issue was actually and necessarily litigated and determined, Ohio courts would give preclusive effect to the determination. *Fort Frye Teachers Ass'n.* This Court must give it preclusive effect as well. *National City Bank v. Plechaty (In re Plechaty),* 213 B.R. 119 (B.A.P. 6th Cir. 1997). *See also In re Calvert.* The amount of the Debt, therefore, will not be re-litigated. The only issue at trial will be whether the Debt is dischargeable.

CONCLUSION

1. The Adversary Proceeding Counterclaim

(A) Ms. Fehrenbacher is entitled to summary judgment on the Counterclaim requests for: (1) attorney fees under the parties' agreement; and (2) a determination that the Judgment is void.

(B) Mr. Okocha's Motion for Summary Judgment on the Counterclaim is denied.

2. The Adversary Proceeding Amended Complaint

(A) Partial Summary Judgment will be entered in favor of Ms. Fehrenbacher on the ground that the amount of the Debt owed to her by Mr. Okocha was established by the Judgment and is entitled to preclusive effect in this action. Summary judgment will not be granted on the balance of her Amended Complaint because the Judgment is not entitled to preclusive effect on the dischargeability issue.

(B) Mr. Okocha is not entitled to summary judgment on the Amended Complaint because there is a genuine issue of material fact as to whether his actions in connection with the settlement check fall within the scope of 11 U.S.C. § 523(a)(4) or (a)(6).

A separate judgment reflecting this decision will be entered.

Date: 10 July 1998

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Mr. Nwabueze Okocha
Edgar Boles, Esq.
Richard Ginley, Trustee

By: Joyce L. Gordon, Secretary

Date: 7/10/98