UNTIED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 01-33028
	)	
Lauren Kay Parris,	)	Chapter 7
	)	
Debtor,	)	Adv. Pro. No. 01-3194
	)	
Krista Hanson,	)	**JUDGE MARY ANN WHIPPLE**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Lauren Kay Parris,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding comes before the court upon cross-motions for summary judgment in response to the "Complaint to Determine Dischargeability of a Debt" ("Complaint") filed by Plaintiff, Krista Hanson ("Plaintiff"). The issue is whether a judgment debt owed to Plaintiff is nondischargeable under 11 U.S.C. § 523(a)(6),[1] and whether the underlying pre-petition state court judgment is dispositive in favor of either party. For the following reasons, the court finds that Plaintiff's Motion for Summary Judgment should be DENIED; that Defendant's Motion for Summary Judgment should also be DENIED; and that this matter should be set for trial.

Summary of Facts:

On June 11, 2001, Debtor-Defendant, Lauren Kay Parris ("Parris"), filed her voluntary Chapter 7 petition. Parris scheduled Plaintiff as a creditor holding an unsecured nonpriority claim in the amount of $2,673.00. [Doc. # 1, Chapter 7 Case No. 01-33028 : Parris' Petition, Schedule F, p.1, No. 6]. On

---

1 The Complaint also sets forth an 11 U.S.C. § 523(a)(2) claim; however, it was not argued in the Motion for Summary Judgment and has presumably been abandoned.

August 15, 2001, Plaintiff filed her Complaint in this court alleging that a Toledo Municipal Court Judgment ("JE"), entered on November 6, 1998, for $2,568.00 plus interest and costs, had been awarded in her favor. [See Exhibit A to Plaintiff's Motion for Summary Judgment; JE, p.5, ¶5]. The JE states that "offsetting claims arose out of a failed living arrangement" between Plaintiff and Parris. [JE, p.1, ¶2]. In the state court Plaintiff had sought "damages for the wrongful withholding and conversion of personal property" to which Parris filed a denial and counterclaim. [JE, p.1, ¶1]. In its adjudication of these claims the state court made several findings of fact. [JE, pp.2-3]. Ultimately, the state court relied upon the burden of proof used "in rental and damage claims", holding that Plaintiff "sustained her burden of proof and awards Judgment against [Parris]." Furthermore, the state court held Parris did not sustain her burden of proof as to her counterclaims and Plaintiff did not sustain "her burden of proof claim [sic] for punitive damages and attorney fees." [JE, p.4, ¶1].

Law and Analysis:

I. Summary Judgment Standard

This case is before the court upon the parties' cross-motions for summary judgment. Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, a party will prevail on a motion for summary judgment when "[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56(c). In order to prevail, movant must prove all elements of the cause of action or defense. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). Once that burden is met, however, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249-51 (1986); *60 Ivy St. Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir. 1987). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-88 (1986).

In cases such as this, where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir.

1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not in itself establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Fed.R.Civ.P. 56 does not automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

II. 11 U.S.C. § 523. Exceptions to discharge

Plaintiff seeks an order declaring nondischargeable the state court judgment entered in her favor against Parris, under 11 U.S.C. § 523(a)(6), as follows, :

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

This section will except from discharge debts for willful and malicious conversion by the debtor of the property of another entity. *See KMK Factoring, L.L.C. v. McKnew (In re McKnew*), 270 B.R. 593, 634-640 (Bankr. E.D.Va. 2001)(discussing at length application of Section 523(a)(6) to conversion cases). Liability for the injury is excluded from debtor's discharge only if both elements, willfulness and malice, are present. Generally, "willfulness" applies to the debtor's volition in causing the injury, and "malice" describes the debtor's motivation or state of mind.

The controlling case analyzing the elements of Section 523(a)(6) is *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). In *Geiger* the Supreme Court concluded that the language of Section 523(a)(6) encompasses only acts done with the actual intent to cause injury, and not merely intentional acts that happened to cause injury. *Id*. at 61-62. Of significance to this case, the Supreme Court cited with approval two of its prior cases involving debtor conversion of a creditor's property. *Id*. at 63-64. Those cases are *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916), and *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934).

In *Davis*, the Supreme Court noted, as follows, that not every tort judgment is excepted from discharge:

> There is no doubt that an act of conversion, if willful and malicious, is an injury

> within the scope of this exception but a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion that is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. There may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one.

Davis, 293 U.S. at 332.

The Sixth Circuit Court of Appeals has interpreted the state of mind required under Section 523(a)(6) in light of *Geiger*. Specifically, according to the Sixth Circuit, "the mere fact that [the debtor] should have known [her] decisions and actions put [the creditor] at risk is also insufficient to establish a 'willful and malicious injury.'" *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 465 n.10 (6th Cir. 1999). Rather, "[she] must will or desire harm, or believe injury is substantially certain to occur as a result of [her] behavior." *Id*. As another bankruptcy court recently concluded, "[c]ases subsequent to *Geiger*, considering whether acts of conversion constitute willful and malicious injury, have focused on the distinction as to whether the conversion was an intentional act or merely a reckless or negligent conversion of property." *McKnew*, 270 B.R. at 638.

III. Collateral Estoppel

Each party bases her motion on the alleged collateral estoppel effect, or issue preclusion, of the state court judgment. The federal full faith and credit statute, *28 U.S.C § 1738*, directs bankruptcy and other federal courts to accord a state court judgment the same preclusive effect the judgment would have in state court. *Corzin v. Fordu* (*In re Fordu*), 201 F.3d 693, 703 (6th Cir. 1999). In this case the court must therefore apply Ohio preclusion principles to determine the effect of the state court judgment.

Under Ohio law, issue preclusion applies when a fact or issue "(1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom [preclusion] is asserted was a party in privity with a party to a prior action." *Thompson v. Wing*, 70 Ohio St. 3d 176, 183, 637 N.E. 2d 917, 923 (1994). "Issue preclusion precludes the relitigation of an issue that has been ***actually*** and necessarily litigated and determined in a prior action." *MetroHealth Medical Ctr. v. Hoffmann-LaRoche, Inc*., 80 Ohio St. 3d 212, 217, 685 N.E.2d 529, 533 (1997) (emphasis added).

In this case, the parties are the same as the parties in the state court, so there is no dispute as to the third factor. Rather, the second and third factors are the focus of the parties' motions.

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue of material fact for trial. There may be some facts necessary for a dischargeability determination that were not necessary to or part of the determination underlying the prior judgment. The record now before the court is unclear as to whether the issues of maliciousness and willfulness as to Parris' actions and Plaintiff's injuries were actually litigated in and determined by the state court. Whether Parris acted to cause "willful and malicious injury" may have been litigated in the state court case; if so, however, the record before this court does not sufficiently reflect that fact. The underlying pleadings are not part of this record. There is no transcript, probably because of the cost. Furthermore, the JE is vague as to the cause of action upon which Plaintiff prevailed. It does state that Plaintiff's underlying claim was for "conversion and wrongful withholding of personal property"; however, the ruling more directly corresponds with the burden of proof standard for "rental and damage claims," as set forth in the first paragraph of the state court's conclusions of law. Also, the state court expressly declined to award Plaintiff punitive damages. The JE alone simply does not provide this court with a sufficient record upon which to make the determinations in favor of either party required under Section 523(a)(6) in light of *Geiger* and described above.

In viewing the facts in a light most favorable to each non-moving party, the court finds that a genuine issue of material fact does exist. This court is unaware of what exactly was litigated in Toledo Municipal Court. Plaintiff's judgment may have been based upon the willful and malicious conversion of the Plaintiff's property, the debt for which would not be dischargeable under Section 523(a)(6). Alternatively, however, the debt may have been incurred as an award for "rental" damages, which could be a contractual remedy that would be dischargeable. So the underlying judgment cannot be construed as collateral estoppel as a matter of law in favor of either party at this stage of the case.

Conclusion:

In reaching its conclusions, the court has considered all the evidence, exhibits, and arguments of counsel, regardless whether they are specifically referred to in this memorandum of decision. Accordingly, it is

ORDERED that the Motion for Summary Judgment [Doc. #8] filed by Plaintiff, Krista Hanson, be, and is hereby, DENIED, without prejudice; and that the Motion for Summary Judgment [Doc. # 9] filed by Defendant, Lauren Kay Parris, be, and is hereby, DENIED, without prejudice.

It is ***FURTHER ORDERED*** that this matter be, and is hereby, set for a scheduling pre-trial conference on **Monday February 25, 2002 at 9:45 a.m.**, in Courtroom No. 2, Room 103, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio.

COUNSEL ARE ADVISED THAT THEY MAY APPEAR AT THE PRETRIAL CONFERENCE BY TELEPHONE IF THEY ADVISE THE COURT IN ADVANCE BY CALLING CHAMBERS AT (419) 259-6327 OR THE COURTROOM DEPUTY AT (419) 259-6440 EXT. 3133.

Dated:

MARY ANN WHIPPLE
UNITED STATES BANKRUPTCY JUDGE