THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-10325
	)	
JOSEPH BOUHALL,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
C. LEE MCCARTY,	)	Adversary Proceeding No. 02-1153
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
JOSEPH BOUHALL,	)	
	)	
Defendant.	)	

The Plaintiff, C. Lee McCarty, filed this Adversary Proceeding to request that his claim against the Debtor, Joseph Bouhall, which is based on a state court consent judgment be declared nondischargeable under 11 U.S.C. § 523(a)(6). The Plaintiff has moved for summary judgment and the Debtor opposes that request. (Docket 16, 17). For the reasons set forth below, the Plaintiff's motion for summary judgment is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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).

FACTS

In March 1990, the Plaintiff filed a state court lawsuit against the Debtor and a co-worker, Austin Chappell. *McCarty v. Bouhall, et al.*, Case No. 185941, Cuyahoga County Court of Common Pleas. The Plaintiff alleged that the Debtor and Chappell made defamatory statements about him relating to his job performance. The parties settled the action before trial and submitted a judgment entry which the state court entered on August 19, 1991 (the "Judgment").[1] Although the Debtor was initially represented by counsel, he was not represented at the time the settlement was reached.

The agreed Judgment provides in relevant part:

> By agreement of the parties, judgment is hereby rendered for the Plaintiff on his Complaint in the amount of $75,000.00 with interest at 8% per annum, this judgment consisting of $74,000.00 as Compensatory Damages, and $1,000.00 as Punitive Damages.
>
> The basis for this judgment is the wanton and reckless acts of the [Debtor and Chappell] in publishing certain documents which included statements about the Plaintiff that were defamatory, and which as a consequence, caused injury to the Plaintiff. It is the intention of the parties that this judgment be non-dischargeable in bankruptcy court subject to 11 U.S.C. Section 523(a)(6).

The Judgment also requires the Debtor (and Chappell) to sign a retraction and to refrain from making further comments about the Plaintiff. Additionally, it provides that the Debtor (and Chappell) may satisfy the judgment by paying a total of $30,000.00 to the Plaintiff.

---

[1] The state court entered a second judgment on February 24, 1992. This entry includes substantially the same terms as the Judgment, but it was not signed by the Debtor, Chappell, the Plaintiff, or his counsel. The parties do not address this second judgment and it is not clear why it was entered. The Debtor filed a motion to vacate judgment in the state court. It is unclear from the evidence: (1) which judgment was the subject of that motion; and (2) what the Debtor's reason for requesting relief was. The state court denied the Debtor's motion.

After the Debtor filed his Chapter 7 case on April 15, 2002, the Plaintiff filed this Adversary Proceeding in which he asks for a determination that the Debtor's liability under the Judgment is not dischargeable under 11 U. S.C. § 523(a)(6). The Plaintiff now moves for summary judgment on his Complaint.

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. FED. R. CIV. P. 56(c), made applicable by FED. R. BANKR. P. 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 . . . ." *Celotex Corp. v. Catrett,* 477 U.S. at 324. "[T]he nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Poss v. Morris (In re Morris),* 260 F.3d 654, 665 (6th Cir. 2001). 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). 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)).

DISCUSSION

An individual Chapter 7 debtor is entitled to a discharge of all prepetition debts except for the debts identified in Bankruptcy Code § 523. The Plaintiff relies on the exception provided in §523(a)(6) and argues that he is entitled to summary judgment based on the doctrine of collateral estoppel.

A. 11 U.S.C. § 523(a)(6)

Debts are not dischargeable under Bankruptcy Code § 523(a)(6) if they are:

> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

To be excluded from discharge under this section a debt must result 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) (emphasis in original). "*Kawaauhau* instructs that for a debt to be nondischargeable under § 523(a)(6), the debtor must have intended not only his conduct, but also the consequences of his conduct." *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 921-22 (B.A.P. 6th Cir. 2000). In following and interpreting *Geiger*, the Sixth Circuit held that an injury falls within this exception if the actor "desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it[.]" *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999) (quoting Restatement (Second) of Torts § 8A (1964)). *See also, Kennedy v. Mustaine (In re Kennedy)*, 249 F.3d 576 (6th Cir. 2001).

B. The Preclusive Effect of the Judgment

"The doctrine of collateral estoppel 'precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action'." *Markowitz*, 190 F.3d at 461 (quoting *Sanders Confectionary Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). Collateral estoppel applies in dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279 (1991). The full faith and credit requirements of 28 U.S.C. § 1738 also apply. This Court must, therefore, look to Ohio law to determine the preclusive effect of the Judgment. *Markowitz,* 190 F.3d at 461.

There are four prerequisites to the application of collateral estoppel under Ohio law:

> (1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; (3) the issue in the present suit must have been identical to the issue in the prior suit; (4) the party against whom estoppel is sought was a party or in privity with the party in the prior action.

Moffitt, 252 B.R. at 921 (quoting *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 415-16 (Bankr. N.D. Ohio 1998)). The Debtor argues that the Plaintiff is not entitled to summary judgment based on collateral estoppel because: (1) he did not have a full and fair opportunity to litigate in the state court; and if he did (2) the issue that is before this Court was not actually litigated.

1. Was the Debtor Given A Full and Fair Opportunity to Litigate?

Consent judgments are generally entitled to preclusive effect under Ohio law. *See Gilbraith v. Hixson (In re Gilbraith)*, 512 N.E.2d 956, 959, 32 Ohio St. 3d 127, 129 (Ohio 1987) ("Implicit in the rule is the recognition that a judgment entered by consent, although predicated

upon an agreement of the parties, is an adjudication as effective as if the merits had been litigated and remains, therefore, just as enforceable as any other validly entered judgment."); *Grant Fritzsche Enters., Inc. v. Fritzsche,* 667 N.E.2d 1004, 107 Ohio App.3d 23 (Ohio Ct. App. 1995) (holding collateral estoppel applies to a consent entry); *State v. Ferraro*, 578 N.E.2d 492, 63 Ohio App.3d 168 (Ohio Ct. App. 1989). This is so even if the judgment is voidable. *See Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 416 (Bankr. N.D. Ohio 1998) (citations omitted) ("Instead[,] to attack a voidable judgment, the claimant must either appeal the decision of the court issuing the judgment, or bring an action under Ohio Civ. R. 60(B) to have the judgment set aside."). Void judgments, on the other hand, are not entitled to preclusive effect under Ohio law. *Id.* at 416 n. 3. A judgment is considered void if: (1) the issuing court lacked subject matter jurisdiction; (2) service of process was insufficient; or (3) the party obtaining the judgment did so by fraud. *Id.* (citations omitted). *See also, Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186 (B.A.P. 6th Cir. 2002) (finding that a factual issue regarding sufficiency of service precluded summary judgment on the issue of whether collateral estoppel applied).

Applying this state law, the consent Judgment is to be given preclusive effect in this Adversary Proceeding unless it is void. The Debtor argued on this point that he did not have a full and fair opportunity to litigate the issues in state court because he acted without counsel and under duress when he consented to the Judgment. The Debtor does not argue that the state court lacked jurisdiction or that he was not appropriately served. His contention that he was not given an opportunity to litigate based on his "belie[f] at the time that he had no choice but to agree to the terms" does not amount to an allegation of fraud by the Plaintiff in obtaining the Judgment. (Debtor's Affidavit at ¶ 17, Docket 17). Therefore, because the Debtor has not raised a factual

argument which would provide a basis for challenging the Judgment as void under Ohio law, it appears that the Debtor did have a full and fair opportunity to litigate in state court. Having entered into the consent Judgment, the Debtor is bound by it, and this Court does not have jurisdiction to go behind such a judgment. *See Singleton v. Fifth Third Bank of Western Ohio (In re Singleton)*, 230 B.R. 533, 536 (B.A.P. 6th Cir. 1999) (discussing the *Rooker-Feldman* doctrine which is a jurisdictional doctrine that "expresses the principle that 'federal trial courts have only original subject matter, and not appellate, jurisdiction [and] . . . may not entertain appellate review [or collateral attack on] a state court judgment'. ").

2. Was the Identical Issue Litigated in the State Action?

The Debtor also argues that Plaintiff is not entitled to summary judgment based on collateral estoppel because the issue before this Court was not actually litigated in state court. In support, he points out that the Judgment does not refer to any acts which are "willful and malicious," the phrase used in the Bankruptcy Code. For his part, the Plaintiff contends that this element is established by this Judgment language: "The basis for this judgment is the wanton and reckless acts of the [Debtor] in publishing certain documents which included statements about the Plaintiff that were defamatory, and which as a consequence, caused injury to the Plaintiff[ ]".[2]

Because the Judgment provides that the Debtor made defamatory statements about the Plaintiff, we must look to Ohio's law on defamation to determine whether this wording is

---

[2] The Plaintiff does not argue that the Judgment is nondischargeable based on the agreement in the Judgment that "[it] is the intention of the parties that this judgment be non-dischargeable in bankruptcy court subject to 11 U.S.C. Section 523(a)(6)[]." Such provisions are generally considered unenforceable. *See, Bank of China v. Huang (In re Huang),* 275 F.3d 1173, 1177 (9th Cir. 2002).

sufficient to establish that the Debtor's actions were willful and malicious within the meaning of § 523(a)(6). The elements of a defamation claim are: "1) a false statement, 2) defamatory to the plaintiff, 3) published to a third party, 4) by a defendant who was at least negligent, and 5) damaging to the plaintiff's reputation." *Parry v. Mohawk Motors of Michigan, Inc.*, 236 F.3d 299, 312 (6th Cir. 2000) (citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 512 N.E.2d 979, 984 (Ohio 1984)). A claim for defamation under Ohio law does not require a showing that the injury was "willful and malicious" because the claim can be based on conduct which is merely negligent. This is to be distinguished from some specific actions for defamation in which certain statements are considered injurious by their nature. *See Kennedy v. Mustaine (In re Kennedy)*, 249 F.3d 576, 582 (6th Cir. 2001) (finding by reference to Michigan law that words as to lack of chastity are defamation *per se* (injurious by their nature) and that a judgment on that basis estopped the debtor from litigating whether the statements were intentional for purposes of § 523(a)(6)). The Judgment is this case finds only that the Debtor's statements were defamatory. That provision is insufficient to establish the intent requirement of § 523(a)(6).

The Judgment also provides that the Debtor's actions in publishing the statements were "wanton and reckless." While Ohio law uses the term reckless interchangeably with the terms "willful and wanton", *see Moffitt,* 252 B.R. at 922 (citing *Thompson v. McNeill*, 559 N.E.2d 705, 708 n. 1 (Ohio Ct. App. 1990)), this provision is also insufficient to satisfy the intent requirement. This is because § 523(a)(6) requires not only that the Debtor intentionally made the statements but also that he intended to cause harm to the Plaintiff. *See Markowitz,* 190 F.3d at 462-63 (noting that "non-dischargeability requires more than an intentional decision but also an

intent to do harm"). The Judgment only addresses the Debtor's intent in making the statements and does not provide that the Debtor made them with the intent to harm the Plaintiff. The issue of whether the Debtor intended to harm the Plaintiff in making the statements is a material issue of fact which was not resolved by the Judgment. The Debtor denies via affidavit in this Adversary Proceeding that he intended to harm the Plaintiff. Consequently, there is a material issue of fact that prevents the Court from entering summary judgment.

CONCLUSION

For the reasons stated above, the Plaintiff is not entitled to summary judgment under § 523(a)(6) based on collateral estoppel. A separate order will be entered reflecting this decision.

Date: 26 Novar 2002

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Harvey Morrison, Esq.
Richard Kenney, Jr., Esq.
Charles Fonda, Esq.
Susan Gray, Esq.

By: Joyce L. Gordon, Secretary

Date: 11/26/02

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-10325
	)	
JOSEPH BOUHALL,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
C. LEE MCCARTY,	)	Adversary Proceeding No. 02-1153
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
JOSEPH BOUHALL,	)	
	)	
Defendant.	)	

For the reasons stated in the Memorandum of Opinion entered this same date, Plaintiff's motion for summary judgment is denied. (Docket 16).

IT IS SO ORDERED.

Date: 26 November 02

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Harvey Morrison, Esq.
Richard Kenney, Jr., Esq.
Charles Fonda, Esq.
Susan Gray, Esq.

By: Joyce L. Gordon, Secretary

Date: 11/26/02