

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

)	CHAPTER 7
)	
)	JUDGE RUSS KENDIG
)	
IN RE:)	CASE NO. 04-65193
)	
DALE R. WARD AND)	ADV. NO. 04-6164
ANGELA D. WARD,)	
Debtors.)	
)	
DIANE MIKES, EXECUTRIX,)	MEMORANDUM DECISION
)	
Plaintiff,)	
)	
v.)	
)	
ANGELA WARD,)	
)	
Defendant.)	
)	

This matter is before the court upon a motion for summary judgment filed by Diane Mikes (hereinafter "Plaintiff"), executrix of the estate of Paul Wagner, and the response thereto. For the following reasons, Plaintiff's motion for summary judgment is denied.

I. JURISDICTION, VENUE, AND PROCEDURAL HISTORY

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Venue is proper pursuant to 28 U.S.C. § 1408.

Angela Ward (hereinafter "Defendant") filed her petition for relief under chapter 7 of the Bankruptcy Code¹ on September 29, 2004. On December 29, 2004, Wagner filed this

¹ Unless otherwise stated, references to "the Code" or "the Bankruptcy Code" are to Title 11 of the United States Code. Unless otherwise stated, a reference to a "Section" is a reference to a section within the Bankruptcy Code.

adversary proceeding to determine the dischargeability of certain debts owed to him by Defendant arising from a judgment in the Mahoning County Court of Common Pleas. On January 19, 2005, Defendant filed her answer and moved for judgment on the pleadings. Following a pretrial on March 9, 2005, the case was set for trial. Wagner died testate on March 28, 2005 and Dianna Mikes, executrix of Wagner's estate, was substituted as Plaintiff by way on an order entered May 31, 2005. Order Granting Mot. for Substitution of Pl., Mikes v. Ward (In re Ward), 04-6164 (Bankr. N.D. Ohio 2004) (No. 14). Plaintiff filed her motion for summary judgment on June 3, 2005 and Defendant responded on June 14, 2005. The following constitute the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7056.

II. FACTS

Defendant is Wagner's daughter. In 1999, Wagner executed a durable power of attorney (hereafter "POA") that gave Defendant wide ranging authority over Wagner's business and financial affairs. The POA granted Defendant the authority to make lifetime gifts of property to members of Wagner's family, so long as the gifts were consistent with prudent estate planning or financial management, or with the known or probable intent with respect to disposition of Wagner's estate.

In May 2003, Wagner was hospitalized for heart surgery. During the period of Wagner's hospitalization, Defendant withdrew all the funds from a bank account captioned in both their names and purchased a bank check in her name. The money was not a gift from Wagner to Defendant and Wagner did not expressly authorize Defendant to withdraw the funds. Wagner took the \$25,302.47 she had withdrawn, gave some of it to her sister, and deposited the remainder in a new bank account accessible by herself and her sister. About a week later, Defendant drew \$8,000.00 from Wagner's line of credit at a local bank and purportedly hid it in Wagner's freezer pursuant to Wagner's instruction. That money, and \$3,000.00 already hidden in the freezer, were never found when Wagner was discharged from the hospital. The only individuals who knew of Wagner's practice of hiding money in his freezer were Wagner and Defendant. Defendant removed the overwhelming majority of Wagner's furniture from his home. Wagner was discharged from the hospital on or about June 26, 2003, and revoked the POA the following day.

Wagner filed a complaint for conversion and intentional infliction of extreme emotional distress in the Court of Common Pleas of Mahoning County on July 30, 2003. Following a bench trial, the magistrate granted judgment in favor of Wagner in the amount of \$36,302.47, plus interest and costs. (Pl.'s Mot. for Summ. Judg., Ex. A.) The Mahoning County Court of Common Pleas found:

beyond a preponderance of the evidence that Angela Ward converted \$25,302.47 from her father's Bank One account; \$8000 from her father's line of credit at Charter Bank; and \$3000 in cash from her father's house. The Magistrate further finds that she converted personal property from her father's home as set forth in Plaintiff's Exhibit 3 . . .

It is therefore the Magistrate's decision that judgment be entered in favor of Plaintiff Paul A. Wagner against Defendant Angela Ward.

Id. The Magistrate's decision was adopted by way of a judgment entry filed July 16, 2004. (Def.'s Resp. to Pl.'s Summ. J., Ex. A.)

III. ARGUMENTS PRESENTED

Plaintiff claims the debt is nondischargeable under 11 U.S.C. § 523(a)(4) and (6). Plaintiff points to the judgment entry issued by the state court and relies on the doctrine of collateral estoppel as legal support for her argument that the bankruptcy court should not relitigate issues already decided. Plaintiff insists that the magistrate's decision "conveys a finding of malice" and therefore satisfies the requirement of willful and malicious injury under 11 U.S.C. § 523(a)(6). Plaintiff also argues that Defendant's position as power of attorney, coupled with the finding of conversion, amounts to fraud or defalcation committed during a fiduciary relationship, which is the basis for nondischargeability under one prong of 523(a)(4). Finally, Plaintiff also presents an argument for nondischargeability under section 523(a)(4), alleging that Defendant's action also constitute embezzlement.

Defendant argues that the POA specifically authorizes gifts. Defendant points to the fact that the magistrate's decision did not make a specific finding of malice, and that Wagner's claim for punitive damages was denied by the court. Defendant contends that the issue of malice is a material fact which remains in dispute and summary judgment is therefore inappropriate. In her motion for judgment on the pleadings, Defendant argues that Plaintiff's claim fails because Plaintiff has obtained a simple money judgment that is dischargeable. Defendant also references repayment of a portion of the debt.

IV. ANALYSIS

A. Motion for Judgment on the Pleadings

Defendant's motion for judgment on the pleadings is denied. While raised in her Answer to Plaintiff's complaint, Defendant provided no subsequent factual or pertinent legal argument to support the motion.² The Court finds that the allegations of the complaint contain grounds of cognizable claims for nondischargeability under 11 U.S.C. § 523(a)(4) and (6).

B. Summary Judgment Standard of Review

The Bankruptcy Code provides for summary judgment through Federal Rule of Bankruptcy Procedure 7056, which adopts Federal Rule of Civil Procedure 56 and provides,

² Defendant cites Fed. R. 12(b)(3) as a legal basis for her request for judgment on the pleadings. Fed. R. 12(b)(3) allows a court to dismiss a claim because of improper venue, and is not relevant to the facts of this case.

in pertinent part:

The judgment sought shall be rendered forthwith if the 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 a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

The evidence must be viewed in the light most favorable to the nonmoving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 44, 158-59 (1970). In evaluating a motion for summary judgment, “the inquiry performed is the threshold inquiry of determining whether there is the need for trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment is appropriate if the opposing party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The Sixth Circuit Court of Appeals has observed that the nonmoving party “cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact.” *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). When one party moves for summary judgment, the nonmoving party must affirmatively rebut the facts material to the determination of summary judgment. Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party would not be able to withstand a motion for directed verdict following trial. If the opposing party cannot demonstrate that he can defeat a motion for directed verdict, then summary judgment is appropriate. *See Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (quoting *Street*, 886 F.2d at 1478).

C. Collateral Estoppel

Collateral estoppel is a doctrine which accords finality to those questions actually and necessarily decided in a prior suit. *See Parklane Hosiery v. Shore*, 439 U.S. 322, 326 (1979). Collateral estoppel may be invoked in nondischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 284-85 (1991). The full faith and credit principles of 28 U.S.C. § 1738 require this court to accord preclusive effect to a state court judgment if it would be preclusive under the law of the state in which the judgment was rendered.

Under Ohio law, the doctrine of collateral estoppel includes four elements:

- (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; and (4) the party against whom estoppel is sought was a party or in privity with the party in the prior action.

Gonzales v. Moffit (In re Moffit), 252 B.R. 916, 921 (B.A.P. 6th Cir. 2000) (quoting Murray v. Wilcox (In re Wilcox), 229 B.R. 411, 415-16 (Bankr. N.D. Ohio 1998)). In this case, the first and fourth elements are not at issue since Defendant appeared in the state court action, the matter proceeded to trial, and the common pleas court issued a judgment entry on July 12, 2004. Pl.'s Mot. Summ. J., Ex. A. The second and third elements, dealing with the identity of the issue in the present suit and its relevance to the state court judgment, deserve further exploration.

The state court found Defendant liable for conversion while the complaint for nondischargeability is brought pursuant to 11 U.S.C. § 523(a)(4): fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny and 11 U.S.C. § 523(a)(6): willful and malicious injury. Under the collateral estoppel doctrine, if the findings of fact and conclusions of law of the Mahoning County court on the conversion claim would support a finding of willful and malicious injury, fraud, defalcation, embezzlement, or larceny under the dischargeability statute, they are entitled to preclusive effect and Plaintiff's motion for summary judgment can be granted.

a. Section 523(a)(6) – Willful and Malicious Injury

Under 11 U.S.C. §523(a)(6), debts for willful and malicious injury are excepted from discharge. The Supreme Court has found that “nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (emphasis in original). In addition to proving the injury was willful, a creditor must also prove that the injury was malicious. The accepted definition of a malicious injury, in the context of section 523(a)(6), is that the act is “taken in conscious disregard of the debtor’s duties or without just cause or excuse.” Superior Metal Products v. Martin (In re Martin), 321 B.R. 437, 442 (Bankr. N.D. Ohio 2004) (citing Wheeler v. Laudani, 783 F.2d 610,615 (6th Cir. 1986); (Tinker v. Colwell, 193 U.S. 473, 486 (1904)); see also Miller v. Harper (In re Harper), 117 B.R. 306 (Bankr. N.D. Ohio 1990). The language used in “the (a)(6) formulation triggers in the lawyer’s mind the category of ‘intentional torts,’ as distinguished from negligent or reckless torts.” Kawaauhau, 523 U.S. 57, 62. Under this reasoning, the Supreme Court determined that not every conversion judgment is nondischargeable under 523(a)(6). Id.

Neither party is attempting to argue that the acts, or resulting injury, committed by Defendant were not deliberate or intentional. Instead, the focus is on malice. Plaintiff posits that the magistrate’s decision “conveys a finding of malice” even though the word “malice” is never used. Nonetheless, Plaintiff reasons that collateral estoppel applies to prevent Defendant from relitigating the issue in this Court. Defendant argues that the state court did not find malice and also suggests that the lack of an award for punitive damages further negates a finding of malice. It is Defendant’s position that the question of malice is a

question of fact precluding summary judgment.

The Court recognizes that malice is not an element of a conversion claim: to prove conversion, it is necessary to show the owner “(1) . . . demanded return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to deliver the property to its rightful owner.” Elias v. Gammel, 2004 WL 1471038, at *3 (Ohio Ct. App. 8th Dist. 2004) (unpublished) (citing Tabar v. Charlie’s Towing Serv., Inc., 97 Ohio App.3d 423 (1994); Bench Billboard Co. v. Columbus, 63 Ohio App.3d 421 (1989); Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co., 24 Ohio App.3d 91 (1985)). The focus is on the taking, the act, rather than the injury. Since section 523(a)(6) focuses on the injury, the state court did not need to examine the facts which give rise to nondischargeability. In order for the doctrine of collateral estoppel to apply, the issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment. In re Moffit, 252 B.R. at 921.

We cannot conclude that the issue was actually and directly litigated. While many of the same facts provide a basis for proving both conversion and willful and malicious injury, “the state court’s finding of conversion does not invoke the doctrine of collateral estoppel, instead only being relevant to the extent that the factual circumstances give rise to the finding of conversion are likewise violative of the conduct proscribed in § 523(a)(6).” Superior Metal Products v. Martin (In re Martin), 321 B.R. 437, 441 (Bankr. N.D. Ohio 2004). Therefore the Court finds that the motion for summary judgment pursuant to 11 U.S.C. §523(a)(6) is not well-taken and is denied.

b. Section 523(a)(4) – Fraud or Defalcation While Acting in a Fiduciary Capacity

A power of attorney is a written instrument that authorizes an agent to perform specific acts on behalf of the principal. *See* O.R.C. § 1337.09; *see also* Testa v. Roberts, 542 N.E.2d 654,658 (Ohio 1988). The holder of a power of attorney has a fiduciary relationship with the principal. In re Scott, 675 N.E.2d 1350, 1352 (Ohio 1996). However, this definition alone does not necessarily place Defendant in a “fiduciary capacity” for purposes of 11 U.S.C. § 523(a)(4). The question of who is a fiduciary for purposes of § 523 is determined by federal law. W. Sur. Co. v. Dauterman (In re Dauterman), 156 B.R. 976, 980 (Bankr. N.D. Ohio 1993). The Sixth Circuit limits the term to one in relation to “express or technical trusts” and not to “implied trusts, which are imposed on transactions by operation of law as a matter of equity.” Carlisle Cashway, Inc. v. Johnson (In re Johnson), 691 F.2d 249, 257 (6th Cir. 1982); *see also* Capitol Indem. Corp. v. Interstate Agency, Inc. (In re Interstate Agency, Inc.), 760 F.2d 121, 124 (holding that a Michigan statute satisfied the requirement that the trust exist separate and apart from any act of alleged wrongdoing).

The Mahoning County judgment entry does not include any findings that the POA created an express trust under state law – only the conclusion that Defendant was a fiduciary in her capacity as attorney-in-fact. These findings do not satisfy the requirements outlined by the Sixth Circuit in In re Johnson and In re Interstate Agency. Accordingly, Plaintiff’s claim that the debt is nondischargeable as one arising from fraud or defalcation while acting in a

fiduciary capacity fails as a matter of law.

c. Section 523(a)(4) – Embezzlement or Larceny

During additional briefing, Plaintiff also raised, as an alternate argument for nondischargeability, that Defendant's actions constituted embezzlement. According to the Sixth Circuit, 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.' Aristocrat Lakewood Nursing Home v. Dryja (In re Dryja), 259 B.R. 629, (Bankr. N.D. Ohio 2001) (citing Brady v. McAllister (In re Brady), 101 F.3d 1165 (6th Cir. 1996)). Similarly, conversion is described as "the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." Panel Town of Dayton, Inc. v. Corrigan (In re Panel Town of Dayton, Inc.), 338 B.R. 764, 774 (Bankr. S.D. Ohio 2006) (citing State ex rel Toma v. Corrigan, 92 Ohio St.3d 589, 592 (2001) (other citations omitted)). According to Plaintiff's argument, the finding of conversion also supports a finding of embezzlement, and nondischargeability, in this proceeding.

As outlined above, to prove conversion, it is necessary to show that the owner "(1) . . . demanded return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to deliver the property to its rightful owner." Elias, 2004 WL 1471038, at *3 (citations omitted). The elements of embezzlement include the owner showing "(1) he entrusted his property to the debtor; (2) the debtor appropriated the property for a use other than that for which it was entrusted; and (3) the circumstances indicate fraud." Aristocrat Lakewood, 259 B.R. 629 (citations omitted). The latter contains an issue of intent, while the former does not.

Although the state court found Plaintiff to have converted Plaintiff's money and property, the conversion judgment did not require proving indicia of fraud. Even Plaintiff recognizes the lack of findings on fraud: "[w]hile the state court did not specifically mention actual 'fraud', the Plaintiff argues that a [sic] minimum that Defendant Angela Ward intentionally misappropriated or failed to properly account for funds and property placed in her trust." (Pl.'s Additional Briefing 3). Since fraudulent misappropriation was not a required element of the conversion finding,³ the Court cannot conclude that it was actually and directly litigated during the state court case, or that it was necessary to the final judgment of conversion. Therefore, collateral estoppel does not apply to Plaintiff's embezzlement claim.

d. Repayment of portion of debt owed Plaintiff

³ The Court finds this also comports with the Kawaauhau case discussed in IV(c)(a). In Kawaauhau, the Supreme Court made a distinction between negligent and reckless torts and intentional torts and "cautioned that [while] an innocent or technical conversion of a person's property does not lend itself to a finding of a willful and malicious injury for dischargeability purposes, it is equally clear that the tort of conversion, if done deliberately and intentionally, will give rise to a nondischargeable debt." Heyne v. Heyne (In re Heyne), 277 B.R. 364 (Bankr. N.D. Ohio 2002)(citing Kawaauhau v. Geiger, 523 U.S. 57 (1998) (other citation omitted)).

Defendant raises the issue of a payable on death account that she opened jointly with her sister using the funds stolen from her father's accounts. (Def.'s Resp. 2). Defendant claims that this account contained \$10,000, the "balance of funds withdrawn from Father/Plaintiff's account," and that the \$10,000 was ultimately repaid to her father. A debtor cannot avoid a finding of nondischargeability under § 523(a)(4) by repaying some or all of the funds stolen, or by acknowledging the theft after it has occurred. See Great Amer. Ins. Co. v. O'Brien (In re O'Brien), 154 B.R. 480, 484 (Bankr. W.D. Tenn. 1993). Any money actually repaid by debtor will only reduce the amount she presently owes. It does not affect the nondischargeability of the debt.

V. CONCLUSION

The state court judgment clearly determined Defendant converted money and property belonging to Plaintiff. However, the facts supporting a conversion claim do not require findings related to intent, nor do they require an analysis of the resulting injury. Since intent is a necessary proof in both a section 523(a)(4) claim of embezzlement and a section 523(a)(6) claim of willful and malicious injury, and it was not actually and directly litigated in the state court case, the doctrine of collateral estoppel cannot be used to find nondischargeability based on the judgment for conversion. Therefore, the Plaintiff's motion for summary judgment must be denied. An appropriate order will enter forthwith.

/s/ Russ Kendig

Judge Russ Kendig
U.S. Bankruptcy Judge

MAY 08 2006

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