THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 04-16922
	)	
ALEX M. BRUSCINO,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
HEATHER HUBER,	)	Adversary Proceeding No. 04-1489
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
ALEX M. BRUSCINO,	)	
	)	
Defendant.	)	

Plaintiff Heather Huber filed a complaint requesting a determination that the unliquidated debt which debtor Alex Bruscino owes her is not dischargeable under bankruptcy code § 523(a)(6). The alleged debt is the subject of an ongoing state court action. The debtor moves for summary judgment on the complaint and the plaintiff opposes that request. (Docket 51, 52, 56). The plaintiff also requests summary judgment. (Docket 50). For the reasons stated below, both motions are denied.

JURISDICTION

Jurisdiction exists 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. Dischargeability actions are core proceedings under 28 U.S.C. § 157(b)(2)(I). The state court action which is the

basis of the plaintiff's asserted debt alleges assault and battery, bodily injury, and negligent and/or intentional infliction of emotional distress. This court lacks jurisdiction to liquidate this debt because it is based on personal injury tort claims. *See* 28 U.S.C. § 157(b)(5).

SUMMARY JUDGMENT

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. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also 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 may 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. 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 Prods., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)). The court must evaluate each summary judgment motion on its merits and "draw all reasonable inferences against the party whose motion is under consideration." *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (quoting *Taft Broad Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991)).

FACTS[1] AND DISCUSSION[2]

I.

In June 1998, Alex Bruscino was indicted on three counts of felonious sexual penetration (OHIO REV. CODE § 2907.12(A)(1)(B)(3)), four counts of gross sexual imposition (OHIO REV. CODE § 2907.05(A)(4)), and three counts of rape (OHIO REV. CODE § 2907.02(A)(2)). The charges related to Mr. Bruscino's sexual molestation of plaintiff Heather Huber as a child. On January 22, 2001, Mr. Bruscino pled guilty to all charges and was sentenced to five years in prison.

On March 17, 2004, Heather Huber filed an action against Mr. Bruscino in the Lorain County Court of Common Pleas alleging assault and battery, bodily injury, and negligent and/or intentional infliction of emotional distress. *Heather Huber v. Alex Bruscino,* case no. 04CV137967 (Lorain, Ohio Ct. of Common Pleas).[3] Ms. Huber's claims in that action are based on the sexual molestation. The state court action is ongoing and the debtor's liability to Ms. Huber has not been determined.

On June 1, 2004, Alex Bruscino filed a chapter 7 bankruptcy case. The court set September 7, 2004 as the deadline for creditors to file complaints to determine dischargeability.

---

[1] These are the undisputed facts based on the parties' pretrial statement, the motions and briefs on summary judgment, and the exhibits attached to the pleadings.

[2] The debtor filed his chapter 7 case before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act and before the adoption of the interim bankruptcy rules. All references in this opinion are to the version of the bankruptcy code and rules in effect when the case was filed.

[3] Although Ms. Huber's complaint indicates that the state court complaint is attached as exhibit A, it is not and it has not been provided.

The meeting of creditors was held and concluded on July 6, 2004. Ms. Huber filed her complaint to determine dischargeability on September 7, 2004. Rather than filing the complaint as an adversary proceeding, however, she filed the complaint in the main bankruptcy case. After Ms. Huber's counsel was notified of this deficiency,[4] this adversary proceeding was opened and the plaintiff re-filed her complaint on September 13, 2004.

II.

11 U.S.C. § 727(a)(6)

An individual chapter 7 debtor's debts are discharged with certain exceptions. Ms. Huber's complaint and motion rely on this exception:

> (a) A discharge under section 727 . . . does not discharge an individual debtor from any debt–
>
> * * *
>
> (6) for willful and malicious injury by the debtor to another entity[.]

11 U.S.C. § 523(a)(6).

The creditor must affirmatively request a determination of dischargeability under § 523(a)(6); absent this action, the debt is automatically discharged. *See* 11 U.S.C. § 523(c)(1). A proceeding to determine the dischargeability of a debt is classified as an adversary proceeding which is commenced by filing a complaint with the court. *See* FED. R. BANKR. P. 7001(6) and FED. R. BANKR. P. 7003 (incorporating FED. R. CIV. P. 3). *See also* FED. R. BANKR. P. 4007(e) (providing that a complaint to determine dischargeability is "governed by Part VII of the rules.").

[4] It is standard clerk's office procedure to send a deficiency notice when a party erroneously files a complaint to determine dischargeability in the main case rather than as a separate adversary proceeding.

A dischargeability complaint "shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." FED. R. BANKR. P. 4007(c). That period may be extended for cause on motion filed before the time has expired. *See* FED. R. BANKR. P. 4007(e).

III.

The debtor-defendant's motion for summary judgment

The debtor moves for summary judgment on the basis that the complaint was not timely filed. He argues that the September 7, 2004 deadline set by the court did not comply with the bankruptcy rules and, therefore, that Ms. Huber was out of time when she filed her complaint on that date. This argument lacks merit. This is so because while bankruptcy rule 4007(c) requires that a dischargeability complaint be filed not later than 60 days after the first date set for the meeting of creditors, bankruptcy rule 9006 determines how the 60 days is to be computed. Rule 9006(a) provides that when computing any time period prescribed by the rules, the day of the event shall not be included and "[t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days." FED. R. BANKR. P. 9006(a). In real time, September 4, 2004 was the sixtieth day after the July 6, 2004 meeting of creditors. However, September 4, 2004 was a Saturday, September 5, 2004 was a Sunday, and September 6, 2004 was Labor Day (a legal holiday under rule 9006). Therefore, based on the computation required by rule 9006(a), September 7, 2004 was the 60th day after the meeting of creditors. Ms. Huber filed her complaint on that day and the fact that the complaint was initially filed in the main bankruptcy case rather than in a separate adversary proceeding does not affect its

timeliness.[5] Consequently, the debtor failed to show that he is entitled to judgment as a matter of law and his summary judgment motion is denied.

IV.

The plaintiff's motion for summary judgment

Ms. Huber moves for summary judgment under § 523(a)(6). As noted above, that section provides that a debt "for willful and malicious injury by the debtor to another entity" is not discharged in a chapter 7 bankruptcy. 11 U.S.C. § 523(a)(6). Although the debtor did not file anything in opposition to this motion, the court must still determine if the motion meets the summary judgment standard.

The conduct which Ms. Huber alleges in her complaint clearly satisfies the "willful and malicious" requirement of § 523(a)(6). Ms. Huber has not, however, obtained a civil judgment based on those allegations[6] and the record does not contain any other evidence of any injury. Without this, there is insufficient evidence to support a finding of injury by the debtor to Ms.

---

[5] The debtor does not cite any law to support his statement that a complaint erroneously filed in the main bankruptcy case is "invalid" and procedurally fatal.

[6] Ms. Huber argues that the state criminal judgment against the debtor is entitled to preclusive effect in this adversary proceeding. This argument is flawed. Collateral estoppel or issue preclusion prevents parties from relitigating facts and issues which were previously litigated. This doctrine applies in dischargeability proceedings. *See Grogan* v. Garner, 498 U.S. 279, 285-86 (1991). When considering the preclusive effect of a state court judgment, this court applies the state's preclusion rules. *See Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6th Cir. 1997); 28 U.S.C. § 1738. As the Ohio preclusion rules do not favor giving a criminal judgment preclusive effect in civil litigation, the criminal judgment is not entitled to be given preclusive effect in this action. *See Grange Mut. Cas. Co. v. Chapman (In re Chapman)*, 228 B.R. 899, 905 (Bankr. N.D. Ohio 1998). Moreover, the criminal judgment does not establish the debtor's monetary liability to Ms. Huber; it instead establishes the state's rights as against the criminal defendant.

Huber. As a result, summary judgment for the plaintiff is not warranted and her motion is denied.

CONCLUSION

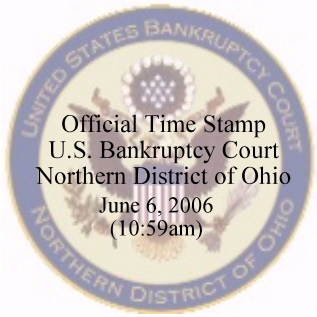
For the reasons stated, both the plaintiff's motion for summary judgment and the defendant's motion for summary judgment are denied. A separate order will be entered reflecting this decision.

The final pretrial in this matter is set for June 15, 2006. As noted above, the debtor's debt to Ms. Huber has not been liquidated, and the court cannot liquidate the debt because it does not have jurisdiction over personal injury tort claims. The parties should be prepared to address this issue at the final pretrial.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 04-16922
	)	
ALEX M. BRUSCINO,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
HEATHER HUBER,	)	Adversary Proceeding No. 04-1489
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
ALEX M. BRUSCINO,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, both the plaintiff's motion for summary judgment and the defendant's motion for summary judgment are denied. (Docket 50, 51).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge