

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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FRANK N. SCHMIDT, \* CASE NUMBER 04-45879  
\*  
Debtor. \*  
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DOUG ROZUM and MARY ROZUM, \*  
\* ADVERSARY NUMBER 05-4066  
\*  
Plaintiffs, \*  
\*  
vs. \*  
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FRANK N. SCHMIDT, \*  
\* HONORABLE KAY WOODS  
\*  
Defendant. \*  
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M E M O R A N D U M O P I N I O N  
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This cause is before the Court on a motion for summary judgment filed by Doug and Mary Rozum ("Plaintiffs"). Plaintiffs initiated this adversary proceeding to determine if a judgment awarded to Plaintiffs against Debtor/Defendant Frank N. Schmidt ("Debtor") is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). Debtor failed to file a response to the motion for summary judgment.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

## I. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

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. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then

shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the 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. *Street*, 886 F.2d at 1479.

## II. PROCEDURAL HISTORY

On December 1, 2004, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code (Case No. 04-45879). Debtor listed on Schedule F (Creditors Holding Unsecured Nonpriority Claims) a judgment awarded to Plaintiffs against Debtor in the amount of \$150,000.00 (the "Judgment").<sup>1</sup> Plaintiffs commenced this adversary proceeding when they filed a Complaint (Case No. 05-4066) on March 21, 2005 to determine the dischargability of the Judgment

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<sup>1</sup>On March 30, 2004, Plaintiffs filed a complaint against Debtor, Schmidt Construction, Inc., Frank Schmidt Construction, Inc. and F. Schmidt Construction, Inc. in the Summit County Court of Common Pleas (Case No. CV-2004-03-1870). Neither Debtor nor any of the other defendants filed an answer in the Summit County Court proceeding. Consequently, on August 20, 2004, the Summit County Court of Common Pleas rendered default judgment in favor of Plaintiffs on all counts - including fraud - for compensatory and punitive damages in the amount of \$150,000.00.

pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). On that same day, Plaintiffs filed First Request for Admissions, Interrogatories and Request for Production. Debtor was served with the Summons, Complaint and Adversary Case Management Order on March 28, 2005. Debtor timely answered the Complaint, through counsel, on April 18, 2005, but filed (i) the Motion to Dismiss,<sup>2</sup> Answer, and (ii) the Motion for Extension of Time to Reply to Plaintiffs' Combined Discovery Request and Objection to Number of Interrogatories in the Debtor's main bankruptcy case (Case No. 04-45879) rather than in this adversary proceeding. On April 19, 2005, Debtor filed a Counterclaim (also in the main case rather than the adversary proceeding). Plaintiffs filed Response to Motion to Dismiss on April 25, 2005.<sup>3</sup> On July 5, 2005, Debtor filed the "• Motion to Dismiss • Answer" - previously filed in the main case - in this adversary proceeding. On that same date, Debtor's counsel filed a Motion to Withdraw as counsel in the adversary proceeding, which motion was granted on August 23, 2005.

Plaintiffs filed three separate motions for sanctions; the first on August 22, 2005, the second on October 14, 2005 and the third on December 22, 2005. Each of these motions alleged that Debtor failed to respond to Plaintiffs' outstanding discovery

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<sup>2</sup>Debtor captioned one pleading (Doc. 22 in main case and Doc. 12 in this case) as "• Motion to Dismiss • Answer," which contained five numbered paragraphs of denials and averments and requested dismissal of the "adversarial (sic) proceeding" in the concluding paragraph. Despite the caption, this pleading contains no moving language. As a consequence, this Court deemed this document to be Debtor's answer. Debtor failed to file a separate motion to dismiss.

<sup>3</sup>A response was not required because Debtor did not file a motion to dismiss. See *supra* n.2.

requests. The Court held a hearing on the second motion for sanctions on November 7, 2005, at which time the motion was denied and the Debtor was given until December 15, 2005 to retain new counsel. Debtor failed to retain new counsel. As a result, on January 3, 2006, the Court issued an order for Debtor to appear and show cause why he should not be sanctioned for failure to abide by this Court's Order to retain new counsel by December 15, 2005 and for failure to respond to discovery that had been outstanding since March 2005. Debtor appeared at the hearing and confirmed that he had not retained new counsel; the Court therefore found that he was proceeding *pro se*. The Court entered an order on January 30, 2006, finding Debtor's delay prejudicial to Plaintiffs and sanctioning Debtor, as follows: "1. The Requests for Admissions shall be deemed admitted. 2. Debtor cannot use any documents at trial or as exhibits to any pleading to the extent such documents should have been produced in response to the Request for Production of Documents." (Order Imposing Sanctions, January 30, 2006.) The Court also ordered that all discovery be completed by March 31, 2006.

On May 8, 2006, the Court conducted a telephonic status conference and ordered any motions for summary judgment to be filed by June 5, 2006 and any responses thereto to be filed by June 26, 2006. On June 5, 2006, Plaintiffs moved for summary judgment. Debtor has not responded to Plaintiffs' motion for summary judgment.

### **III. FACTS**

On March 3, 2003, Plaintiffs and Debtor entered into a project management contract (the "Contract"). (Plaintiffs' Request for

Admissions at ¶ 4.) Plaintiffs agreed to pay Debtor \$8,000.00 for his services as project manager. (*Id.*) On or about April 16, 2003, Debtor advised Plaintiffs that he had an account with Doherty Lumber and that he needed a deposit of one half the cost of the lumber to begin the project. (*Id.* ¶ 9.) On or about April 18, 2003, Debtor requested, for a second time, a deposit for the lumber in the amount of \$8,250.00. (*Id.* ¶ 10.) On or about that date, Plaintiffs provided Debtor with a check for \$8,250.00. (*Id.* ¶ 11.) Debtor further requested and was paid \$7,980.00 for the balance of the lumber in order to finish the project. (*Id.* ¶¶ 18, 20, 22.) Debtor did not have an account with Doherty Lumber, nor did he intend to use such funds for the purchase of lumber. (*Id.* ¶¶ 14, 23-24, 45.) Consequently, Debtor did not purchase or order any lumber to complete the project. (*Id.* ¶¶ 12, 19, 21, 45.) Plaintiffs demanded that Debtor return the \$16,230.00 paid for lumber, but Debtor refused to return any of said funds. (*Id.* ¶¶ 13, 18, 20, 22.)

Furthermore, Plaintiffs paid Debtor \$6,000.00 for his work as project manager, but Debtor failed to complete the work set forth in the Contract. (*Id.* ¶¶ 28-29, 46.) At the time Debtor received the \$6,000.00, Debtor knew he was not going to complete the project. (*Id.* ¶¶ 30-31.) Debtor has refused to return the \$6,000.00 to the Plaintiffs and has also refused to complete the work on the house. (*Id.* ¶ 32.) Debtor admits to breaching the Contract. (*Id.* ¶ 4.)

On March 30, 2004, Plaintiffs filed a complaint against Debtor, Schmidt Construction, Inc., Frank Schmidt Construction, Inc. and F. Schmidt Construction, Inc. in the Summit County Court of Common

Pleas (Case No. CV-2004-03-1870) (the "State Court Action"). (*Id.* ¶¶ 36-37.) None of the defendants, including Debtor, filed an answer in the State Court Action. (*Id.* ¶ 38.) On August 20, 2004, the State Court issued the Judgment in favor of Plaintiffs on all counts - including fraud, breach of contract and consumer sales practices act violations - against all of the defendants, including Debtor. The Judgment is in the amount of \$150,000.00, which consists of compensatory and punitive damages. (*Id.* ¶¶ 39-40, 50-51.)

Plaintiffs commenced this adversary proceeding on March 21, 2005 to determine the dischargeability of the Judgment pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). Debtor admits that he fraudulently induced Plaintiffs to enter into the Contract and that the Judgment is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and/or (B). (*Id.* ¶¶ 43, 52.)

#### **IV. LEGAL ANALYSIS**

##### **A. Section 523(a)(2)(A)**

Section 523(a)(2) states in pertinent part:

(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--

. . . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

It is well established that in order to except debt from discharge under § 523(a)(2)(A), a creditor must prove that: (1) the debtor obtained money through a material misrepresentation that, at the time the representation was made, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the reliance was the proximate cause of the loss. *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993). The creditor must prove each of the aforementioned elements by a preponderance of the evidence. *Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). Moreover, exceptions to discharge are to be strictly construed against the creditor. *Id.*

Debtor has admitted each element in the *In re McLaren* test. Debtor admits that he obtained money from Plaintiffs by representing to them that he was going to purchase lumber and finish work on the house when Debtor knew he was not going to purchase lumber or finish the construction work. (*Id.* ¶¶ 9, 14, 24 32, 45.) Debtor intended to deceive Plaintiffs by stating that the requested money was for lumber and for his services to complete the project. (*Id.* ¶¶ 15, 25, 33.) Plaintiffs justifiably relied on Debtor's statements that he was going to purchase lumber and complete the house. (*Id.* ¶¶ 16, 26, 34.) Plaintiffs' reliance on Debtor's statements are the proximate cause of Plaintiffs' damages. (*Id.* ¶¶ 17, 27, 35.)

Furthermore, Debtor admits that the debt is nondischargeable under § 523(a)(2)(A). (Id. ¶ 52.) As a result of the aforementioned admissions, Plaintiffs proved, by the preponderance of the evidence and by Debtor's admissions, that the Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

**B. Section 523(a)(6)**

Section 523(a)(6) of the Bankruptcy Code provides that "a discharge under [the Bankruptcy Code] does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523.

The Supreme Court has held that only acts done with intent to cause injury, and not merely acts done intentionally, rise to the level of willful and malicious injury for the purposes of satisfying § 523(a)(6). *Kawaauhau v. Geiger*, 523 U.S. 57, 57-58, 118 S.Ct. 974, 975 (1998). In *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455 (6th Cir. 1999), the Sixth Circuit Court of Appeals expanded the definition of "willfulness" to include the debtor's subjective belief that the injury is "substantially certain to result" from his actions. *Id.* at 464.

A person acts maliciously when that person acts in conscious disregard of his or her duties or without just cause or excuse. See *Heyne v. Heyne (In re Heyne)*, 277 B.R. 364, 368 (Bankr. N.D. Ohio 2002) (citing *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 419 (Bankr. N.D. Ohio 1998)); see also *Abdel-Hak v. Saad (In re Saad)*, 319 B.R. 147, 156 (2004) (citing *Tinker v. Colwell*, 193 U.S. 473,

485-86, 24 S.Ct 505 (1904) (defining "malice" under § 17(a)(2) of the former Bankruptcy Act [now § 523(a)(6)] as "a wrongful act, done without just cause or excuse") (internal quotation marks and citations omitted)).

As the requirements of the statute are set forth in the conjunctive, a creditor must establish both willfulness and malice in order to prevail in a § 523(a)(6) action. However, two bankruptcy courts in this district have recognized that, in the great majority of cases, the same factual events giving rise to a finding of willfulness will likewise be indicative of malice. *Superior Metal Products v. Martin (In re Martin)*, 321 B.R. 437, 442 (Bankr. N.D. Ohio 2004); *CMEA Title Agency v. Little (In re Little)*, 335 B.R. 376, 383 (Bankr. N.D. Ohio 2005) ("Although the 'willful' and 'malicious' requirements will be found concurrently in most cases, the terms are distinct, and both requirements must be met under § 523(a)(6).") Both courts, however, acknowledge that the "malice" element requires "a heightened level of culpability transcending mere willfulness." *In re Martin*, 321 B.R. at 442, *In re Little*, 335 B.R. at 384.

Therefore, the elements of a § 523(a)(6) claim are: (1) Debtor caused injury to Plaintiffs or their property; (2) Debtor intended to cause the injury or that such injury was substantially certain to occur as a result of Debtor's actions; and (3) Debtor acted in conscious disregard of his duties or without just cause or excuse.

Plaintiffs have not established the elements required to find a debt nondischargeable pursuant to 11 U.S.C. § 523(a)(6). Plaintiffs

failed to provide any evidence and/or admissions to prove that Debtor intended to cause injury to Plaintiffs. Plaintiffs rely solely on the common law tort of conversion as the basis for this Court to find the Judgment to be nondischargable under § 523(a)(6). Plaintiffs argue that "intent or purpose to do wrongful action is not a necessary element of conversion." (Plaintiffs' Motion for Summary Judgment p. 7.) Plaintiffs are correct that the common law tort of conversion does not require intent under Ohio law. However, they fail to recognize that for a debt to be nondischargable under § 523(a)(6), the act that forms the basis of the debt must be done with intent to cause injury; an intentional act without intent to injure is not enough. *Kawaauhau*, 523 U.S. at 57-58. Consequently, because Plaintiffs have failed to meet their burden to prove Debtor acted with the requisite intent to injure Plaintiffs, they fail to prove the Judgment is nondischargable pursuant to 11 U.S.C. § 523(a)(6).

#### V. CONCLUSION

In the State Court Action, Plaintiffs were awarded the Judgment based on fraud, breach of contract and consumer sales practices act violations in the amount of \$150,000.00. The Judgment, which is the debt at issue, encompasses both compensatory and punitive damages. The Judgment, including actual and punitive damages, is nondischargable. See *Cohen v. De La Cruz*, 523 U.S. 213 (1998) (finding that bankruptcy law prevented the discharge of all liability arising from fraud, including actual and treble damages); *The Spring Works, Inc. V. Sarff (In re Sarff)*, 242 B.R. 620 (B.A.P. 6th Cir. 2000)

(recognizing no distinction between compensatory and punitive damages).

Plaintiffs proved, by a preponderance of the evidence, that the Judgment is nondischargable pursuant to 11 U.S.C. § 523(a)(2)(A). Debtor admitted each element set forth in the *In re McLaren* test, which attests that Debtor made fraudulent misrepresentations to Plaintiffs in order to obtain money. Furthermore, Debtor admitted the Judgment debt was nondischargable pursuant to 11 U.S.C. 523(a)(2)(A) and/or (B). (*Id.* ¶ 52.)

An appropriate order will follow.

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**HONORABLE KAY WOODS**  
**UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

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For the reasons set forth in this Court's memorandum opinion entered this date, Plaintiffs' motion for summary judgment is granted. The Judgment, including actual and punitive damages, is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(B).

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE