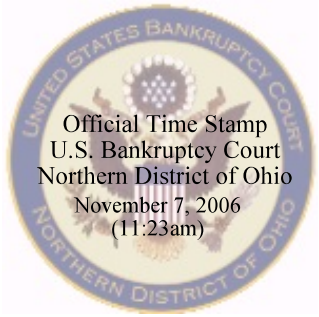
THIS OPINION NOT INTENDED FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-11873
	)	
STEVEN H. KERR,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
SHOWE MANAGEMENT CORPORATION dba LAKESHORE TOWERS,	)	Adversary Proceeding No. 06-1298
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
STEVEN H. KERR,	)	
	)	
Defendant.	)	

Creditor Showe Management Corp. filed this adversary proceeding to request a determination that a judgment debt owed to it by the debtor-defendant Steven Kerr is not dischargeable based on bankruptcy code § 523(a)(6). Showe requests summary judgment based on the collateral estoppel effect of the prepetition judgment entered in state court and Mr. Kerr opposes the request.[1] For the reasons stated below, the motion 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).

[1] *See* docket 35, 49, 50.

FACTS[2]

Steven Kerr filed a chapter 13 case on February 17, 2005. The case was later converted to chapter 7. Before the bankruptcy filing, Showe and Mr. Kerr were involved in a series of lawsuits regarding a real estate lease.

The Lakewood Municipal Court Action

Showe filed a forcible eviction and detainer action against Mr. Kerr in the Lakewood municipal court August 18, 2004; *Showe Management Corp. v. Kerr,* case no. 04 CBG 0001980. Showe's request for relief in this adversary proceeding is based on a judgment entered in that action on January 3, 2005 in its favor against Mr. Kerr (the Lakewood Court Judgment). The judgment adopts a magistrate's report and awards Showe the sum of $13,990.55 plus interest. The magistrate's report includes these findings:

1. Showe [as landlord] and [Mr. Kerr][as tenant] entered into a lease with a monthly rent payment of $907.00 and the debtor paid Showe a $500.00 security deposit.

2. Showe gave Mr. Kerr a three-day notice to vacate the premises for non-payment of rent on August 11, 2004.

3. Mr. Kerr vacated the premises on September 10, 2004 without paying rent and late fees for the months of August and September of 2004 in the total amount of $1,874.00.

4. Showe alleges that damages to the premises for the following things exceeded ordinary wear and tear in the stated amounts: (a) replacement of kitchen cabinets, doors and slides ($3,462.22); (b) replacement of windows and screens ($807.00); (c) replacement of a missing range ($289.00); (d) replacement of a missing refrigerator ($418.00); (e) replacement of a missing dishwasher ($241.00); (f) repair of all outlets and reinstallation of light fixtures

[2] These are the facts as shown by the evidence introduced on summary judgment and the case file.

($3,389.31); (g) lock change ($35.00); (h) replacement of all doors ($2,415.02); (i) replacement of missing shower rods ($40.00); (j) repair of closet drywall ($100.00); (k) cleaning ($405.00); (l) repair cut phone lines ($300.00); and (m) repair and replace hallway lights and wiring ($350.00).

5. Mr. Kerr "intentionally cut wires and placed expanding insulating foam in electrical outlets throughout the apartment."

6. Mr. Kerr "failed to return an entry key, 2 garage card keys, and a mailbox key to [Showe]. Showe "claims damages of $75.00 for the entry key, $100.00 for the garage card key, and $15.00 for the mailbox key."

7. Showe's "attorney presented evidence that [Showe] incurred attorney's fees of $675.00 in eviction of [Mr. Kerr]."

8. Mr. Kerr "did not return [Showe's] security deposit."

The magistrate's report concluded that Mr. Kerr breached the lease by failing to pay rent and late fees of $1,874.00, that Showe had provided evidence to support an award for the damages which it alleged and its attorney fees, and that Showe was entitled to apply the $500.00 deposit to its damages, late fees, and rent of $14,490.55, leaving a total of $13,990.55 owed to Showe.

The Cuyahoga County Common Pleas Court Actions

Before the Lakewood court action was filed, the parties were involved in other litigation involving the same lease. On February 27, 2003, Mr. Kerr filed a rent escrow action in Lakewood Municipal Court; *Kerr v. Showe Management Corp*., case no. CV-G1-03-0000523. On April 8, 2003, Showe filed a forcible entry and detainer action in the Lakewood court; *Showe Management Corp. v. Kerr*, case no. CV-G-03-0000853. These two cases were consolidated and transferred to Cuyahoga County Common Pleas Court on May 7, 2003 and given the case no.

CV-03-500788 (the Common Pleas action). Showe also filed another action against Mr. Kerr in the Cuyahoga County Common Pleas Court on February 23, 2005; *Showe Management Corp. v. Kerr*, case no. CV-04-520739.

DISCUSSION

Showe's complaint seeks a determination that the Lakewood Court Judgment debt is not dischargeable under bankruptcy code § 523(a)(6).[3] Showe requests summary judgment in its favor based on its position is that the judgment is a determination that Mr. Kerr willfully and maliciously injured the leased premises and that the judgment collaterally estops Mr. Kerr in this proceeding. Mr. Kerr makes two arguments in opposition to summary judgment. He argues that (1) the Lakewood court did not have jurisdiction to enter the judgment; and (2) collateral estoppel does not apply under the circumstances.

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 materials

[3] The amount of the debt–$13,990.55–has been determined by the state court and is not disputed here.

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)).

The Lakewood Court Judgment

Mr. Kerr argues that the Lakewood municipal court did not have jurisdiction to enter the judgment. One basis for this argument is Ohio's jurisdictional priority rule which "provides that '[a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties'." *State ex rel. Red Head Brass, Inc. v. Holmes County Court of Common Pleas*, 684 N.E.2d 1234, 1236 (Ohio 1997). Mr. Kerr argues that the Lakewood municipal court lacked jurisdiction to enter the Lakewood Court Judgment based on the earlier filed Cuyahoga County Common Pleas Court proceeding. This argument fails because it is a challenge to the Lakewood Court Judgment which this court does not have jurisdiction to entertain.

"[B]ankruptcy courts . . . do not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings." *Van Aken v. Van Aken (In re Van Aken)*, 320 B.R. 620, 628 (B.A.P. 6th Cir. 2005) (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995)). This limitation on jurisdiction is based on two decisions: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and is referred to as the Rooker-Feldman doctrine. The doctrine "expresses the principle that 'federal trial courts have only original subject matter, and not appellate, jurisdiction [and] . . . may not entertain appellate review of [or collateral attack on] a state court judgment'." *Singleton v. Fifth Third Bank of Western Ohio (In re Singleton)*, 230 B.R. 533, 536 (B.A.P. 6th Cir. 1999) (quoting *In re Johnson*, 210 B.R. 1004, 1006 (Bankr. W.D. Tenn. 1997)).

The Lakewood court judgment has not been appealed in state court and this court is unable to review it for the jurisdictional error which Mr. Kerr has cited. Consequently, the argument that the judgment was entered in violation of the jurisdictional priority rule does not preclude summary judgment.

The other part of Mr. Kerr's argument regarding lack of jurisdiction is based on his contention that he was not properly served with the magistrate's report before entry of the Lakewood Court Judgment. This again is an issue which this court does not have jurisdiction to address. It should also be noted, however, that Mr. Kerr did not provide any evidence to establish that he was not appropriately served.

Collateral Estoppel

The doctrine of collateral estoppel, or issue preclusion, applies in dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279 (1991). The doctrine "'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 v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6th Cir. 1999) (quoting *Sanders Confectionary Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). The party requesting a determination of nondischargeability bears the burden of proof by a preponderance of the evidence. *Grogan,* 498 U.S. at 286.

Federal courts look to state law to determine the preclusive effect of a state court judgment. *Markowitz*, 190 F.3d at 461. Under Ohio law, a judgment is entitled to preclusive effect if:

> 1) [A court entered 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 to the prior action.

Gonzalez v. Moffitt (In re Moffitt), 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)).

For the Lakewood court judgment to be entitled to preclusive effect in this proceeding, Showe is, therefore, required to prove that the factual issues necessary to proving that the debt is nondischargeable under bankruptcy code § 523(a)(6) were previously litigated in the prior action.

11 U.S.C. § 523(a)(6)

Section 523(a)(6) denies a debtor a discharge for a debt:

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

11 U.S.C. § 523(a)(6). An injury is "willful and malicious" if the debtor intends the consequences of his act or believes the consequences are substantially certain to result from it. *Kennedy v. Mustaine (In re Kennedy),* 249 F.3d 576 (6th Cir. 2001); *Markowitz* 190 F.3d at 464. Therefore, "only acts done with the intent to cause injury–and not merely acts done intentionally–rise to the level of willful and malicious injury for purposes of satisfying § 523(a)(6)." *Kennedy*, 249 F.3d at 581.

Although the Lakewood Court Judgment is a final judgment against Mr. Kerr, it is not entitled to collateral estoppel effect in this proceeding because there is no certainty that the requisite factual determinations regarding § 523(a)(6) dischargeability were made by the Lakewood court. While Showe argues that Mr. Kerr 'went about to willfully and maliciously injure [Showe] by destroying property and [taking] . . . actions that would drive up costs to . . . [Showe][]," the judgment does not say that. (Reply brief, docket 50 at 2). The judgment and the magistrate's report are ambiguous on that point. They do make a finding that Mr. Kerr "intentionally cut wires and placed expanding insulating foam in electrical outlets throughout the apartment[ ]," but did not find that he did so intending to harm Showe or believing that harm was certain. Consequently, while it is a close call, bearing in mind the burden of proof on a summary judgment motion, it cannot be said with any certainty that the Lakewood court determined that Mr. Kerr acted willfully and maliciously as required by the bankruptcy code. Additionally, only a portion of the damages awarded to Showe in the judgment appear to relate to those specific actions. The remainder of the damages awarded are based on findings that Mr. Kerr breached the lease by failing to pay rent and that items in the apartment had been subjected to more than

ordinary wear and tear, findings which clearly do not support a determination that the judgment debt is not dischargeable under § 523(a)(6) of the bankruptcy code.

CONCLUSION

For the reasons stated, Showe's motion for summary judgment is denied. A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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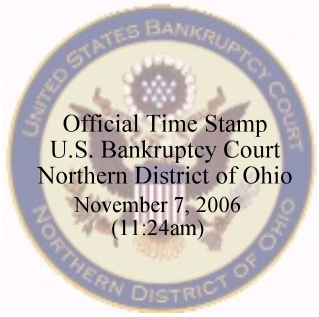
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



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SHOWE MANAGEMENT CORPORATION dba LAKESHORE TOWERS,	)	Adversary Proceeding No. 06-1298
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
STEVEN H. KERR,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion issued this same date, the plaintiff's motion for summary judgment is denied.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge