The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on December 08, 2006, which may be different from its entry on the record.

IT IS SO ORDERED.

Arthur I. Harris
United States Bankruptcy Judge

Dated: December 08, 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 05-94829
	)	
JUDITH WAY,	)	Chapter 7
Debtor.	)	
	)	
PB EXPRESS, INC.,	)	Adversary Proceeding No. 06-1207
Plaintiff,	)	
	)	Judge Arthur I. Harris
v.	)	
	)	
JUDITH WAY,	)	
Defendant.	)	

MEMORANDUM OF OPINION

Before the Court is the plaintiff's unopposed motion for summary judgment. At issue is the dischargeability of a debt arising from the debtor's conversion of the plaintiff's funds while she was employed by the plaintiff. For the reasons that follow, summary judgment is granted, and the debt is nondischargeable under 11 U.S.C. § 523(a)(6).

JURISDICTION

Determinations of dischargeability are core proceedings under 28 U.S.C. § 157(b)(2)(I). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio.

BACKGROUND

Based on the stipulated judgment in the defendant's civil trial, the defendant's guilty pleas in her criminal trial, and the civil trial transcript of Linda Larson's testimony, the following facts are undisputed.

The defendant, Judith Way, was formerly employed by the plaintiff, PB Express, Inc. In May 2002, while working collections for the plaintiff, the defendant began accepting and cashing checks written by another PB employee and improperly payable to the defendant. The defendant signed and cashed ten checks totaling $251,012.89. To protect this fraud from being discovered, the defendant removed checks from the plaintiff's bank statements.

In November 2003, the plaintiff discovered the scheme, which led to the commencement of civil and criminal proceedings against the defendant and three other former PB employees. The defendant pleaded guilty to aggravated theft and to tampering with records and was sentenced to two years in prison. In January

2005, the defendant signed a stipulated judgment in the civil suit. The judgment provided that the defendant was liable to the plaintiff in the amount of $251,012.89 for funds she converted through improper means.

On October 15, 2005, the defendant filed her petition under Chapter 7 of the Bankruptcy Code. On March 2, 2006, the plaintiff commenced this adversary proceeding to determine the dischargeability of the defendant's debts to the plaintiff. The plaintiff moved for summary judgment on November 17, 2006. The defendant has not filed a timely response.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c), as made applicable to bankruptcy proceedings by Bankruptcy Rule 7056, provides that a court shall render summary judgment:

> 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.

The party moving the court for summary judgment bears the burden of showing that "there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law." *Jones v. Union County*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322

(1986). Once the moving party meets that burden, the nonmoving party "must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997); *see, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."). In determining the existence or nonexistence of a material fact, a court will view the evidence in a light most favorable to the nonmoving party. *Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996).

Absent such evidence from the nonmoving party in a motion for summary judgment, the Court need not excavate the entire record to determine if any of the available evidence could be construed in such a light. *See In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001) (holding that the "trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact"); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993). "[S]ummary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56.

DISCUSSION

Section 523 of the Bankruptcy Code[1] provides in pertinent part:

> (a) A discharge under section 727 . . . of this title . . . does not discharge an individual debtor from any debt—
>
> . . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), the Supreme Court clarified the meaning of "willful and malicious injury" as it appears in section 523(a)(6) to cover only those debts incurred as a result of an intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Following the Supreme Court, the Sixth Circuit has held that unless "the actor desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it," he has not committed a "willful and malicious injury" as defined under section 523(a)(6). *In re Markowitz*, 190 F.3d 455, 464 (6th Cir. 1999). Therefore, section 523(a)(6) excepts from discharge debts resulting from intentional torts, not negligent or reckless torts. *See Kennedy v. Mustaine* (*In re Kennedy*), 249 F.3d 576, 580 (6th Cir. 2001) (holding debt owing as a result of the intentional

[1] This bankruptcy case was filed prior to October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, 119 Stat. 23 (BAPCPA). Therefore, all references to the Bankruptcy Code are to the Bankruptcy Code as it existed prior to the effective date of BAPCPA.

tort of defamation was nondischargeable); *see also Superior Metal Products v. Martin* (*In re Martin*), 321 B.R. 437, 441 (Bankr. N.D. Ohio 2004) (holding debt for conversion was nondischargeable when defendant wrongfully negotiated a check and dissipated the funds). As with all the exceptions under section 523, nondischargeability under section 523(a)(6) must be proven by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279 (1991).

In the defendant's civil case, she stipulated that she converted the plaintiff's funds. The undisputed testimony of Linda Larson establishes that the defendant knowingly received and negotiated checks which were not properly payable to her in the total amount of $251,012.89. The testimony also establishes that in order to conceal this conversion, the defendant removed the improper checks from the plaintiff's bank statements. In addition, the defendant pleaded guilty to tampering with evidence, an element of which is "with purpose to defraud" and to theft, an element of which is "with purpose to deprive the owner of property." O.R.C. § 2913.42 (2006); O.R.C. § 2913.02 (2006). It is therefore undisputed that the defendant, by knowingly converting substantial funds of the plaintiff, and by knowingly concealing her acts, intended an injury to the plaintiff's property. The plaintiff has sustained its burden of establishing by a preponderance of the evidence that the defendant caused an injury that was both willful and malicious.

See In re Martin, 321 B.R. at 442. Accordingly, the debt of $251,012.89, which arose from the willful and malicious conduct, is nondischargeable under 11 U.S.C. § 523(a)(6).

Because the plaintiff has established nondischargeability under 11 U.S.C. § 523(a)(6), the Court finds no need to address the alternative theories of issue preclusion and nondischargeability under 11 U.S.C. § 523(a)(2)(A) and (a)(4).

CONCLUSION

For the reasons stated above, the plaintiff's motion for summary judgment is granted. The defendant's debt of $251,012.89 owing to the plaintiff as a result of the defendant's conversion is nondischargeable under 11 U.S.C. § 523(a)(6).

IT IS SO ORDERED.