

IT IS SO ORDERED.



Dated: June 04, 2007
09:23:02 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

GREGORY F. ELLIS,
Debtor.

CASE NUMBER 05-49410

PETER D. CAHOON,
Plaintiff,

ADVERSARY NUMBER 06-4055

vs.

GREGORY F. ELLIS,
Defendant.

THE HONORABLE KAY WOODS

MEMORANDUM OPINION
(NOT INTENDED FOR NATIONAL PUBLICATION)

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available for electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause came before the Court for a bench trial on May 21, 2007. Plaintiff Peter D. Cahoon ("Plaintiff") was not present but was represented by Andrew W. Suhar, Esq. Debtor/Defendant Gregory F. Ellis ("Defendant") was present and represented by James A. Vitullo, Esq. The Court received the testimony of Defendant, Jeffrey Ellis, and Jeffrey Ellis, Jr.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 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. Facts

The following facts are uncontroverted and taken from the trial testimony unless otherwise noted. Defendant, his brother, Jeffrey Ellis ("Jeffrey"), and their children traveled to Alexandria, Virginia to attend a wedding at the Embassy Suites on October 6, 2001. The Embassy Suites in Alexandria, Virginia has an architectural atrium, or open center area on the main floor, which is framed by several floors of hotel rooms. This atrium contains a lounge area with tables and chairs.

Jeffrey and some college kids were playing "catch" on the eighth floor by throwing a "novelty smaller-type youth-type" football across the balcony that surrounded the atrium. On two occasions, the football fell from the eighth floor balcony to the

main floor lounge. The Ellis children retrieved the football from the main floor the first time without incident. However, the second attempt was unsuccessful and they returned to the eighth floor empty-handed. Defendant's youngest daughter explained to Defendant that someone on the main floor had taken the football and refused to return it.

Defendant and Jeffrey accompanied the children to the main floor where Defendant's youngest daughter identified Plaintiff as the man who had confiscated the football. Defendant described Plaintiff as being a little taller and a lot heavier than himself. He estimated that Plaintiff weighed in excess of three hundred pounds.

According to Defendant's testimony, he approached Plaintiff, who was seated at a table with two women and another man, and asked him "two or three times nicely" to return the football. However, Plaintiff, whose demeanor Defendant described as being arrogant and hostile, ignored his requests.

Defendant testified that he "went back again" to ask for the football, at which time, Plaintiff stood up, told Defendant "Go f*** yourself," came toward Defendant, and grabbed Defendant's tie.¹ Defendant then punched Plaintiff in the face. According to Defendant's testimony, both men "ended up the floor" after Plaintiff "actually pulled the tie off of [Defendant's] head."

Defendant testified that he did not punch Plaintiff in the face to injure him, but, instead, to "get[] away from him." On cross-examination, Defendant conceded that he did not ask or demand

¹The tie was apparently loosened since it came off in the ensuing struggle. There is no evidence that Defendant was in any danger of being choked or strangled by the tie.

that Plaintiff release his tie, or seek the assistance of the front desk staff or hotel security in his efforts to recover the football.

During the scuffle on the floor, Jeffrey testified that he intervened, and used his foot to "shove[] [Plaintiff] off [Defendant]," which, according to Jeffrey's testimony, ended the brawl. Neither Defendant nor Jeffrey knew whether Plaintiff was taken to a hospital. Defendant testified that they retreated to Jeffrey's room immediately after the altercation because the children were upset.² The police arrived at Jeffrey's room a short time later. Neither Defendant nor Jeffrey testified that they informed the police that Plaintiff started the fight or that Defendant was acting in self-defense.

Defendant and Jeffrey were subsequently charged with the crime of assault and entered pleas of guilty in the General District Court for the City of Alexandria, Virginia. (Joint Stipulation of Facts ¶ 2.) Defendant explained that the brothers did not mount a defense in the criminal case because Jeffrey "found the cheapest attorney" to handle the case, who advised them to plead guilty and not to file assault charges against Plaintiff. The brothers were each sentenced to one year of probation, community service, and anger management classes.

Plaintiff filed a civil complaint against Defendant and Jeffrey ("Civil Action") based upon the same set of facts that gave

²Jeffrey's son, Jeffrey Ellis, Jr. corroborated the testimony of Defendant and Jeffrey. Jeffrey Ellis, Jr., who was 11 years old at that time, conceded that he watched the altercation from the eighth floor balcony. As the chain of events that occurred on October 6, 2001 is uncontroverted, the testimony of Jeffrey Ellis, Jr. is cumulative and will not be considered by the Court.

rise to the criminal action. The Final Judgment Order, entered in the Circuit Court for the City of Alexandria, Virginia, Law No. CL-3030276 ("Civil Judgment") indicates that Defendant was properly served but filed no responsive pleading.³

At an *ex parte* hearing on proof of damages in the Civil Action, the state court entered default judgment in the amount of \$250,000.00 in compensatory damages and \$50,000.00 in punitive damages in favor of Plaintiff and against Defendant and Jeffrey, jointly and severally. The Civil Judgment reads, in pertinent part, "the defendants Jeffrey Ellis and Gregory Ellis jointly perpetrated a malicious assault upon plaintiff without provocation or cause that caused serious injuries to this plaintiff." (Civil Judgment at 2.)

Defendant stated that he "didn't believe that he was served with papers" in the Civil Action, and, as a consequence, did not defend the action. At trial, Defendant and Jeffrey expressed grave doubts regarding the severity of the damages suffered by Plaintiff as a result of the altercation. Neither of the brothers believed that Plaintiff could have sustained permanent injuries.

Defendant filed his Chapter 7 petition on October 15, 2005. Plaintiff is a creditor of Defendant by virtue of the Civil Judgment in the amount of \$300,000.00. (Joint Stipulation of Fact ¶ 1.) The entire amount of the Civil Judgment remains unpaid. (*Id.* ¶ 3).

³According to the Civil Judgment, Jeffrey provided Defendant's address to Plaintiff in his Answer to Interrogatories and that non-resident service was perfected on September 25, 2003.

Plaintiff filed the above-captioned adversary proceeding on February 10, 2006. Plaintiff contends that the debt memorialized in the Civil Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(6) because the debt is for willful and malicious injury to Plaintiff by Defendant. An Order of Discharge was entered in the main case on February 16, 2006.

II. The Parties' Positions

At the final pre-trial conference held on January 17, 2007, the parties stipulated that the only issue to be decided by the court is whether Defendant intended to cause the injuries sustained by Plaintiff on October 6, 2001.⁴ Likewise, in their respective Lists of Legal Issues to be Determined by the Court ("List of Legal Issues"), the parties recognized that intent was the sole issue before the Court.

At trial, Plaintiff argued that Defendant and Jeffrey angrily descended eight floors in order to confront the man who had refused to return the children's football. Plaintiff contends that Defendant seized upon the slightest provocation to intentionally injure Plaintiff in order to punish him for confiscating the toy. Plaintiff further argued that Defendant is collaterally estopped from claiming that he acted in self-defense based upon his failure to raise self-defense as an affirmative defense to the criminal charges in the Civil Action.

⁴At the final pre-trial conference, Plaintiff's counsel represented to the Court on the record that intent was the only issue that remained for adjudication. Defendant's counsel, who was present at the final pre-trial conference, did not object to or otherwise contradict Plaintiff's representation.

Defendant, on the other hand, argued that (i) Plaintiff failed to produce any evidence of injury, causation, and damages at trial; (ii) Plaintiff was the aggressor in the altercation, and, finally, (iii) Defendant did not intend to injure Plaintiff when he punched him in the face, but, rather, he was merely attempting to protect himself and his family.

III. Law

A. Dischargeability

Section 523(a) provides several exceptions to the general rule that pre-petition debts are dischargeable under the Code. Plaintiff bears the burden of proving that a debt is excepted from discharge. See *Meyers v. Internal Revenue Service (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (citing *Grogan v. Garner*, 498 U.S. 279, 290-91, 111 S.Ct. 654, 661 (1991) Exceptions to discharge are narrowly construed. See *id.* (citing *Grogan*, 498 U.S. at 286-87, 111 S.Ct. at 654).

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 (West 2006).

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 injury for the purposes of satisfying section 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 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 *In re Saad*, 319 B.R. 147, 156 (Bankr. E.D. Mich. 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 section 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.

B. *Res Judicata* and Collateral Estoppel

Pursuant to the Full Faith and Credit Statute, 28 U.S.C. § 1738, bankruptcy courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which that judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892 (1984). "[T]he party asserting preclusion bears the burden of proof." *Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust Dated June 27, 2002*, 410 F.3d 304, 310 (6th Cir. 2005) (quoting *United States v. Dominguez*, 359 F.3d 839, 842 (6th Cir.), cert. denied, 543 U.S. 848, 125 S.Ct. 261 (2004)).

In Ohio, the doctrine of *res judicata* encompasses the two related concepts of claim preclusion, also known as *res judicata* or estoppel by judgment, and issue preclusion, also known as collateral estoppel. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995).

Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998). Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter. *Grava*, 73 Ohio St.3d at 382, 653 N.E.2d 226.

Claim preclusion has four elements in Ohio: (1) a prior final, valid decision on the merits by a court of competent jurisdiction;

(2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 704-05 (6th Cir. 1999).

Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. *Fort Frye*, 81 Ohio St.3d at 395, 692 N.E.2d 140. Issue preclusion applies even if the causes of action differ. *Id.*

In Ohio, the following elements must be established to apply the doctrine of collateral estoppel: 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 a party to the prior action. *Gonzalez v. Moffit (In re Moffitt)*, 252 B.R. 916, 921 (B.A.P. 6th Cir. 2000).

1. Default Judgments

In *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186 (B.A.P. 6th Cir. 2002), the Bankruptcy Appellate Panel of the Sixth Circuit recognized that Ohio courts have not agreed on whether and how to apply the "actually litigated" prong of the collateral estoppel test to default judgments. *Id.* at 192. In an effort to synthesize

numerous unreported Ohio cases, the BAP limited the preclusive effect of default judgments to what it described as "two conjoined circumstances" first articulated by Judge Richard Speer of the Northern District of Ohio. *Id.* In *Hinze v. Robinson (In re Robinson)*, 242 B.R. 380 (Bankr. N.D. Ohio 1999), Judge Speer reasoned:

First, the plaintiff must actually submit to the state court admissible evidence apart from his pleadings. In other words, a plaintiff's complaint, standing alone, can never provide a sufficient basis for the application of the collateral estoppel doctrine. Second, the state court, from the evidence submitted, must actually make findings of fact and conclusions of law which are sufficiently detailed to support the application of the collateral estoppel doctrine in the subsequent proceeding. In addition, given other potential problems that may arise with applying the collateral estoppel doctrine to default judgments (e.g., due process concerns), this Court will only make such an application if the circumstances of the case would make it equitable to do so.

Id. at 387.

Based upon Judge Speer's rationale in *Robinson*, the BAP held that the best evidence of a decision on the merits is findings of fact and conclusions of law by the court entering the default judgment. *In re Sweeney*, 276 B.R. at 194. The *Sweeney* Court wrote, "These need not be entered in any special or formal way, but the default court must state what findings and conclusions, if any, it has reached in arriving at the judgment." *Id.*

2. Guilty Pleas

Although a guilty plea in a criminal prosecution constitutes a complete admission of a defendant's guilt in that criminal proceeding in Ohio, see Ohio R. Crim. P. 11(B)(1); *State of Ohio ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 423, 662 N.E.2d 370,

372 (1996), Ohio courts have concluded that the "mutuality" requirement is not met when a private party plaintiff attempts to invoke offensive collateral estoppel based upon a defendant's criminal conviction. *Culberson v. Doan*, 72 F.Supp.2d 865, 872 (S.D. Ohio 1999)(citing *Phillips v. Rayburn*, 113 Ohio App.3d 374, 382, 680 N.E.2d 1279, 1284 (4th Dist. 1996)); *Grange Mut. Cas. Co. v. Chapman (In re Chapman)*, 228 B.R. 899, 905 (Bankr. N.D. Ohio 1998); *North American Science Associates v. Clark (In re Clark)*, 222 B.R. 114, 117 (Bankr. N.D. Ohio 1997).

Ohio courts cite policy concerns first articulated in *Walden v. State*, 47 Ohio St.3d 47, 51-52, 547 N.E.2d 962, 965-67 (1989), including the procedural and discovery differences between civil and criminal forums as well as the defendant's dilemma over whether to testify on his/her own behalf or present any defense at the criminal trial, for their adoption of the minority view that additional litigation involving the facts and legal issues underlying the conviction is the proper practice. *Culberson*, 72 F. Supp.2d at 873; *Phillips*, 113 Ohio App.3d at 382, 680 N.E.2d at 1284; *In re Chapman*, 228 B.R. at 906; *In re Clark*, 222 B.R. at 117.

Despite Ohio's proscription of the use of collateral estoppel with respect to prior criminal convictions, a criminal conviction may nevertheless be admitted into evidence in a subsequent civil case and accorded whatever weight the factfinder deems appropriate. *Phillips*, 113 Ohio App.3d at 382, 680 N.E.2d at 1284, *In re Chapman*, 228 B.R. at 905.

IV. Analysis

Defendant argued that Plaintiff produced no evidence of injury, causation, or damages⁵ at trial. In fact, Plaintiff established all of those elements by way of the admission of the Civil Judgment as an exhibit in this case. Although Plaintiff cannot rely on Defendant's guilty plea to establish the elements of injury, causation, and damages in this case, he can rely on the Civil Judgment to establish those elements.

In the Civil Action, the state court held an *ex parte* hearing on proof of damages and issued an order finding that Defendant and Jeffrey maliciously assaulted Plaintiff and that Plaintiff sustained \$300,000.00 in damages. Because Plaintiff did not rely solely on his pleadings in state court, but, instead, filed a motion for an evidentiary hearing on damages, and the Court issued specific findings with respect to injury, causation, and damages, Defendant is collaterally estopped from challenging the findings of the state court in the Civil Action. See *Sweeney*, 276 B.R. at 194.

Furthermore, this Court finds that the rules of equity favor the application of collateral estoppel in this case. *Id.* Simply stated, Defendant's testimony that he was not served in the Civil Action is not credible, particularly since Jeffrey filed an Answer in the Civil Action and provided Defendant's address to Plaintiff in his Answers to Interrogatories. As a consequence, Defendant's argument that Plaintiff failed to establish the elements of injury,

⁵At trial, Defendant and Jeffrey called into question the *extent* of Plaintiff's injuries, rather than the *existence* of any injury. However, as stated *infra.*, Defendant's failure to challenge the extent of damages caused by the altercation in the Civil Action precludes him from raising such a defense in this case.

causation, and damages is incorrect, and Defendant is foreclosed from challenging the existence of those elements based upon *res judicata*.

Defendant's remaining two arguments go to the issue of intent, but, nonetheless, suffer the same fate as his first argument. Defendant contends that Plaintiff was the aggressor in the confrontation, and that Defendant was merely trying to escape Plaintiff's grasp and to protect himself and his children.

First, Defendant is precluded from asserting self-defense as an affirmative defense in this case based upon his failure to raise the defense in state court. In Ohio, self-defense is an affirmative defense which must be asserted in the pleadings or an amendment to the pleadings. *Whislam v. Gator Invest. Properties*, 149 Ohio App.3d 225, 776 N.E.2d 1126 (1st Dist. 2002). Therefore, Defendant's failure to raise self-defense in the Civil Action prevents him from raising it in this Court. *See Fordu*, 201 F.3d at 704-05.

Defendant's eleventh-hour decision⁶ to assert self-defense in this case was obviously precipitated by Plaintiff's absence, and, therefore, the absence of any conflicting evidence regarding the altercation, at trial. Despite the one-sidedness of the testimony at trial, Defendant may not raise the issue of self-defense for the first time before this Court.

However, even though Defendant is foreclosed from arguing self-defense in this case, he may still argue that the injury he caused to Plaintiff was not willful or malicious. *See Radermacher*

⁶Defendant failed to assert self-defense in his Answer in this case or move this Court to amend his Answer to include self-defense at trial.

v. Sullivan (In re Sullivan), 122 B.R. 720 (Bankr. D. Minn. 1991)(bankruptcy court's holding that self-defense had to be joined in original action did not preclude debtor from litigating "willfulness" and "malice").

Here, Defendant contends that he punched Plaintiff in the face merely to escape Plaintiff's grasp. Defendant points to the fact that he and Jeffrey immediately retreated to Jeffrey's hotel room after Jeffrey used his foot to "shove[] [Plaintiff] off [Defendant]," during the scuffle on the floor. According to Defendant, if his main goal was to injure Plaintiff, he would not have voluntarily left the scene as soon as he was able to get up from the floor.

Despite Defendant's protestations, this Court finds that Defendant intended to injure Plaintiff when he punched him in the face. First, if Defendant's only objective was to get away from Plaintiff, there are a number of actions he could have taken - short of punching Plaintiff in the face - that could have accomplished his stated goal. Defendant did not ask or demand that Plaintiff release his tie. Defendant did not try to pull away from Plaintiff. Defendant did not try to remove Defendant's hand from his tie.

As a matter of fact, Defendant made no effort whatsoever to end the confrontation, but, instead, chose to escalate it by punching Plaintiff in the face with such force that it knocked both of them to the floor. Defendant provided no explanation for his allegedly tactical decision to punch Plaintiff in the face. In other words, he did not explain why he believed a punch in the face

would cause Plaintiff to release Defendant's tie rather than start a full-blown fist fight. A punch in the face is, by its very nature, intended to cause injury. Without any explanation from Defendant as to why the punch was a tactical move to facilitate escape, rather than an offensive move to cause injury, the Court finds that the punch was delivered to cause injury to Defendant.

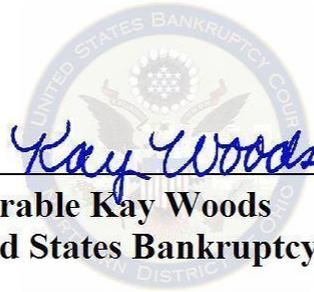
Finally, the Ellis' quick exit to Jeffrey's hotel room is not dispositive of any intent to injure. Not only did such action occur after Defendant punched Plaintiff in the face, the Ellises did not call the police after the altercation or report the tie-grabbing incident to the hotel staff when they returned to Jeffrey's room. Indeed, it appears they did not level any counter charges against Plaintiff when the police came to the hotel room.

Because Defendant intended to injure Plaintiff when he punched him in the face, and there is no just cause or excuse for Defendant's actions, the Court finds that the debt owed to Plaintiff by Defendant is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: June 04, 2007
09:23:03 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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Debtor.

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Plaintiff,

ADVERSARY NUMBER 06-4055

vs.

GREGORY F. ELLIS,

Defendant.

THE HONORABLE KAY WOODS

O R D E R

For the reasons set forth in the Court's Memorandum Opinion, this Court finds that the debt memorialized in the Final Judgment Order, entered in the Circuit Court for the City of Alexandria Virginia, Law No. CL-3030276, in the amount of \$300,000.00 is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

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