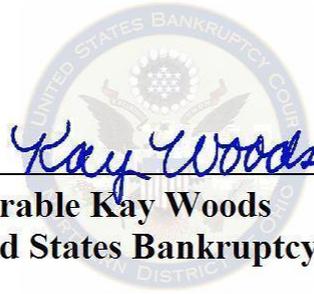


IT IS SO ORDERED.



Dated: October 09, 2007
04:49:52 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

SAMMY RICHARD BARTH,
Debtor.

CASE NUMBER 06-40804

DIANE BANAR and
EMIL BANAR,

Plaintiffs,

ADVERSARY NUMBER 07-4064

vs.

SAMMY RICHARD BARTH,
Defendant.

THE HONORABLE KAY WOODS

MEMORANDUM OPINION
REGARDING DEFENDANT'S MOTION TO DISMISS
(NOT INTENDED FOR NATIONAL PUBLICATION)

The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is

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

This matter is before the Court upon the Debtor's 12(b)(6) Motion to Dismiss Adversary Complaint ("Motion to Dismiss") filed by Debtor/Defendant, Sammy Richard Barth ("Debtor") on July 27, 2007. Plaintiffs failed to respond to the Motion to Dismiss.

Plaintiffs Diane Banar and Emil Banar ("Plaintiffs") filed Complaint to Determine Dischargeability of Debt ("Complaint") on May 14, 2007. The Complaint alleges Debtor "committed several acts of fraud and misrepresentation against them, and that he was indebted to them as a consequence of that fraud and misrepresentation, for indemnification and actual and punitive damages" (Complaint ¶ 13).

In Count One of their Complaint, Plaintiffs assert that "[Debtor's] debt owed [to the Plaintiffs] is for fraud," and, accordingly, nondischargeable pursuant to the exceptions to discharge enumerated in 11 U.S.C. §§ 523(a)(2)(A) (debts for fraud) and¹ (a)(6) (debts for willful and malicious injury). In the alternative, Plaintiffs concede in Count Two that Debtor owes them no debt because "[t]he only current debt to the [Plaintiffs] out of their involvement with [Debtor] is owed by Salem Industrial alone." (Complaint ¶ 21).

In the Motion to Dismiss, Debtor argues that Plaintiffs' Complaint fails to state a cause of action upon which relief may be

¹Plaintiffs allege these two bases for exception to discharge in the conjunctive rather than the disjunctive. Plaintiffs fail to allege all necessary elements for either of these exceptions.

granted because it is devoid of several essential elements necessary to establish a nondischargeable debt.

Although not addressed by the Parties, it is apparent to the Court that Defendant's Rule 12(b)(6) motion should be converted into a Rule 12(c) motion. "A Court may . . . grant judgment on the pleadings *sua sponte* when, 'after the pleadings are closed,' the court determines that there is no material issue of fact presented and that one party is clearly entitled to judgment." *Bajenski v. Chivatero*, 818 F. Supp. 1083, 1085 (N.D. Ohio 1993) (citing *Flora v. Home Federal Sav. and Loan Ass'n*, 685 F.2d 209 (7th Cir. 1982)).

The test for evaluating a 12(c) motion for judgment on the pleadings is the same as that applicable to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Judgment on the pleadings is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings.

Scope, Inc. v. Pataki, 386 F. Supp. 2d 184, 190 (W.D. N.Y. 2005) (internal citations omitted) (where the court considered "only the complaint and the matters attached to it for purposes of its Rule 12 analysis." *Id.*).

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. Standard for Review

Judgment on the pleadings is governed by FED. R. CIV. P. 12(c), which is made applicable to this proceeding pursuant to FED. R. BANKR. P. 7012. Rule 12(c) provides, in pertinent part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

Judgment on the pleadings is proper when no material issue of fact exists and the party is entitled to judgment as a matter of law. *Paskvan v. Cleveland Civil Service Commission*, 946 F.2d 1233, 1235 (6th Cir. 1991). In determining if a material issue of fact exists, the Court must construe the complaint in the light most favorable to the non-moving party, *Estill County Board of Education v. Zurich Insurance Co.*, 84 Fed. Appx. 516, 518 (6th Cir. 2003), and take all well-pleaded material of the non-moving party as true. *United States v. Moriarty*, 8 F.3d 329, 332 (6th Cir. 1993) (quoting *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973)). However, the Court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction." *In re KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)). Judgment on the pleadings may only be granted if the moving party is clearly entitled to judgment. *Southern Ohio Bank*, 479 F.2d at 480.

II. Law

A. Dischargeability

Section 523(a) provides several exceptions to the general rule that pre-petition debts are dischargeable under the Bankruptcy Code. Plaintiffs bear the burden of proving by a preponderance of the evidence 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 (1991)). Exceptions to discharge are narrowly construed. *See id.* (*citing Grogan*, 498 U.S. at 286-87). "Exceptions to discharge are strictly construed against creditors." *Steier v. Best (In re Best)*, 109 Fed. Appx. 1, 4 (6th Cir. 2004).

B. § 523(a)(2)(A)

Section 523(a)(2)(A) of the Bankruptcy Code implements the long standing Congressional policy that a debtor who incurs a debt through fraudulent means is not, with respect to that particular debt, entitled to the benefits of a bankruptcy discharge. *Bernard Lumber Co. v. Patrick (In re Patrick)*, 265 B.R. 913, 916 (Bankr. N.D. Ohio 2001). Section 523(a)(2)(A) provides in pertinent part:

(a) A discharge under section 727 . . . 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;

11 U.S.C. § 523 (West 2007).

To satisfy § 523(a)(2)(A), Plaintiffs must prove that: (i) Debtor obtained something of value through a material misrepresentation that Debtor knew was false or that Debtor made with gross recklessness; (ii) Debtor intended to deceive Plaintiffs; (iii) Plaintiffs justifiably relied on Debtor's false representation; and (iv) Plaintiffs' reliance was the proximate cause of their losses. *Rembert v. AT&T Universal Card Servs., Inc.* (*In re Rembert*), 141 F.3d 277, 280 (6th Cir. 1998).

Finally, where fraud is alleged, the concept of notice pleading is heightened by a requirement of specificity. FED. R. CIV. P. 9(b), made applicable to adversary proceedings pursuant to FED. R. BANKR. P. 7009(b), provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

FED. R. CIV. P. 9(b) requires Plaintiffs, "at a minimum, to allege the time, place and content of the misrepresentations upon which he or she relied; the fraudulent scheme, the fraudulent intent of the defendants; and the injury resulting from the fraud." *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-162 (6th Cir. 1993) (quoting *Ballan v. Upjohn Co.*, 814 F. Supp. 1375, 1385 (W.D. Mich. 1992); *Equal Justice Foundation v. Deutsche Bank Trust Co. Americas*, 412 F.Supp. 2d 790, 797 (S.D. Ohio 2005). Plaintiffs must state with particularity the specific circumstances giving rise to the complaint. *Trell v. Dunlevy (Matter of Dunlevy)*, 75 B.R. 914, 916 (Bankr. S.D. Ohio 1987).

C. § 523(a)(6)

Section 523(a)(6) provides that a discharge under § 727 of 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(a)(6) (West 2007).

D. 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 (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 (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 (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 (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.

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, 703-04 (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. 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; 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).

While default judgments, by definition, do not result from litigation, in *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186 (B.A.P. 6th Cir. 2002), the Bankruptcy Appellate Panel ("BAP") 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 circumstances conjoined" first articulated by Judge Richard Speer of the Northern District of Ohio. *Id.* at 193. 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.

In re Sweeney, 276 B.R. at 193-194 (quoting *In re Robinson*, 242 B.R. at 387) (emphasis omitted).

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. *Id.* 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.*

III. Facts

The following facts, included in the Complaint and the exhibits attached thereto,² are accepted as true for purposes of this Judgment on the Pleadings.

Debtor was majority shareholder, and Plaintiffs were minority shareholders, in Salem Industrial Products Inc. ("Salem Industrial"), a closely held corporation. (Complaint ¶ 5). On September 30, 2002, Plaintiffs filed suit in the Columbiana County Court of Common Pleas ("Common Pleas Court" or "State Court") against Debtor and Salem Industrial, alleging that Debtor had "wrongfully fr[ozen] the Banars out of their rights and privileges as minority shareholders of Salem Industrial." (Complaint ¶ 5). Plaintiffs, Debtor, and Salem Industrial entered into a subsequent settlement agreement on January 13, 2003. (Complaint ¶ 6). Salem Industrial later breached this settlement agreement. (Complaint ¶ 7). On August 22, 2005, the State Court entered judgment against Salem Industrial, in favor of Plaintiffs, for \$48,406.30. (Complaint ¶ 11).

On January 26, 2006, Consumer's Bank filed suit against Plaintiffs, Debtor, and Salem Industrial in the Common Pleas Court for Salem Industrial's failure to make payments on a loan for certain printing equipment. (Complaint ¶ 12). In that case, Plaintiffs filed Defendants Emil J. Banar and Diane K. Banar's Cross Claim Against Defendants Salem Industrial Products, Inc., and Sam R. Barth ("Cross-Claim") against Debtor and Salem Industrial, on February 27, 2006. (Complaint ¶ 13; Ex. F).

²All references herein to "Ex. ___" are to the various exhibits attached to the Complaint.

Plaintiffs alleged in the Cross-Claim that "any liability" to Consumer's Bank "stems solely" from the failure of Debtor and Salem Industrial to make payments to Consumer's Bank for a single printer variable printing system, purchased by Salem Industrial. (Ex. F ¶ 9). Plaintiffs further alleged that, on or about October 20, 2000, Debtor "knowingly made material misleading statements and misrepresentations" to Plaintiffs, which induced them to execute a promissory note to Consumer's Bank for the purchase of the printing system. (Ex. F ¶ 15). Plaintiffs were officers of Salem Industrial when they executed the promissory note. (Ex. F ¶ 16).

Because Debtor defaulted on the Cross-Claim, the Common Pleas Court entered a default judgment ("Default Judgment") against him on May 1, 2006. (Complaint ¶ 15; Ex. G). The Common Pleas Court set a hearing for 3:00 p.m. on June 9, 2006, to determine damages on the Default Judgment. (Complaint ¶ 15). At 11:02 a.m. on June 9, 2006, Debtor filed a voluntary chapter 7 petition. As a result, the Common Pleas Court stayed the Cross-Claim action. (Complaint ¶ 17; Ex. H).

IV. Analysis

A. Count One

Plaintiffs assert that Debtor owes them a debt as a result of fraud and that this debt is nondischargeable under both § 523(a)(2)(A) and § 523(a)(6). However, Plaintiffs fail to support this argument by specifying any particular action of the Debtor as constituting fraud. Nor do Plaintiffs identify any debt, damages, or injury in making their assertion, leaving it to this Court to ferret out whether they have satisfied the elements necessary to

support their claims. Even construing the Complaint in the light most favorable to Plaintiffs, the Court concludes that Plaintiffs are unable to meet their *prima facie* burden.

Section 523(a)(2) governs debts "for money, property, services, or an extension, renewal, or refinancing of credit to the extent [those debts are] obtained, by- false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Plaintiffs, however, have failed to allege any such debt owed to them by Debtor. The only current debt established by the Complaint is owed to Plaintiffs by Salem Industrial, which has not filed for bankruptcy protection and is not a party to this action. (Complaint ¶ 11; Ex. E).

Furthermore, Plaintiffs fail to satisfy the particularity requirements of FED. R. CIV. P. 9(b). *See also, Coffey*, 2 F.3d at 161-162; *Trell*, 75 B.R. at 916. Despite the heightened pleading standard for fraud, Plaintiffs' Complaint only avers generally that Debtor made misrepresentations to them, but does not allege any specific time, place, or contents of such misrepresentations. Plaintiffs reference only two instances of statements by Debtor that could possibly serve as bases for their § 523(a)(2)(A) claim. The Court will analyze each instance, in turn, but neither is sufficient to support a § 523(a)(2)(A) claim.

First, the Complaint implies that Debtor (i) made statements to Plaintiffs and the Common Pleas Court that he would cause Salem Industrial to perform the settlement agreement, and (ii) failed to fulfill these promises. (Complaint ¶¶ 6-11). "[F]or purposes of

a purported misrepresentation under 11 U.S.C. § 523(a)(2)(A), courts ordinarily distinguish a knowing misstatement of a prior fact, which ordinarily falls within § 523(a)(2)(A), and a promise of future performance that is subsequently not performed, which ordinarily does not." *Idolan v. Horton (In re Horton)*, 2007 Bankr. LEXIS 2934, *20 (Bankr. D. Ky. 2007). See also, 4 Collier on Bankruptcy ¶ 523.08[1][d] (15th ed. rev. 2007) ("The failure to perform a mere promise is not sufficient to make a debt nondischargeable, even if there is no excuse for the subsequent breach of promise.").³ Despite any promises to do so, Debtor's failure to cause Salem Industrial to perform the Settlement Agreement to Plaintiffs' satisfaction is, at most, a breach of contract. It is not sufficient, however, to support nondischargeability under § 523(a)(2)(A).

Second, Plaintiffs reference their attached Cross-Claim. (Complaint ¶ 13). By Plaintiffs' own admission, liability in the Cross-Claim is limited to the failure of Debtor and Salem Industrial to make payments on a loan to Consumer's Bank. (Ex. F ¶ 9). Failure to make loan payments may be a breach of contract, but this failure, by itself, does not constitute fraud.

In their Cross-Claim, Plaintiffs allege that Debtor "knowingly made material misleading statements and misrepresentations" to them on or around October 20, 2000, to induce them to execute a

³A statement made with the intent not to perform may be a false representation under § 523(a)(2)(A). 4 Collier ¶ 523.08[1][d]. Such intent may be inferred by the failure of the debtor to take any steps under the contract. *Id.* Here, in contrast, Debtor apparently fulfilled his promises to the satisfaction of the Common Pleas Court, which, according to Plaintiffs, "found that [Debtor] had purged himself of his remaining contempt and cancelled further proceedings in the matter." (Ex. F ¶ 27).

promissory note, enabling Salem Industrial to purchase the printing system. (Ex. F ¶¶ 15-17). Leaving aside the real questions concerning (i) whether Debtor personally received something of value from the Plaintiffs as a result of these alleged statements, and (ii) whether Plaintiffs' reliance thereon was justifiable,⁴ Debtor's alleged statements cannot form the basis for a claim based on fraud because the statute of limitations has run for such a claim.

In a nondischargeability proceeding, "the establishment of the debt . . . is governed by the state statute of limitations--if suit is not brought within the time period allotted under state law, the debt cannot be established." *Resolution Trust Corp. v. McKendry* (*In re McKendry*), 40 F.3d 331, 337 (10th Cir. 1994); see also, *Banks v. Gill Distrib. Ctrs., Inc* (*In re Banks*), 263 F.3d 862, 868 (9th Cir. 2001) (The first issue in the dischargeability analysis is "the establishment of the debt itself, which is subject to the applicable state statute of limitations[.]"); and *Fledderman v. Glunk*, (*In re Glunk*), 343 B.R. 754, 761 (Bankr. E.D. Pa. 2006) ("[I]f the underlying lawsuit was not brought within the applicable statute of limitations, a debt cannot be established."). Ohio has a four year statute of limitations for actions based on claims of fraud. Ohio Revised Code ("O.R.C.") § 2305.09(C). Therefore, under Ohio law, any statements made by Debtor on or about October 20, 2000, cannot create an action for fraud after the end of

⁴Plaintiffs, who were officers of Salem Industrial at the time they signed the note, provide no explanation about why they believed Debtor's alleged statement that they would incur no personal liability by signing the note. They also offer no basis for their reliance on Debtor's alleged statement, which was made as one corporate officer to another.

October 2004. Plaintiffs did not file their Cross-Claim until February 27, 2006 - nearly a year and a half after expiration of the applicable statute of limitations.⁵ Even if all the assertions in Plaintiffs' Cross-Claim are accepted as true, Debtor's statements in October 2000 are not sufficient to establish a claim in fraud because Plaintiffs are time-barred from establishing a cause of action for fraud.

On the other hand, although Plaintiffs do not expressly state so in their Complaint, it may be that Plaintiffs are depending upon the mere existence of the Default Judgment to establish the requisite elements of fraud. If that is the case, Plaintiffs are mistaken. The Court in *Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.*, 2006 U.S. Dist. LEXIS 66055 (E.D. Mich. 2006), recently summarized the prevailing rule on applying collateral estoppel to default judgments:

In accord with the *Restatement* view and the unpublished decisions of the Ohio courts, the federal courts that have considered the matter have determined that, under Ohio law, a default judgment may have preclusive effect, but only if the judgment itself expressly adjudicates an issue. "Ohio courts give preclusive effect to default judgments only when there is an express adjudication of the issue. '[A]n unanswered complaint and the default judgment based on it do not, by themselves, constitute an express

⁵Ohio has a 15 year statute of limitations for breach of written contract. O.R.C. § 2305.06. Consequently, Plaintiffs' Cross-Claim may not be barred in its entirety, but the Cross-Claim conclusively fails to provide a basis for fraud upon which this nondischargeability action is based. *Cf.*, *Spinnenweber v. Moran (In re Moran)*, 152 B.R. 493, 495 (Bankr. S.D. Ohio 1993) ("The only relevant question with respect to Ohio's statute of limitations is whether the plaintiffs sought to *enforce* their "*debt*" against the debtor within the period prescribed by the statute of limitations." (emphasis in original)). As set forth at pp. 12-13 *supra*, a mere breach of contract cannot constitute fraud for purposes of nondischargeability. Accordingly, Plaintiffs failed to seek to enforce their alleged "debt" for fraud against Debtor in a timely manner.

adjudication.'" *In re Monas*, 309 B.R. 302, 306-07 (Bankr. N.D. Ohio 2004) (citation omitted) (quoting *In re Sweeney*, 276 B.R. 186, 193 (B.A.P. 6th Cir. 2002)). Thus, "[a] default judgment containing no express findings and based solely on an unanswered complaint does not constitute an express adjudication." *In re Henderson*, 277 B.R. 889, 893 (Bankr. S.D. Ohio 2002).

Id. at *8.

The *Chiaverini* court's reasoning applies to the present case. Here, the Default Judgment was granted solely on Plaintiffs' unanswered Cross-Claim. (Complaint ¶ 15). In addition, the Default Judgment contains no findings of fact. (Ex. G). The mere existence of the State Court Default Judgment does not establish grounds for non-dischargeability under § 523(a)(2)(A).

In short, Plaintiffs have failed to plead any factual basis that could support non-dischargeability under § 523(a)(2)(A). They have provided no examples of specific conduct by Debtor that satisfy the § 523(a)(2)(A) requirements for fraud, nor do they have a previous judgment that supports collateral estoppel.

Finally, Section 523(a)(6) requires injury to "another entity or to the property of another entity." Here, even a liberal construction of Plaintiffs' Cross-Claim fails to establish any personal injury or property damage of another entity. The closest Plaintiffs come is their allegation that Debtor "maliciously and systematically engaged in a pattern of behavior designed to thwart the operation of the Settlement Agreement . . . and to bring as much financial harm to the [Plaintiffs] as he possibly could." (Ex. G ¶ 29). "Financial harm" is not the same as personal injury or property damage. Furthermore, despite Plaintiffs' invocation of

the words "maliciously" and "intentionally," the Cross-Claim alleges no tort, but only breach of contract. As a consequence, Debtor is entitled to judgment as a matter of law on Plaintiffs' § 523(a)(6) claim.

B. Count Two

Plaintiffs acknowledge in Count Two of their Complaint that Debtor owes them no current debt. However, they then ask the Court to issue an Order declaring non-dischargeable any subsequent indebtedness that may arise from their Cross-Claim in the State Court. Plaintiffs' reasoning in making this request is flawed.

The Bankruptcy Code defines a "debt" as "liability on a claim." 11 U.S.C. § 101 (12) (West 2006). A "claim" is defined as "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C. § 101 (5) (West 2006). The Supreme Court has recognized that the foregoing definitions reveal the intent of Congress that the meanings of "debt" and "claim" be coextensive. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990).

Plaintiffs have asserted a cognizable claim against Debtor. All facts pled in the Cross-Claim and relied upon by Plaintiffs to establish Debtor's liability occurred prior to the Petition Date. As a consequence, any claim by Plaintiffs against Debtor based on the facts set forth in the Complaint, which incorporates the Cross-Claim, is a pre-petition claim that is dischargeable in Debtor's bankruptcy case - unless Plaintiffs can establish one of the exceptions to discharge. As set forth above, these Plaintiffs have

not and cannot establish an exception to discharge. This Court has determined dischargeability based on the averments contained in the Complaint (and the incorporated Cross-Claim). Construing all of the allegations therein in the light most favorable to Plaintiffs, this Court finds any debt owed to Plaintiffs by Debtor does not come within the narrow exceptions of § 523(a)(2)(A) or (6). Accordingly, Plaintiffs' claims against Debtor are dischargeable.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: October 09, 2007
04:49:52 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

SAMMY RICHARD BARTH,
Debtor.

CASE NUMBER 06-40804

DIANE BANAR and
EMIL BANAR,

Plaintiffs,

ADVERSARY NUMBER 07-4064

vs.

SAMMY RICHARD BARTH,
Defendant.

THE HONORABLE KAY WOODS

ORDER GRANTING JUDGMENT ON THE PLEADINGS

For the reasons set forth in this Court's Memorandum of Opinion entered this date, the Court has considered Debtor's Motion to Dismiss as a Motion for Judgment on the Pleadings, which Motion is hereby granted. Plaintiffs' Complaint fails to state a claim upon which relief can be granted. Defendant is entitled to judgment based upon the allegations in the Complaint. All debts

and/or claims, as set forth in Plaintiffs' Complaint, are dischargeable.

IT IS SO ORDERED.

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