

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 has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



A blue ink signature of Mary Ann Whipple, written in a cursive style.

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 07-35190
)	
Tina M. Wentland,)	Chapter 7
)	
Debtor.)	Adv. Pro. No. 08-3091
)	
Randall M. Baker,)	Hon. Mary Ann Whipple
)	
Plaintiff,)	
v.)	
)	
Tina M. Wentland,)	
)	
Defendant.)	
)	

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION IN LIMINE

This adversary proceeding is before the court on Defendant's Motion in Limine [Doc. # 27] and Plaintiff's response [Doc. # 32]. Defendant is the debtor in the underlying Chapter 7 no asset case in which there will be no distribution to creditors from the bankruptcy estate. [Case No. 07-35190, Doc. # 19]. This adversary proceeding is scheduled for trial on June 1, 2009, on Plaintiff's Complaint to Determine Dischargeability of a Debt. Plaintiff alleges in his complaint that the debt owed him by Defendant is

nondischargeable under 11 U.S.C. § 523(a)(2), (4), (6) and (13). After discussion among the court and the parties at a pretrial conference on April 2, 2009, and in consideration of efficiency and judicial economy, the court entered a scheduling order stating that it presently intends to try both liability as to a determination of nondischargeability and to liquidate damages as a predicate to a possible money judgment being entered against Defendant in this court if Plaintiff is so entitled beyond his claim under § 523(a)(13). *See Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965-66 (6th Cir. 1993) (finding that the bankruptcy court properly determined both the nondischargeability and the amount of the debt owed by the debtor); *Morrison v. Western Builders of Amarillo, Inc. (In re Morrison)*, 555 F.3d 473 (5th Cir. 2009).

In her instant motion, Defendant seeks an order precluding Plaintiff from introducing any evidence at trial regarding treble damages, punitive damages or any other extraordinary monetary damages, arguing that Plaintiff did not specifically request either punitive or treble damages in his demand for relief. According to Defendant, punitive and treble damages are “special damages” that, under Federal Rule of Civil Procedure 9(g), applicable in this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7009, must be specifically stated. Defendant further argues that it would be unfair to require her to defend against a claim for treble damages since Plaintiff failed to plead any specific statutory or common law entitlement to treble damages.

Plaintiff responds that his complaint sought only a determination of the dischargeability of any debt owed to him by Defendant and not a liquidation of that debt and, therefore, that Defendant should not now be permitted to gain an advantage as a result of the court’s decision to try both dischargeability and damages. Plaintiff’s complaint alleges the underlying facts that form the basis of his claims that Defendant owes him a debt that is nondischargeable under § 523(a)(2)(A), (a)(4) and (a)(6), as well as debt for restitution that is nondischargeable under § 523(a)(13).¹ Plaintiff’s demand for relief seeks only an order declaring such debts non-dischargeable and allowing him to pursue his remedies against Defendant and others in pending Lucas County Court of Common Pleas Case Number CI0200604387, [Doc. # 10], which has been stayed under 11 U.S.C. § 362(a). His demand also requests “attorneys fees, costs and any other

¹ There are no factual or legal issues as to liability or damages on the § 523(a)(13) claim. Responding to an argument asserted by Defendant at an earlier pretrial conference, the court had previously orally indicated to the parties its conclusion that Defendant’s potential liability on claims nondischargeable under § 523(a)(2), (4) or (6) is not limited by the amount of the criminal restitution obligation imposed on Defendant by the federal district court’s judgment against her in criminal proceedings. [Doc. ## 7, 9]; see *Cohen v. De La Cruz*, 523 U.S. 213, 215 (1998)(a debtor’s liability for all damages flowing from fraud, including punitive damages as well as compensatory damages, is nondischargeable). The claims are different.

relief deemed appropriate by this Court.” [Doc. #1, p.5]. It does not expressly seek any determination of damages or a money judgment. By contrast, the complaint filed by Plaintiff in the above referenced state court case does include a demand for “treble damages as mandated by code.” [Doc. #10].

Rule 9(g) provides that “[i]f an item of special damage is claimed, it must be specifically stated.” Fed. R. Civ. P. 9(g); *cf.* Fed. R. Bankr. P. 7054; Fed. R. Civ. P. 54(c). The rule does not define “special damages,” however, the Sixth Circuit has explained it as follows: “The distinction between general and special damages is not that one is and the other is not the direct and proximate consequence of the breach complained of, but that general damages are such as naturally and ordinarily follow the breach, whereas special damages are those that ensue, not necessarily or ordinarily, but because of special circumstances.” *Ruggles v. Buffalo Foundry & Machine Co.*, 27 F.2d 234, 235 (6th Cir. 1928); *see Figgins v. Advance Am. Cash Advance Centers of Mich., Inc.*, 482 F.Supp. 2d. 861, 869 (E.D. Mich. 2007) (stating that “special damages are those that are unusual for a type of claim”). While the Sixth Circuit has not specifically addressed the issue of whether punitive and treble damages constitute “special damages” as contemplated in Rule 9(g), some courts have considered the issue, at least as to punitive damages. *See Gillen v. Kuykendall*, 470 F.2d 745, 748 (5th Cir. 1972) (finding that it is not necessary to claim punitive damages by specific denomination if the complaint alleges an adequate factual basis for such damages); *Scutieri v. Paige*, 808 F.2d 785, 792 (11th Cir. 1987) (same); *Figgins*, 482 F.Supp. 2d at 235 (“Punitive damages are not special damages”). *But see Kingston Square Tenants Ass’n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566, 1579 (S.D. Fla. 1992) (stating that “special damages, such as punitive damages, are to be specifically pleaded”). At least one court found that “even if punitive damages are ‘special’ within the meaning of [Rule 9(g)], the object of the rule is to guard against unfair surprise. . . .” *Bowles v. Osmose Utilities Servs.*, 443 F.3d 671, 675 (8th Cir. 2006). Thus, where pretrial disclosures put the defendant on notice of the plaintiff’s intent to seek punitive damages three weeks before trial, and requested information sought during discovery made sense only if the plaintiff intended to seek punitive damages, the object of Rule 9(g) was fully satisfied. *Id.*

In light of the foregoing, after review of the complaint in this proceeding, the court has reconsidered its previously stated intention to determine issues relating to both nondischargeability and the quantification of damages as a predicate to a possible money judgment. Plaintiff’s complaint in this proceeding is based upon the same conduct and the resulting debt allegedly owed to him by Defendant that is alleged in the pending state court action, in which there are also other defendants. Although Plaintiff’s complaint in this

proceeding does not specifically request punitive and treble damages and, at least arguably, does not allege a factual basis for punitive damages, in his complaint in the pending state court case, Plaintiff included a specific demand for treble damages and included an allegation that Defendant's "act of conversion demonstrated actual malice against Plaintiff," [Doc. # 10, Complaint, ¶ 19], which is a factual predicate for an award of punitive damages under Ohio law. *See Preston v. Murty*, 32 Ohio St. 3d 334, syllabus (1987). The parties had engaged in discovery in the state court action and that case was ready to go to trial against Defendant and others when Defendant filed her bankruptcy petition. While the court questions whether either punitive or treble damages are "special damages" that must be specifically stated, to the extent that they are, the court cannot determine whether Defendant had sufficient notice of such damages such that the object of the rule is satisfied. *See id.*

Having reviewed the proceedings in this case, and given Plaintiff's position throughout these proceedings that the purpose of his complaint was only to obtain a nondischargeability determination as to the debt allegedly owed him by Defendant, the court does not believe that any pleading deficiency in this case with respect to damages should impair Plaintiff's ultimate ability to obtain a judgment for any damages to which he might be entitled. The court will, therefore, amend the scheduling order entered on April 6, 2009, to provide that the trial scheduled in this proceeding will not address damages but will address only the liability of Defendant and the dischargeability of any debt owed by her to Plaintiff. And since there are other defendants in the state court action, issues relating to damages and apportionment thereof would appropriately and more consistently be determined in the pending state court action if Plaintiff prevails on his nondischargeability claims under § 523(a)(2), (4) or (6). *See* 1 Rosemary E. Williams, *Bankruptcy Practice Handbook* § 6.15 (2nd ed. 2005). While the Sixth Circuit found in *McLaren* that the bankruptcy court has authority to determine both liability and damages in determining the dischargeability of debt, the court does not read *McLaren* as requiring it to do so. *See McLaren*, 3 F.3d at 965-66; *Shaw v. Santos (In re Santos)*, 304 B.R. 639, 646-50 (Bankr. D.N.J. 2004)(court exercises discretion not to liquidate damages and enter possible money judgment in § 523(a)(2) fraud claims involving alleged physical injury); *Lindsay Mfg. Co. v. Morris (In re Morris)*, Case No. 05-11888, Adv. No. 05-5535, 2005 Bankr. LEXIS 1758, *6-*7, n.7 (Bankr. D. Kan. Sept. 14, 2005)(court is not required to exercise jurisdiction to award monetary damages); *In re Toms*, 229 B.R. 646, 659-60 (Bankr. E.D. Pa. 1999)(court notes that it has discretion to fix the amount of a claim, and would exercise its discretion to do so); *Park v. Chan (In re Chan)*, Case No. 06-13521, Adv. No. 06-00623, 2008 Bankr. LEXIS 3563, *3, n.5, *83-*89, 2008 WL 5428271, *2, n.5, *21-

*22 (Bankr. E.D. Pa. Dec. 30, 2008)(court assumes without deciding that it has jurisdiction to enter money judgment but exercises discretion not to do so); *cf. Stevens v. Antonious (In re Antonious)*, 358 B.R. 172, 176 (Bankr. E.D. Pa. 2006)(bankruptcy court adopts parties' agreement that it should not determine amount of debt and "to the extent the obligation is nondischargeable, the defendants' liability will be fixed by state court in litigation now pending in that forum"). *But see, e.g., Cambio v. Mattera (In re Cambio)*, 353 B.R. 30 (B.A.P. 1st Cir. 2004)(bankruptcy court erred in entering money judgment on § 523(a)(2), (4) and (6) claims because it does not have jurisdiction to do so).

In light of Plaintiff's complaint and his consistently stated position that he seeks only a dischargeability determination, as well as the trial readiness of the state court action in which other defendants are involved, and Defendant's previously asserted and sustained objection to any further discovery herein, the court will limit trial to a determination of dischargeability. Having determined that the court will not liquidate in this proceeding any debt that is found to be owed by Defendant and nondischargeable, and for the foregoing reasons, good cause appearing,

IT IS ORDERED that Defendant's Motion in Limine [Doc. # 27] be, and hereby is, **DENIED as moot.**