

IT IS SO ORDERED.



Dated: June 08, 2009  
09:44:57 AM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

BRUCE GILPIN and  
SHEREE GILPIN,

Debtors.

\* \* \* \* \*

MCS ACQUISITION CORP.,

Plaintiff,

v.

BRUCE GILPIN and  
SHEREE GILPIN,

Defendants.

CASE NUMBER 07-40471

ADVERSARY NUMBER 07-4076

HONORABLE KAY WOODS

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MEMORANDUM OPINION REGARDING MOTION FOR SUMMARY JUDGMENT

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This cause is before the Court on Motion of MCS Acquisition Corp., d/b/a Mobile Container Service, for Summary Judgment ("Motion

for Summary Judgment") (Doc. # 46) filed by Plaintiff MCS Acquisition Corp. ("MCS") on February 10, 2009. On March 5, 2009, Debtors Bruce Gilpin and Sheree Gilpin ("Debtors") filed Defendants [sic] Request for Extension of Time to Respond to Plaintiff's Motion for Summary Judgment ("Request for Extension") (Doc. # 47). The Court entered a marginal order, which granted the Request for Extension until March 16, 2009 (Doc. # 48); however, Debtors failed to file any response to the Motion for Summary Judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). 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). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

#### **I. FACTUAL AND PROCEDURAL BACKGROUND**

Debtors filed a voluntary chapter 7 petition (Case No. 07-40471) on March 7, 2007 ("Petition Date"). MCS initiated the instant adversary proceeding on June 15, 2007, by filing Complaint (Doc. # 1). Debtors filed Answer (Doc. # 5) on July 15, 2007.

Prior to the Petition Date, MCS was a plaintiff and Debtor Bruce Gilpin ("Gilpin") was a defendant in two civil actions in the Lehigh County Court of Common Pleas, Pennsylvania ("State Court"), Civil Action No. 2003-E-61 and Civil Action No. 2004-C-2474 ("State

Court Cases"). (Mot. Summ. J. at 6.) The State Court Cases were consolidated for discovery and trial. (*Id.*)

At the conclusion of a non-jury trial, Judge Thomas A. Wallitisch entered Verdict in the State Court Cases, which contains detailed Findings of Fact and Conclusions of Law. (See Compl. Ex. B.) Gilpin admits that the State Court adopted the Findings of Fact and Conclusions of Law attached to the Complaint as Exhibit B. (Answer ¶ 15.)

The following facts were found and entered as Findings of Fact in the State Court Cases.

Gilpin was a key employee of Mobile Container Service, Inc. ("Old MCS"). Old MCS was in the business of repairing, refurbishing, and maintaining waste refuse containers for customers. Old MCS operated principally in Pennsylvania, New Jersey, and Delaware, but it also had customers in Maryland and New York.

The owner of Old MCS, Michael Sisselberger ("Sisselberger"), sold Old MCS to MCS, which was formed by Brian and Ken Sullivan. As a part of the purchase agreement with Old MCS, MCS required Sisselberger and employees of Old MCS, including Gilpin, to enter into non-competition agreements with MCS. On March 25, 2002, MCS closed on the purchase agreement with Old MCS and Gilpin's non-competition agreement with MCS became effective.

In part, Gilpin's non-competition agreement prohibited Gilpin from (i) becoming involved in any way with any person engaging in the repair, refurbishing or maintenance of waste refuse containers

in a proscribed geographic region, (ii) attempting to induce any employees or customers of MCS to cease doing business with MCS, and (iii) soliciting business away from MCS. Gilpin's non-competition agreement also provided that, in the event of a breach, Gilpin would be liable for MCS's attorneys' fees if MCS prevailed in an action against Gilpin.

In early 2003, Sisselberger took steps to open a container refurbishing/repair business. Sisselberger discussed the new company with Gilpin, and together they formed Professional Container Service, Inc. ("PCSI"). After its formation, PCSI engaged in the same business as MCS, *i.e.*, repairing, refurbishing and maintaining waste refuse containers. PCSI's business came from within the area proscribed by the non-competition agreements. PCSI's largest customer was a Waste Management Services facility, which had formerly been a customer of MCS.

PCSI stopped doing business in late summer 2004, but the business continued under the name Gilpin Welding and Repair. Gilpin Welding and Repair was described as "using the same employees and equipment, and servicing the same customers, particularly Waste Management, Pen Argyl." (Compl. Ex. B Findings of Fact ¶ 76.) Gilpin Welding and Repair engaged in the same welding and repair business as MCS.

The State Court determined in the Findings of Fact that PCSI was started, and the business was continued through Gilpin Welding and Repair, "for the purpose of undermining MCS' [sic] relationships

with its employees and customers." (*Id.* ¶ 81.)

Accordingly, the State Court found in its Conclusions of Law that Gilpin violated his non-competition agreement with MCS by (i) becoming involved with PCSI and (ii) becoming involved with and owning Gilpin Welding and Repair. Gilpin and the other defendants were held jointly and severally liable for breaching their non-competition agreements, and MCS was awarded compensatory damages and prejudgment interest. Further, because of contractual attorney fee provisions in the non-competition agreements, MCS was awarded attorneys' fees and costs. The State Court additionally found that Gilpin and other defendants "acted willfully, and with malicious motive and intent, in conspiring to secretly form PCSI, to compete directly against [MCS]." (*Id.* Conclusions of Law ¶ 19.) Therefore, Gilpin and the other defendants were "liable to [MCS] for having engaged in a civil conspiracy to engage in unlawful and inappropriate conduct." (*Id.* ¶ 20.) The State Court also awarded MCS punitive damages in the amount of \$10,000.00 against Gilpin, finding Gilpin's conduct "constitutes sufficiently malicious and purposeful behavior designed to harm [MCS], so as to justify an award of punitive damages in favor of [MCS] and against [Gilpin]." (*Id.* ¶ 24.)

Along with the Findings of Fact and the Conclusions of Law, the State Court entered the Verdict, which provides in part:

AND NOW, this 21st day of February, 2006, following a non-jury trial in this matter, submission by the parties of Proposed Findings of Fact, Conclusions of Law and Legal Memoranda, and after oral argument:

IT IS ORDERED that Defendants [including Gilpin] . . . are hereby declared to have violated their Non-Competition Agreements with [MCS], by engaging in competing waste-container repair businesses between June, 2003, and January, 2004 [sic], the first being [PCSI] the second being Gilpin Welding and Repair;

. . . .

IT IS FURTHER ORDERED that [MCS] is hereby awarded the sum of \$232,166.22, against Defendants [including Gilpin] . . . as compensatory damages for the operation of PCSI (\$190,896.00) and Gilpin Welding and Repair (\$41,270.22);

IT IS FURTHER ORDERED that Defendants [including Gilpin] . . . are jointly and severally liable for having engaged in a civil conspiracy to violate the Gilpins' and Sisselberger's Non-Competition Agreements, and to unfairly and improperly compete against [MCS]; the amount awarded on this claim is \$232,166.22, which represents the same damages awarded against [Gilpin] . . . for breaching their Non-Competition Agreements;

IT IS FURTHER ORDERED that [MCS] is hereby declared entitled to, and hereby is awarded prejudgment interest . . . of \$20,867.00 on the lost gross margin relating to PCSI, and \$2,118.22 on the lost gross margin relating to Gilpin Welding and Repair through February 6, 2006;

IT IS FURTHER ORDERED that [MCS]'s total compensatory damages and related prejudgment interest (totaling \$255,151.44) are declared to be offset against the previously deducted interest and principal payments on Purchase Note #1 (now held by Brian Sullivan), the Sullivan Note (Made by Brian Sullivan to Old MCS to purchase Purchase Note #1), and Purchase Note No. 2 (totaling \$132,350.00), and against the presently outstanding principal balance on those Notes (totaling \$62,500.00), so those Notes are declared to have zero outstanding balances, with the remaining portion of [MCS]'s lost-gross-margin compensatory damages, after this setoff - for which [MCS] is entitled to an entry of judgment against Defendants [including Gilpin] . . . - totaling \$60,301.44;

IT IS FURTHER ORDERED that [MCS] is hereby awarded \$115,563.58 against Defendants [including Gilpin] . . . for recoverable attorneys' fees, costs and expenses (which includes \$3,868.82 of interest on the line of

credit obtained to secure the collateral posted to secure the Injunction Order). [sic]

. . . .

IT IS FURTHER ORDERED that the period of each of the restrictive covenants contained in [Gilpin]'s . . . Non-Competition Agreements with [MCS] is hereby ordered extended, beyond what would have been the expiration of each of those two-year covenants (had each of them not engaged in activities violating the covenants), so that the new expiration date of the covenant is May 6, 2007 (the last billing from Gilpin Welding and Repair to Carbon Service Corp was May 6, 2005);

. . . .

IT IS FURTHER ORDERED that, based on this Court's finding of intentional and malicious conduct engaged in in connection with [MCS]'s claim for tortious interference with existing contractual relationships, and civil conspiracy, an award of punitive damages is hereby entered in favor of [MCS] and against [Gilpin] in the amount of \$10,000.00 for formation of, participation in and concealment of the activities of [PCSI] and Gilpin Welding and Repair;

(Compl. Ex. B.)

Thus, under the terms of the Verdict, (i) Gilpin was found liable to MCS for various monetary judgments and (ii) the period of the non-competition restrictive covenant was extended.

The monetary judgments against Gilpin are as follows: (i) \$60,301.44, which represents Gilpin's liability, in the alternative, for breach of the non-competition agreement or civil conspiracy; (ii) \$115,563.58, which represents Gilpin's liability for MCS's attorneys' fees; and (iii) \$10,000, which represents the punitive damages the State Court levied against Gilpin. The total amount Gilpin owes MCS under the terms of the Verdict is \$185,865.02 ("Monetary Judgment"). The Verdict also extended the period of the

non-competition restrictive covenant until May 6, 2007 ("Non-Competition Judgment" collectively with the Monetary Judgment, the "State Court Judgment").

Gilpin did not file an appeal or any other motion for post-trial relief. As a result, the State Court Judgment is final. (Mot. Summ. J. at 10; Answer ¶ 19.)

Shortly after the Petition Date, on April 13, 2007, MCS filed Motion of MCS Acquisiton Corp., d/b/a Mobile Container Service, for Relief From Stay ("Relief From Stay") (Main Case Doc. # 13). MCS requested relief from stay to pursue extension of the Non-Competition Judgment in the State Court. Gilpin filed Debtor's Opposition to Motion for Relief From Automatic Stay Filed By MCS Acquisition Corp d/b/a Mobile Container Service (Main Case Doc. # 24). This Court held a hearing on the Motion for Relief on May 17, 2007. On May 21, 2007, this Court entered Order Denying Motion for Relief From Automatic Stay Filed By MCS Acquisition Corp d/b/a Mobile Container Service ("MFR Order") (Doc. # 30). MCS appealed the MFR Order by Notice of Appeal on May 31, 2007.

On July 17, 2008, the Sixth Circuit Bankruptcy Appellate Panel ("BAP") entered an order reversing this Court's MFR Order. The BAP held that (i) "MCS's right to enforce its noncompetition agreement by equitable relief does not constitute a claim under 11 U.S.C. § 101(5)(B)," and (ii) the State Court's determination that the non-competition agreement was reasonable was entitled to full faith and credit, so this Court was collaterally estopped from entering a

ruling to the contrary. See *MCS Acquisition Corp. v. Gilpin (In re Gilpin)*, Case No. 07-8031, 9-11 (B.A.P. 6th Cir. 2008).

While the MFR Order was on appeal, MCS filed the instant adversary proceeding objecting to the discharge of the State Court Judgment. In its Motion for Summary Judgment, MCS requests two determinations:<sup>1</sup> (i) that the total amount of the Monetary Judgment is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6) because the Monetary Judgment was based on willful and malicious injuries, and (ii) that the Non-Competition Judgment is non-dischargeable. As set forth above, Gilpin failed to respond to the Motion for Summary Judgment.

For the reasons set forth below, Summary Judgment will be granted in favor of MCS.

## **II. STANDARD FOR REVIEW**

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part:

The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

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<sup>1</sup> On September 15, 2008, this Court entered Order (i) Dismissing Sheree Gilpin and (ii) Setting Final Pre-Trial ("Dismissal Order") (Doc. # 25), which resulted in the dismissal of Debtor Sheree Gilpin as a defendant in this Adversary Proceeding. Two of the Counts in this case - Counts II and III - were either solely against Sheree Gilpin or required the presence of Sheree Gilpin to proceed. As a consequence, the Dismissal Order disposed of Counts II and III of the Complaint, leaving only Counts I and IV to be addressed in this Motion for Summary Judgment.

FED. R. CIV. P. 56(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248 (1986).

In a motion for summary judgment, the movant bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323; *Abdulnour v. Campbell Soup Supply Co., LLC*, 502 F.3d 496, 501 (6th Cir. 2007). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed

fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the 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. *Street*, 886 F.2d at 1479.

### **III. ANALYSIS**

MCS contends that there are no genuine issues of material fact because the material facts have been previously litigated by the parties and decided by the State Court. Specifically, MCS asserts that, based upon the State Court's Findings of Fact and Conclusions of Law, the State Court Judgment was based on willful and malicious conduct. MCS argues that, therefore, this Court is constrained by the principles of *res judicata* and collateral estoppel to find the State Court Judgment to be non-dischargeable.

#### **A. Nondischargeability of the Non-Competition Judgment**

The Non-Competition Judgment is neither dischargeable or non-dischargeable because it is not a claim. Except for certain debts specifically listed in the Bankruptcy Code, a chapter 7 discharge discharges a debtor from all debts that arose before bankruptcy. See 11 U.S.C. § 727(b) (LexisNexis 2009). A "debt" is a "liability on a claim." 11 U.S.C. § 101(12) (LexisNexis 2009). "The right to equitable relief constitutes a claim only if it is an alternative to a right to payment or if compliance with the equitable order will

itself require the payment of money." *Kennedy v. Medicap Pharm., Inc. (In re Kennedy)*, 267 F.3d 493, 497 (6th Cir. 2001).

The BAP held that "MCS's right to enforce its noncompetition agreement by equitable relief does not constitute a claim under 11 U.S.C. § 101(5)(B)." As a result, the issue of dischargeability does not apply to the Non-Competition Judgment because it is not a claim.

#### **B. Non-Dischargability of the Monetary Judgment**

The Bankruptcy Code provides that a chapter 7 discharge 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) (LexisNexis 2009). Thus, for a debt to be non-dischargeable, the injury must be both willful and malicious. See *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999); and conjunctive nature of 11 U.S.C. § 523(a)(6) (LexisNexis 2009).

A willful injury is one that is done voluntarily, intentionally, or deliberately. *Markowitz*, 190 F.3d at 464. "As such, only acts done with the intent to cause injury -- and not merely acts done intentionally -- can cause willful and malicious injury." *Id.* The Sixth Circuit Court of Appeals has specifically 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 § 523(a)(6)." *Id.* (internal citations omitted).

A malicious injury is one that is done "in conscious disregard of one's duties or without just cause or excuse . . . ." *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986).

MCS argues that: (i) the State Court determined that the Monetary Judgment is based on a willful and malicious injury; and (ii) this Court is bound by the State Court determinations - under the doctrines of *res judicata* or collateral estoppel - to find that the Monetary Judgment is non-dischargeable as a willful and malicious injury under 11 U.S.C. § 523(a)(6).

### **1. Res Judicata**

Under the Sixth Circuit's articulation of *res judicata*, a claim will be barred by prior litigation if there is "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir. 1997) (emphasis removed). Thus, only claims that were determined (or that should have been litigated) in the previous action are barred from being relitigated in this adversary proceeding.

MCS argues that *res judicata* applies so that "the issues conclusively decided by the [State Court], specifically with respect

to [Gilpin], cannot be relitigated." (Mot. Summ. J. 12.) The claims litigated in the State Court were (i) breach of Gilpin's non-competition agreement, (ii) civil conspiracy, and (iii) tortious interference with contract. The State Court rendered the Monetary Judgment (compensatory and punitive damages) against Gilpin based on liability for these causes of action. Thus, the amount of the Monetary Judgment and the basis for the Monetary Judgment are governed by *res judicata* and cannot be relitigated. However, the dischargability of the Monetary Judgment was not litigated in the State Court and is not covered by *res judicata*.

## **2. Collateral Estoppel**

"The doctrine of collateral estoppel '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*, 190 F.3d at 461 (quoting *Sanders Confectionary Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). Collateral estoppel applies when "(1) the law of collateral estoppel in the state in which the issue was litigated would preclude relitigation of such issue, and (2) the issue was fully and fairly litigated in state court." *Markowitz*, 190 F.3d at 461.

Under Pennsylvania law:

The doctrine of collateral estoppel precludes relitigation of an issue determined in a previous action if: (1) the issue decided in the prior case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with

a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

*Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 50-51 (Pa. 2005).

Applying these factors to MCS's claim that the Monetary Judgment is based on willful and malicious injuries, the Court finds: (i) the issue of willful and malicious injury was addressed by the State Court; (ii) the Monetary Judgment was a final adjudication on the merits; (iii) Gilpin was a party in the State Court Case; (iv) Gilpin had a full and fair opportunity to litigate the issue in the State Court Cases; and (v) determination of whether the injury was willful and malicious was essential to the State Court Judgment. Thus, under Pennsylvania law, collateral estoppel precludes relitigating whether the Monetary Judgment was the result of willful and malicious conduct. As a consequence, this Court is collaterally estopped from revisiting the State Court's determinations in its Verdict, Findings of Fact, and Conclusions of Law that the Monetary Judgment was the result of Gilpin's willful and malicious conduct.

The Monetary Judgment was based on the State Court's finding that Gilpin was liable to MCS for (i) civil conspiracy, (ii) tortious interference with contract, and (iii) breach of his non-competition agreement with MCS. The Monetary Judgment is comprised of compensatory damages, including attorneys' fees, and punitive

damages.

Although the State Court awarded compensatory damages under different theories of liability, there is only one set of damages. The same damages resulted from Gilpin's (i) civil conspiracy, (ii) tortious interference with contract, and (iii) breach of his non-competition agreement with MCS. (See Compl. Ex. B Findings of Fact ¶¶ 75, 82, and 86.) As a result, even though the State Court found Gilpin liable for damages under three separate causes of action, there is only one set of damages. Because the Monetary Judgment was awarded for each cause of action, the non-dischargability of any one cause of action makes the Monetary Judgment non-dischargeable under § 523(a)(6). Nevertheless, the Court will address each cause of action below.

**a. Civil conspiracy, tortious interference with existing contractual relationships, and punitive damages**

The State Court's Conclusions of Law specifically found in relation to the civil conspiracy claim:

19. Sisselberger, the Gilpins and Khal acted willfully, and with malicious motive and intent, in conspiring to secretly form PCSI, to compete directly against [MCS], and in concealing Sisselberger's involvement in PCSI.

20. [Gilpin is] therefore liable to [MCS] for having engaged in a civil conspiracy to engage in unlawful and inappropriate conduct.

(Compl. Ex. B. Conclusions of Law ¶¶ 19 - 20.) Thus, because the State Court entered judgment on the count of civil conspiracy, based upon a finding that the injury to MCS was willful and malicious, the

Monetary Judgment is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6).

The State Court also found Gilpin liable for punitive damages in connection with Gilpin's tortious interference with existing contractual relationships and civil conspiracy. The State Court specifically found in the Conclusions of Law:

24. The Gilpins' conduct, in joining with Sisselberger to violate each one's Non-Competition Agreement in purposely setting up PCSI to compete against [MCS], and in joining with Sisselberger to conceal his involvement in PCSI (by collaborating with Khal and to function as Sisselberger's straw party), constitutes sufficiently malicious and purposeful behavior designed to harm Plaintiffs, so as to justify an award of punitive damages in favor of [MCS] and against Bruce Gilpin.

25. Because of the willful and malicious conduct of Sisselberger and Bruce Gilpin, [MCS] is entitled to an entry of . . . an award of punitive damages against Bruce Gilpin for \$10,000.00.

(*Id.* ¶¶ 24 - 25.) The State Court further explained the punitive damages award in the Verdict:

IT IS FURTHER ORDERED that, based on this Court's finding of intentional and malicious conduct engaged in in connection with [MCS]'s claim for tortious interference with existing contractual relationships, and civil conspiracy, an award of punitive damages is hereby entered in favor of [MCS] and against [Gilpin] in the amount of \$10,000.00 for formation of, participation in and concealment of the activities of [PCSI] and Gilpin Welding and Repair;

(*Id.* Verdict at 5.) Thus, the State Court found that the punitive damages portion of the Monetary Judgment is based on the willful and malicious injuries inflicted with regard to (i) tortious interference with existing contractual relationships and (ii) civil conspiracy. As a result, the punitive damages award portion of the

Monetary Judgment is not dischargeable under § 523(a)(6).

**b. Breach of the non-competition agreement**

Although, the State Court's determination that Gilpin's breach of the non-competition agreement was a willful and malicious injury is less straight-forward than its determination relating to civil conspiracy and tortious interference with contract, the State Court nonetheless made such determination.

Damages arising from breach of contract are non-dischargeable under § 523(a)(6) when the debtor intended to cause the plaintiff harm through the breach of contract. See *Spring Works, Inc. v. Sarff (In re Sarff)*, 242 B.R. 620, 626 (B.A.P. 6th Cir. 2000). The plaintiff must, however, show more than just a knowing breach of contract; plaintiff must also prove that debtor intended to cause him harm by breaching the contract. *Id.* See also *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998) (stating that "nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury" and a "knowing breach of contract" alone should not give rise to nondischargeability). A debtor intends to cause an injury when he "desires to cause the consequences of his act, or . . . believes that the consequences are substantially certain from it." *Markowitz*, 190 F.3d at 463.

The State Court found that, when Gilpin breached his non-competition agreement, he desired to cause injury to MCS. In the Findings of Fact, the State Court addressed Gilpin's intent when he breached his non-competition agreement, as follows:

(i) Gilpin "had planned to take the Waste Management, Pen Argyl business away from [MCS], to provide PCSI with that container-repair business, which averaged revenues of approximately \$20,000.00 per month." (Compl. Ex. B Findings of Fact ¶ 60.)

(ii) Gilpin "caused PCSI to engage in trash-container repair, refurbishing and rehabbing business work within the tri-state region (. . . which was [MCS] franchise territory) . . . as well as other areas encompassed by the . . . Non-Competition Agreements." (*Id.* ¶ 63.)

(iii) Gilpin "started PCSI, and continued its activities through Gilpin Welding and Repair, for the purpose of undermining [MCS's] relationships with its employees and customers." (*Id.* ¶ 81.)

Through these findings, the State Court factually determined that when Giplin breached his non-competition agreement with MCS he either (i) desired to cause MCS injury or (ii) was substantially certain that his actions would result in injury to MCS. Specifically, the State Court's determination that Gilpin's purpose in operating the competing businesses was to harm MCS's relationship with its customers and employees establishes that Gilpin intended to injure MCS when he breached his non-competition agreement. As a result, Gilpin willfully caused injury to MCS by breaching his non-competition agreement.

In *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298 (B.A.P. 6th Cir. 2004), the BAP had to determine whether a pre-petition patent infringement judgment was non-dischargeable under § 523(a)(6) as a willful and malicious injury. The BAP reasoned that the injury was willful because, even though there was no evidence that the debtor desired to cause an injury, the debtor had to be substantially certain that the patent infringement would

result in economic damage. *Id.* at 307. This is, in part, because it was a zero-sum situation - the debtor only gained if the creditor lost. *Id.* The BAP analogized the patent infringement case to a bank robbery, where, although the bank robber's chief motive is to enrich himself, he is also substantially certain that his actions will cause injury to the bank. *See id.*

Thus, even assuming, *arguendo*, that Gilpin did not subjectively intend to cause MCS injury by breaching the non-competition agreement, Gilpin must have been substantially certain that his actions would injure MCS. When Gilpin planned to take one of MCS's largest customers for his competing company, he had to be substantially certain that such action would result in injury to MCS. When Gilpin operated a competing business in the area proscribed by his non-competition agreement, he had to be substantially certain that his actions would result in injury to MCS. Therefore, Gilpin willfully caused injury to MCS through the breach of his non-competition agreement.

The State Court also found that the injury was malicious. A malicious injury is one that is done "in conscious disregard of one's duties or without just cause or excuse . . . ." *Wheeler*, 783 F.2d at 615. The State Court concluded that, although Gilpin knew he was bound by the terms of his non-competition agreement, he violated such agreement without just cause or excuse.

As a result, the damages awarded to MCS because of Gilpin's violation of the non-competition agreement are non-dischargeable

under § 523(a)(6) as a willful and malicious injury.

**c. Attorneys' fees**

The Monetary Judgment described in the Verdict includes an award of attorneys' fees in the amount of \$115,563.58. (Compl. Ex. B. Verdict.) The basis for the award of attorneys' fees was explained in the Conclusions of Law:

14. Based on the contractual attorneys' fee provisions in . . . [Gilpin's] Non-Competition Agreement[], Plaintiffs are entitled to recover their reasonable attorneys' fees, costs and expenses incurred in pursuing their claims against . . . [Gilpin], for violations of these Non-Competition Agreements; . . . Plaintiffs are hereby awarded the sum of \$111,694.76 for fees and costs . . . and, as against Michael Sisselberger only, based on the language in Section 11.2(b) of the Asset Purchase Agreement, and \$3,868.82 of interest costs on the line of credit taken out to obtain the Injunction Bond posted by [MCS] in January, 2005.

(Compl. Ex. B. Conclusions of Law ¶ 14 (emphasis in original).)

As a result, Gilpin is liable for the attorneys' fee award of \$111,694.76.

"Ancillary obligations such as attorneys' fees and interest may attach to the primary debt; consequently, their status depends on that of the primary debt." *In re Hunter*, 771 F.2d 1126, 1131 (8th Cir. 1985); see also *In re Foster*, 38 Bankr. 639, 642 ([Bankr.] M.D. Tenn. 1984) ("When a debt evidenced by a note or other contract allowing attorneys' fees and other costs of collection is determined nondischargeable, the attendant attorneys' fees and costs are similarly nondischargeable.").

*Klingman v. Levinson*, 831 F.2d 1292, 1296-97 (7th Cir. Ill. 1987).

The attorneys' fee award was based on a contractual provision in Gilpin's non-competition agreement. Because Gilpin's breach of his non-competition agreement was willful and malicious, the attorneys' fee award is also non-dischargeable under § 523(a)(6).

The award of \$3,868.82 in interest costs ("Injunction Bond Interest"), however, is not part of the contractual attorneys' fees damages and does not constitute damages relating to the willful and malicious injury. Rather, the Injunction Bond Interest relates to the posting of an Injunction Bond. As a result, the Injunction Bond Interest does not come within the exception to discharge under § 523(a)(6).

#### IV. CONCLUSION

MCS's Motion for Summary Judgment is well taken. Gilpin's debt to MCS pursuant to the State Court Monetary Judgment is non-dischargeable. Based upon *res judicata* and collateral estoppel, this Court adopts the State Court's Verdict, Findings of Fact, and Conclusions of Law. The Monetary Judgment is non-dischargeable under § 523(a)(6) because it is based on willful and malicious injury to MCS.

As determined by the BAP, the Non-Competition Judgment is not a claim under the Bankruptcy Code and, as a result, cannot be discharged.

As pled in the Complaint (Compl. ¶ 24) and admitted by Gilpin in the Answer (Answer ¶ 24), the outstanding balance of the Monetary Judgment on the Petition Date was \$195,289.98. In the Motion for Summary Judgment, MCS calculated the remaining balance under the Monetary Judgment, as follows:

	\$195,289.98	Amount owed as of the Petition Date
+	\$ 21,027.11	Interest at 6%, which is the legal rate in Pennsylvania, through December 22, 2008
-	\$ 71,053.40	Amount received from the release of an appeal bond on December 22, 2008
+	<u>\$ 1,170.07</u>	Interest at 6% from December 22, 2008 through February 9, 2009
	\$146,433.76	Total Amount of the Monetary Judgment

However, because this Court determined that the Injunction Bond Interest in the amount of \$3,868.82 does not fall within the § 523(a)(6) exception to discharge, MCS's calculation must be reduced accordingly. The Monetary Judgment in the amount of \$142,564.94 is non-dischargeable.

For the reasons stated above, the Motion for Summary Judgment is granted. An appropriate order will follow.

# # #

IT IS SO ORDERED.



Dated: June 08, 2009  
09:44:57 AM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

BRUCE GILPIN and  
SHEREE GILPIN,

Debtors.

\* \* \* \* \*

MCS ACQUISITION CORP.,

Plaintiff,

v.

BRUCE GILPIN and  
SHEREE GILPIN,

Defendants.

CASE NUMBER 07-40471

ADVERSARY NUMBER 07-4076

HONORABLE KAY WOODS

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ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

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This cause is before the Court on Motion of MCS Acquisition Corp., d/b/a Mobile Container Service, for Summary Judgment ("Motion

for Summary Judgment") (Doc. # 46) filed by Plaintiff MCS Acquisition Corp. ("MCS") on February 10, 2009. On March 5, 2009, Debtors Bruce Gilpin and Sheree Gilpin<sup>1</sup> ("Debtors") filed Defendants [sic] Request for Extension of Time to Respond to Plaintiff's Motion for Summary Judgment ("Request for Extension") (Doc. # 47). The Court entered a marginal order, which granted the Request for Extension (Doc. # 48); however, Debtors failed to file any response to the Motion for Summary Judgment.

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby grants the Motion for Summary Judgment. MCS's claim against Debtor Bruce Gilpin in the amount of \$142,564.94 is non-dischargeable under 11 U.S.C. § 523(a)(6) as a willful and malicious injury.

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<sup>1</sup> On September 15, 2008, Sheree Gilpin was dismissed from this Adversary Proceeding pursuant to Order (i) Dismissing Sheree Gilpin and (ii) Setting Final Pre-Trial (Doc. # 25).