

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 10-16057
)
JOHN A. SIVINSKI,)
) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
_____)
)
LYNN ARKO KELLEY, Individually and in) Adversary Proceeding No. 10-1263
her capacity as Executrix of the Estate of)
Michael V. Kelley,)
)
Plaintiff,)
)
)
v.)
)
JOHN A. SIVINSKI,) **MEMORANDUM OF OPINION**¹
)
)
Defendant.)

Plaintiff Lynn Arko Kelley holds a state court judgment against defendant-debtor John Sivinski, which judgment is based on claims of abuse of process and spoliation of evidence. She filed this adversary proceeding seeking, among other things, a determination that the judgment is not dischargeable under Bankruptcy Code § 523(a)(6); she now moves for partial summary judgment to that effect based on the preclusive effect of the state court judgment.² The debtor did not file anything in opposition to the motion.³

¹ This opinion is not intended for publication.

² Docket 29, 30, and 33.

³ The debtor's response was due by April 18, 2011. (Docket 25).

I. JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. FACTS

These are the relevant undisputed facts based on the evidence offered by the plaintiff in support of her motion, the debtor's answer to the complaint, and the parties' joint pretrial statement:⁴

In 1997, the debtor entered into a salaried partner agreement with the newly-formed law firm of Kelley & Ferraro L.L.P., through Ms. Kelley's late husband and Kelley & Ferraro partner, Michael Kelley. Following Michael Kelley's death in 2006, the debtor filed a state court lawsuit against Ms. Kelley, James Ferraro, and Kelley & Ferraro, asking for a declaratory judgment and an accounting of the affairs of the law firm, and also raising claims for breach of contract, unjust enrichment, and breach of fiduciary duty. Before trial, the debtor dismissed his claims against the law firm and James Ferraro. After the debtor presented his case at trial, the state court granted a directed verdict for Ms. Kelley on all of the claims brought against her.

Ms. Kelley filed counterclaims against the debtor in the lawsuit, including claims for abuse of process and spoliation of evidence. According to the counterclaims, the debtor had "conspired with Defendant Ferraro to aid each in their wrongful pursuits against [Ms. Kelley] and the estate of Michael V. Kelley in order to unjustly enrich each other at the expense of [Ms.

⁴ See docket 12, 13, 29, 30, and 33.

Kelley] and the estate of Michael V. Kelley.”⁵ Her spoliation of evidence claim asserted that the debtor “intentionally, willfully and/or maliciously destroyed evidence” relevant to the claims he asserted in the lawsuit. In her abuse of process claim, Ms. Kelley alleged that the debtor had perverted the litigation in order to force Ms. Kelley to compromise or abandon claims which she had brought against James Ferraro and the firm in a different lawsuit.

Ms. Kelley’s counterclaims were tried to a jury. On the spoliation of evidence claim, the trial judge instructed the jury that they must find by the greater weight of the evidence that:

A, There was a pending or probable lawsuit involving [Ms. Kelley]; and B, Mr. Sivinski knew that a lawsuit involving [Ms. Kelley] was pending or probable; and C, Mr. Sivinski willingly destroyed, altered, or concealed evidence for the purpose of disrupting [Ms. Kelley’s] ability to prove a claim or defense in the pending lawsuit; and D, Mr. Sivinski’s conduct disrupted [Ms. Kelley’s] ability to prove claims in the pending lawsuit; and E, Mr. Sivinski’s conduct was a proximate cause of injury to the [Ms. Kelley] . . . Willful means an act is intentional and malicious or done with a bad motive or purpose . . . Additionally; if you find that Mr. Sivinski’s conduct was malicious, you may also award punitive damages . . . Actual malicious [sic] necessary for an award of punitive damages is: A, the state of mind under which a person’s conduct is characterized by hatred, ill-will, or a spirit of revenge or, a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.⁶

The jury returned verdicts in favor of Ms. Kelley on her counterclaims for spoliation of evidence and abuse of process, awarding her \$100,000.00 in compensatory damages on each claim, \$400,000.00 in punitive damages, and attorney fees, which the court later set at \$296,352.01. In awarding punitive damages, the jury specifically found that the debtor “by his acts or failures to

⁵ Exh. 4, docket 29.

⁶ Exh. 11, Transcript of Proceedings, docket 30.

act, demonstrated malice, aggravated or egregious fraud, oppression, or insult” towards Ms. Kelley.⁷ The debtor appealed the state court judgment.

III. DISCUSSION

A. Summary Judgment

Summary judgment is governed by Federal Rule of Civil Procedure 56, which provides in relevant part:

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

* * *

(c) Serving the Motion; Proceedings. . . . 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.

FED. R. CIV. P. 56(a) and (c) (made applicable by FED. R. BANKR. P. 7056). Summary judgment

is appropriate “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.” FED.R.CIV.P. 56(c). However, [the movant] bears the burden of proving that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Nance v. Goodyear Tire & Rubber Co., 527 F.3d 539, 546-47 (6th Cir. 2008). In evaluating the evidence presented, the court must

draw all inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

⁷ Exh 10, Interrogatories to the Jury, docket 29.

574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A genuine issue of material fact exists when there are “disputes over facts that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348.

Savedoff v. Access Group, Inc., 524 F.3d 754, 762 (6th Cir. 2008). In sum, to meet her burden, the plaintiff must establish that (1) there is no dispute over any material fact; and (2) she is entitled to judgment as a matter of law. The moving party must meet these requirements even where the motion is unopposed.

B. Collateral Estoppel

The doctrine of collateral estoppel applies in dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991). The doctrine, “also referred to as issue preclusion, prevents a party from relitigating issues that were actually litigated in a prior proceeding.” *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 920 (B.A.P. 6th Cir. 2000) (footnote omitted). Under the doctrine, “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153 (1979). “Even though Congress intended the bankruptcy court to determine the issue of whether a debt is dischargeable, Congress does not require the bankruptcy court to determine all the underlying facts.” *Phillips v. Weissert (In re Phillips)*, 434 B.R. 475,485 (B.A.P. 6th Cir. 2010). Therefore, where a state court has determined factual issues using the same standards applicable in bankruptcy court, collateral estoppel applies. *Id.* The party asserting estoppel bears the

burden of proving that the doctrine applies. *Spilman v. Harley*, 656 F.2d 224, 229 (6th Cir. 1981), *overruled on other grounds*, *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 319 (6th Cir.1997).

This court must give preclusive effect to the state court judgment in this action if a state court would give the judgment preclusive effect. *In re Calvert*, 105 F.3d at 317. Under Ohio law, “[c]ollateral estoppel [or issue preclusion] precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action.” *State ex rel. Kirby v. S.G. Loewendick & Sons, Inc.*, 596 N.E.2d 460, 463 (Ohio 1992) (internal quotation marks and citations omitted). Collateral estoppel applies:

when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.

State ex rel. Davis v. Pub. Employees Ret. Bd., 899 N.E.2d 975, 982 (Ohio 2008). The doctrine applies even if an appeal is pending. *Hixson v. Ogg*, 42 N.E. 32 at syllabus (Ohio 1895); *First Nat’l Bank of Cincinnati v. Doyle*, 193 N.E. 2d 442, 447 (Ohio Ct. App. 1962).

C. 11 U.S.C. § 523(a)(6)

A chapter 7 debtor is released from most obligations, with certain exceptions. One such exception is that the debtor is not discharged from a 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). A plaintiff must show both willful injury and malicious injury by a preponderance of the evidence to establish nondischargeability under § 523(a)(6). *Grogan*, 498 U.S. at 291; *Markowitz v.*

Campbell (In re Markowitz), 190 F.3d 455, 463 (6th Cir. 1999). An intentional act alone is insufficient; the injury itself must be intentional. *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). A willful injury results when the actor desires to cause the consequences of his actions or when he believes that the consequences are substantially certain to result from his actions. *Markowitz*, 190 F.3d at 464. A person acts maliciously in this context, when the person acts “in conscious disregard of his duties or without just cause or excuse.” *In re Moffitt*, 252 B.R. at 923. “As the Supreme Court pointed out in *Geiger*, the ‘willful and malicious’ standard in § 523(a)(6) brings to the legal mind the idea of an intentional tort.” *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 307 (B.A.P. 6th Cir. 2004). These types of misconduct satisfy the § 523(a)(6) standard: intentional infliction of emotional distress; malicious prosecution; conversion; assault; false arrest; intentional libel; and deliberate vandalism. *Steier v. Best (In re Best)*, No. 03-5098, 109 Fed. Appx. 1 at *4 (6th Cir. June 30, 2004).

If a state court judgment debt is nondischargeable under § 523(a)(6), the debtor remains liable for both the compensatory and punitive damages. *Abbo v. Rossi, McCreery & Assocs., Inc. (In re Abbo)*, 168 F.3d 930, 931 (6th Cir. 1999). Additionally, the debtor is responsible for attorney fees and costs awarded by the state court if that award arises out of the same conduct that resulted in the underlying debt being nondischargeable. *Suarez v. Barrett (In re Suarez)*, 400 B.R. 732, 738 (B.A.P. 9th Cir. 2009).

D. The Motion

The plaintiff’s complaint has seven counts, the first three of which are the subject of this motion. She argues that the state court judgment conclusively establishes the elements of § 523(a)(6) nondischargeability under the doctrine of collateral estoppel. As collateral estoppel

applies here and the judgment was issued by a court of competent jurisdiction, the only remaining step is to determine whether that judgment supports a determination of nondischargeability.

As to the plaintiff's judgment for spoliation of evidence, there is no issue of material fact regarding whether the debtor committed an intentional tort within the meaning of § 523(a)(6). Per the jury instructions and as a predicate to rendering its verdict for Ms. Kelley, the jury was required to find that the debtor willingly destroyed, altered, or concealed evidence with the purpose of interfering with Ms. Kelley's ability to prove her claims or defenses in the lawsuit. The state court judge defined "willfulness" as an intentional act with a bad motive or purpose. And, to award punitive damages, the jury was required to find that the debtor's conduct was malicious, with that term being defined as "the state of mind under which a person's conduct is characterized by hatred, ill-will, or a spirit of revenge or, a conscious disregard of . . . rights and safety . . . that [had] a great probability of causing substantial harm."⁸ Consequently, the § 523(a)(6) requirements of willfulness and maliciousness injury were determined by the state court and that determination is entitled to preclusive effect here. That portion of the judgment, including punitive damages and attorney fees, is not dischargeable.

Next to be considered is the plaintiff's judgment for the tort of abuse of process, which tort applies to cases in which "legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed." *Yaklevich v. Kemp, Schaeffer & Rowe Co.*, 626 N.E.2d 115, 118 (Ohio 1994) (internal quotation marks and citation omitted).

⁸ Exh. 11, docket 30.

“Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order.” *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 662 N.E.2d 9, 14 (Ohio 1996).

There are three elements for an abuse of process claim under Ohio law: “(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.” *Yaklevich*, 626 N.E.2d at paragraph one of the syllabus. Any injury resulting from abuse of process is willful within the meaning of § 523(a)(6), because the legal proceeding is being used with the intent to achieve a particular purpose. Malice or evil intent is also implicated. *See Rogers v. Barbera*, 164 N.E.2d 162, 243 (Ohio 1960) (“In the case of malicious prosecution, as in abuse of process, valid process justifies restraint or imprisonment, and the gist of the cause of action is malice or evil intent.”) (quotation marks and citation omitted); *Donohoe v. Burd*, 722 F. Supp. 1507, 1517 (S.D. Ohio 1989), *aff’d* 923 F.2d 854 (6th Cir. 1991) (unpublished decision) (noting that the difference between a cause of action for malicious prosecution and abuse of process is “the point at which malice becomes involved”). Consequently, abuse of process is conduct which satisfies the § 523(a)(6) standard for nondischargeability. *See In re Aboo*, 168 F.3d at 932 (stating that the state court’s judgment for abuse of process “required the jury to find that the defendant willfully and maliciously injured the plaintiff by abuse of process”).

Based on the state court’s judgment for abuse of process, there is no issue of material fact as to whether the debtor committed an intentional tort within the scope of § 523(a)(6). The state court judgment determined that the debtor acted willfully and maliciously, a finding that is

entitled to preclusive effect here. This portion of the judgment, including punitive damages and attorney fees, is also nondischargeable.

IV. CONCLUSION

For the reasons stated, the plaintiff's motion for partial summary judgment is granted and her state court judgment is determined to be nondischargeable under 11 U.S.C. § 523(a)(6). The court will enter a separate judgment to that effect.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

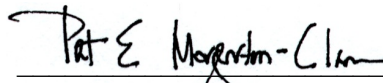
UNITED STATES BANKRUPTCY COURT
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her capacity as Executrix of the Estate of)
Michael V. Kelley,)
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Plaintiff,)
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v.)
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JOHN A. SIVINSKI,) **JUDGMENT**
)
Defendant.)

For the reasons stated in the memorandum of opinion entered this same date, the plaintiff's motion for partial summary judgment is granted. (Docket 29, 30, 33). The plaintiff's state court judgment against the defendant-debtor for spoilation of evidence and for abuse of process in the amount of \$896,352.01 is determined to be nondischargeable under 11 U.S.C. § 523(a)(6).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge