

Judgment") (Doc. # 29) filed by Defendant/Debtor Michael J. Mercure ("Mercure") on March 19, 2012. Mercure requests the Court to enter summary judgment and dismiss the instant adversary proceeding. On April 9, 2012, Plaintiff GMAC LLC, f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc. ("Ally") filed Memorandum of Plaintiff GMAC LLC, f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc. in Opposition to Defendant Michael J. Mercure's Motion for Summary Judgment ("Response") (Doc. # 30). Mercure filed Defendant Michael J. Mercure's Reply Regarding His Motion for Summary Judgment ("Reply") (Doc. # 33) on April 23, 2012.

For the reasons set forth herein, the Court finds that Mercure is not entitled to judgment as a matter of law and that genuine issues of material fact exist. As a consequence, the Court will deny 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. 2012-7) 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)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mercure filed a voluntary petition pursuant to chapter 7 of Title 11, United States Code, on February 1, 2011. The first date set for the meeting of creditors pursuant to 11 U.S.C. § 341(a) was

March 29, 2011. The last date to object to the discharge of a debt pursuant to 11 U.S.C. § 523(c)¹ was May 31, 2011.² See FED. R. BANKR. P. 4007(c) (West 2012).

A. Complaint

On May 27, 2011, Ally filed Complaint (Doc. # 1), which commenced the instant adversary proceeding. The Complaint includes the following allegations:³

1. Mercure served as President and Owner of the now-defunct auto dealership Midway Motor Sales, Inc. ("Midway"). (Compl. ¶ 1.)
2. On January 17, 1991, Mercure's parents executed a guaranty in which they guaranteed all indebtedness of Midway to Ally. (*Id.* ¶¶ 32-33.)
3. On September 30, 1993, Mercure executed a guaranty in which he guaranteed all indebtedness of Midway to

¹Section 523(c)(1) states,

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c)(1) (West 2012) (emphasis added).

²May 31, 2011, was the first non-weekend or holiday following the 60th day after the first date set for the meeting of creditors.

³"In evaluating summary judgment, [the court] must view all the facts and the inferences drawn from it [sic] in the light most favorable to the nonmoving party." *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 702 (6th Cir. 2008); see also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

Ally ("Guaranty").⁴ (*Id.*)

4. Midway engaged in odometer tampering and misrepresented the odometer readings of vehicles that were subsequently sold by Ally at auction. (*Id.* ¶¶ 14-15.)
5. Upon discovering the odometer tampering in early 2004, Ally compensated the purchasers of the vehicles with altered odometers, thereby incurring losses and expenses. (*Id.* ¶ 20.)
6. On August 3, 2004, Ally initiated a lawsuit in the Cuyahoga County Court of Common Pleas ("State Court") against Mercure and his parents seeking recovery pursuant to the guaranty agreements, which proceeding was denominated Case No. CV 04 542097 ("State Court Action"). (*Id.* ¶ 34.)
7. On December 23, 2005, the State Court entered partial summary judgment with respect to liability in favor of Ally. (*Id.* ¶ 35).⁵
8. On October 5, 2006, the State Court awarded Ally damages in excess of \$1.7 million ("Judgment"),⁶ specifically finding that the Judgment included "\$1,055,397.50 as and for damages related to Midway Motor Sales' Odometer Tampering." (*Id.* ¶ 36.)

⁴A copy of the Guaranty is attached to the Response at page 13 of Exhibit A.

⁵A copy of the summary judgment entry is attached to the Complaint as Exhibit C.

⁶A copy of the Judgment is attached to the Complaint as Exhibit D.

9. Mercure and his parents are jointly and severally liable for the Judgment. (*Id.* ¶ 38.)
10. The Judgment was affirmed by the Eighth Appellate District Court of Appeals of Ohio.⁷ (*Id.* ¶ 39.)
11. The Judgment has not been paid in full, but a portion of the Judgment has been paid by or on behalf of Mercure's parents. (*Id.* ¶ 40.)

Ally asserts, "While the basis for recovery in the state court action was Mercure's breach of his guaranty obligations to [Ally], the underlying conduct that led to this contractual indebtedness was Mercure's fraudulent activity. As such, Mercure has incurred debts to [Ally] that are nondischargeable in bankruptcy under 11 U.S.C. § 523." (*Id.* ¶ 1.) Specifically, Ally contends that the Judgment is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2), (a)(4) and (a)(6). (*Id.* ¶¶ 49, 51.)

B. Mercure's Motion for Summary Judgment

Mercure asserts that he is entitled to judgment as a matter of law because the Judgment is not based upon misrepresentation, fraud, criminality or willful and malicious injury and, thus, the Judgment is not excepted from discharge pursuant to § 523(a)(2), (a)(4) or (a)(6). Mercure alleges that Ally has had knowledge of all relevant facts since 2004, yet Ally failed to bring an action against him for anything but breach of contract prior to filing the Complaint. As

⁷A copy of the appellate court judgment is attached to the Complaint as Exhibit F.

a result, Mercure argues that this proceeding is barred by (i) the doctrine of claim preclusion; and (ii) the applicable Ohio statutes of limitations. Finally, Mercure states that Ally is improperly seeking to hold him liable for Midway's conduct without alleging facts sufficient to pierce the corporate veil.⁸

C. Ally's Response

Ally states that, although the Judgment was based on breach of contract, "[t]he guaranteed obligations included amounts owed for failure to discharge a duty to provide safe storage of certain of [Ally]'s vehicles This failure was due to the illegal altering of the vehicle odometers, i.e., willful and malicious injury to [Ally]'s property." (Resp. at 2.) Ally continues,

Therefore, while there was not a specific cause of action for fraud, misrepresentation, or embezzlement asserted against Mercure individually in the State Court Action - which is not required as a matter of law for purposes of non-dischargeability - odometer tampering activity clearly was the conduct creating the debt for willful and malicious injury to [Ally]'s property and thus was at issue in the State Court Action.

(*Id.* at 4-5 (emphasis in original).)

In response to Mercure's argument that this proceeding is barred by the doctrine of claim preclusion, Ally avers, "Mercure is, once again, misstating or ignoring long-standing and controlling law." (*Id.* at 11.) Specifically, Ally states that, in *Brown v. Felsen*, 442 U.S. 127 (1979), the Supreme Court expressly rejected

⁸In his Reply, Mercure does not present any arguments that were not set forth in the Motion for Summary Judgment. Thus, the Court will not restate those arguments in Part I of this Memorandum Opinion.

the contention that claim preclusion prevents a creditor from seeking a determination that a state court judgment, which is not based on fraud, is excepted from discharge due to fraud.

Ally next contends that, because the Judgment was timely obtained in state court, the Ohio statutes of limitations have no bearing on this proceeding. Ally asserts that Mercure fails to recognize the distinction between a suit brought to enforce state-created rights and a suit brought to determine the dischargeability of a debt, the latter of which cannot be initiated until after the bankruptcy petition is filed.

Finally, Ally argues that "there is no need to pierce the corporate veil in this case, as the debt for which [Ally] now seeks a non-dischargeability determination (a Judgment against Mercure personally), which is for willful and malicious injury to [Ally]'s property, was based upon Mercure's personal guarantee to [Ally]." (*Id.* (citations omitted) (emphasis in original).)

II. STANDARD OF REVIEW

FED. R. CIV. P. 56(a), made applicable to this proceeding by FED. R. BANKR. P. 7056, states, in pertinent part,

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a) (West 2012). 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); *Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472

(6th Cir. 1996). An issue of material fact is genuine if a rational trier of fact 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, 30 (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.

In a motion for summary judgment, the movant bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Anderson*, 477 U.S. at 248-49. In response to a proper motion for summary judgment, the nonmoving party must present evidence upon which a reasonable trier of fact could rule in its favor. *Id.* at 252. 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) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. ANALYSIS

A. This Proceeding Is Not Barred by Claim Preclusion

The Supreme Court directly addressed the application of claim preclusion or *res judicata* to dischargeability actions in *Brown v. Felsen*, 442 U.S. 127 (1979). In *Felsen*, the debtor argued that, because the state court judgment did not specify that it was based upon fraud, claim preclusion prohibited the creditor from asserting

that the debt was non-dischargeable due to fraud. The Court first stated that requiring the bankruptcy court to rely on the state court record would undermine the bankruptcy court's jurisdiction. "If a state court should expressly rule on [dischargeability] questions, then giving finality to those rulings would undercut Congress' intention to commit [dischargeability] issues to the jurisdiction of the bankruptcy court."⁹ *Id.* at 135. The Court further disagreed with the debtor's position by finding,

When [dischargeability] issues are not identical to those arising under state law, the parties have little incentive to litigate them. In the collection suit, the debtor's bankruptcy is still hypothetical. The rule proposed by [the debtor] would force an otherwise unwilling party to try [dischargeability] questions to the hilt in order to protect himself against the mere possibility that a debtor might take bankruptcy in the future. In many cases, such litigation would prove, in the end, to have been entirely unnecessary

Id. The Court ultimately concluded that claim preclusion did not apply and held, "[W]e reject [the debtor]'s contention that res judicata applies here and we hold that the bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceedings when considering the dischargeability of [the debtor]'s debt." *Id.* at 138-39; see also *Spilman v. Harley*, 656 F.2d 224, 227 (6th Cir. 1981) ("[W]here the facts necessary for

⁹Although the *Felsen* opinion analyzed the former Bankruptcy Act, it applies equally to proceedings brought pursuant to § 523(c) – *i.e.*, proceedings over which the bankruptcy court has exclusive jurisdiction. See 11 U.S.C. § 523(c)(1) (West 2012); *Dollar Corp. v. Zebedee (In re Dollar Corp.)*, 25 F.3d 1320, 1325 (6th Cir. 1994) (citations omitted) ("Dischargeability determinations were vested in bankruptcy courts by the 1970 Amendments to the Bankruptcy Act. In so doing, Congress intended 'to take the determinations governed by 11 U.S.C. § 523(c) away from state courts and grant exclusive jurisdiction in the bankruptcy courts.'")

a dischargeability determination were not necessary to the determination in the prior judgment, the parties should not be bound or else the parties would always have to anticipate future bankruptcy proceedings and the state courts would be deciding facts not necessary to the state proceedings but only relevant to a possible future bankruptcy proceeding."); *Mack v. Mills (In re Mills)*, 345 B.R. 598, 603 (Bankr. N.D. Ohio 2006) ("[T]he state court judgment entered in the [creditors]' favor has no *res judicata* effect for purposes of this Court making an independent determination of dischargeability.")

Binding precedent establishes that the doctrine of claim preclusion does not limit this Court to a review of the State Court Action to determine if the Judgment is excepted from discharge pursuant to § 523(a)(2), (a)(4) or (a)(6). Mercure's argument to the contrary is wholly unfounded. Accordingly, the Court finds that claim preclusion does not entitle Mercure to judgment as a matter of law.

B. This Proceeding Is Not Barred by Ohio Statutes of Limitations

A state statute of limitations defense similar to that presented by Mercure was addressed by the Bankruptcy Court for the Southern District of Ohio in *Spinnenweber v. Moran (In re Moran)*, 152 B.R. 493 (Bankr. S.D. Ohio 1993). In *Moran*, the debtor moved to dismiss a dischargeability proceeding, which was based upon defalcation while acting in a fiduciary capacity, on the basis that the Ohio statute of limitations for breach of fiduciary duty had

expired. The bankruptcy court denied the debtor's motion and stated,

Implicit in the debtor's motion is the premise that the [creditors] must have alleged a breach of fiduciary duty in state court to preserve their claim against the debtor under Ohio's statute of limitations and to bring the same claim in bankruptcy court. There is a fundamental flaw in the debtor's position in that it fails to recognize the distinction between a suit brought under state law to enforce state created rights and a suit filed in bankruptcy court to determine dischargeability issues under § 523(a) of the Bankruptcy Code.

Id. at 495. The court noted that a creditor cannot file a proceeding to determine the dischargeability of a debt until after the debtor files its petition for relief. "Therefore, whether or not the pleadings in state court referred to fiduciary duties of the debtor is irrelevant. The only relevant question with respect to Ohio's statute of limitations is whether the [creditors] sought to enforce their 'debt' against the debtor within the period prescribed by the statute of limitations." *Id.* (italics in original) (emphasis added). The bankruptcy court stated that its analysis applies equally in situations where a creditor receives a judgment under one theory of recovery and later asserts that the judgment is non-dischargeable under a different theory.

The analysis in *Moran* was adopted by the Tenth Circuit Court of Appeals in *Resolution Trust Corp. v. McKendry (In re McKendry)*, 40 F.3d 331 (10th Cir. 1994). In *McKendry*, the debtor argued that the creditor's § 523(a)(2) claim was barred by the state statute of limitations for fraud, which had lapsed prior to the petition date. However, the creditor had timely obtained a pre-petition judgment

against the debtor establishing the existence and the amount of the debt. The court stated that, based upon the Supreme Court's holding in *Felsen*, discussed *supra* at 8-9, allowing state statutes of limitations to bar § 523(c) proceedings "would allow the exclusive jurisdiction of the bankruptcy courts over core proceedings to be divested by operation of state law and would be inimical to the philosophy underlying the Bankruptcy Code." *Id.* at 335. The court opined,

We likewise find two distinct issues in a nondischargeability proceeding. The first, the establishment of the debt itself, 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. However, the question of the dischargeability of the debt under the Bankruptcy Code is a distinct issue governed solely by the limitations periods established by bankruptcy law. In this case, the debt has already been established, so the state statute of limitations is immaterial.

Id. at 337 (emphasis added); see also *Lee-Benner v. Gergely (In re Gergely)*, 110 F.3d 1448, 1454 (9th Cir. 1997) ("[The creditor]'s debt is established. The state limitations period for fraud actions is irrelevant to the dischargeability of an established debt.")¹⁰

This Court finds that the analyses in *Moran* and *McKendry* are well-reasoned and persuasive. The Court concludes that, so long as a creditor timely establishes a debt, the creditor may later seek

¹⁰In support of his position that this proceeding is barred by the state statutes of limitations, *Mercure* extensively cites and quotes the opinion of the Ninth Circuit B.A.P. in *Lee-Benner v. Gergely (In re Gergely)*, 186 B.R. 951 (B.A.P. 9th Cir. 1995). However, those portions of *Gergely* cited by *Mercure* were explicitly overruled by the Ninth Circuit Court of Appeals. See *In re Gergely*, 110 F.3d at 1454 ("We therefore reverse the dismissal of [the creditor]'s claim for nondischargeability under § 523(a)(2)(A), and remand so that [the creditor] may attempt to show that [the debtor]'s debt to him arose from fraud.")

a determination that such debt is non-dischargeable, regardless of the state statutes of limitations.

Mercure does not dispute that Ally timely obtained the Judgment against him. Thus, the Ohio statutes of limitations do not prohibit Ally from seeking a determination that the Judgment is excepted from discharge. As a consequence, the Court finds that Mercure is not entitled to judgment as a matter of law based upon the Ohio statutes of limitations.

C. Genuine Issues of Material Fact Remain

Mercure argues that Ally has not alleged sufficient facts to pierce the corporate veil of Midway and, thus, Ally may not hold him liable for Midway's conduct.¹¹ However, Ally states in the Complaint,

49. By engaging in this conduct, Mercure caused GMAC damages as set forth in the Judgment Amount. These damages are the product of fraud and/or misrepresentation and embezzlement, and as such are nondischargeable under 11 U.S.C. §§ 523(a)(2) and 523(a)(4).
50. The Judgment Amount that has already been levied against Mercure resulted from his embezzlement and fraudulent activity and is therefore not dischargeable in bankruptcy.
51. Mercure's conduct in this regard has been malicious, deliberate, gross and egregious, and, as such is also non-dischargeable under 11 U.S.C. § 523(a)(6).

(Compl. ¶¶ 49-51 (emphasis added).) Together with the remainder of the Complaint, these allegations sufficiently apprise Mercure of the

¹¹The Court notes that Mercure appears to argue, in his Motion for Summary Judgment, that Ally has failed to state a claim upon which relief can be granted.

conduct for which Ally seeks to hold him liable.

In the Response, Ally contends that it need not pierce the corporate veil because the Judgment is against Mercure personally. Yet, at the same time, Ally appears to assert that the Judgment is non-dischargeable based upon Mercure's participation in odometer tampering and other fraudulent activity. Despite these allegations, the Judgment states, "The judgment amount of \$1,743,176.18 includes \$1,055,397.50 as and for damages related to Midway Motor Sales' Odometer Tampering" (*Id.*, Ex. D, at 1 (emphasis added).) Moreover, the appellate court judgment states, "There is no evidence in the record that the Mercures were involved with the odometer tampering" (*Id.*, Ex. F, at 4 (emphasis added).) Thus, genuine issues of material fact exist concerning whether Mercure participated in odometer tampering or other fraudulent activity.

Because genuine issues of material fact remain, resolution of this proceeding is not appropriate at the summary judgment stage. As a result, the Court will deny Mercure's Motion for Summary Judgment.

IV. CONCLUSION

In *Brown v. Felsen*, 442 U.S. 127 (1979), the Supreme Court ruled that claim preclusion does not limit the bankruptcy court to a review of the state court judgment and record to determine if a debt is non-dischargeable. Thus, Mercure is not entitled to judgment as a matter of law on the basis that the Judgment is not based upon misrepresentation, fraud, criminality or willful and

malicious injury.

State statutes of limitations do not bar a creditor from seeking a determination that an established debt is non-dischargeable. Because Ally timely obtained the Judgment, Mercure is not entitled to judgment as a matter of law on the basis that the applicable Ohio statutes of limitations expired prior to commencement of this proceeding.

Finally, there are genuine issues of material fact concerning whether Mercure engaged in odometer tampering or other fraudulent activity that may except the Judgment from discharge.

For the reasons set forth above, the Court will deny Mercure's Motion for Summary Judgment.

An appropriate order will follow.

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("Mercure") on March 19, 2012. Mercure requests the Court to enter summary judgment and dismiss the instant adversary proceeding. On April 9, 2012, Plaintiff GMAC LLC, f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc. filed Memorandum of Plaintiff GMAC LLC, f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc. in Opposition to Defendant Michael J. Mercure's Motion for Summary Judgment (Doc. # 30). Mercure filed Defendant Michael J. Mercure's Reply Regarding his Motion for Summary Judgment (Doc. # 33) on April 23, 2012.

For the reasons set forth in this Court's Memorandum Opinion Regarding Mercure's Motion for Summary Judgment entered on this date, the Court hereby:

1. Finds that the doctrine of claim preclusion does not entitle Mercure to judgment as a matter of law;
2. Finds that the Ohio statutes of limitations do not entitle Mercure to judgment as a matter of law;
3. Finds that genuine issues of material fact remain regarding Mercure's alleged participation in odometer tampering or other fraudulent activity; and
4. Denies Mercure's Motion for Summary Judgment.

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