UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 13-13197
	)	
DAVID LEE GIBSON, JR.,	)	Chapter 7
	)	
Debtor.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
	)	
K. RONALD BAILEY & ASSOCIATES CO., L.P.A.,	)	Adversary Proceeding No. 13-1146
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DAVID LEE GIBSON, JR.,	)	**MEMORANDUM OF OPINION**[1]
	)	
Defendant.	)	

Plaintiff K. Ronald Bailey & Associates Co., LPA (the law firm) filed this adversary proceeding seeking a determination that its claim against the defendant-debtor David Gibson, which is based on legal services rendered, is not dischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6). For the reasons stated below, the plaintiff did not meet its burden of proof and judgment will be entered in favor of the defendant.

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). This decision is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

[1] This opinion is not intended for publication, either print or electronic.

II. THE TRIAL

The court held a trial on February 14, 2014. The plaintiff presented its case through the testimony of attorney K. Ronald Bailey and Lynn Bailey (the law firm's bookkeeper), together with cross-examination of the defendant, and exhibits. The defendant presented his case through his own testimony, as well as cross-examination of the plaintiff's witnesses.

III. FACTS

A. The Representation on the Criminal Charge

In October 1999, the State of Ohio charged the debtor David Gibson with felonious assault arising out of a bar fight. At Mr. Gibson's arraignment, attorney K. Ronald Bailey approached Mr. Gibson and stated an interest in representing him. Mr. Gibson, who had no prior knowledge of or contact with Mr. Bailey, agreed to meet with him at the jail. They had to meet at the jail because Mr. Gibson was held pending trial because he could not make bail.

At their next meeting, they agreed that Mr. Bailey would indeed represent Mr. Gibson and they discussed the terms of the representation. Except in a rare case, Mr. Bailey requires a retainer from clients. Here, Mr. Gibson explained that he had no money to pay a retainer and no family who could help. For three years, he had been self-employed as the owner of a tattoo shop in Norwalk. At this point, the parties' narratives differ: Mr. Bailey testified that Mr. Gibson told him that he was working construction in the summers on "the islands"[2] and that he would be able to pay him from that income. Mr. Gibson testified that Mr. Bailey asked where he got the money to open the shop, to which he responded that he had saved up money from working on the

[2] In context, the court assumes this refers to The Lake Erie Islands: South Bass Island (Put-in-Bay), Middle Bass Island, and Kelley's Island.

islands in the summer. He had not worked on the islands in the years since he started his business. After explaining where he got the money to open the shop, he told Mr. Bailey that he would do the best he could to pay the retainer.

The court finds that Mr. Gibson would not have any reason to tell Mr. Bailey anything other than the truth—that he did not have any money to pay a retainer, he had saved up his money to open his small tattoo shop, and he would try to pay the money owed. In accepting Mr. Gibson's version as true, the court is by no means finding that Mr. Bailey was not telling the truth as he remembered the conversation. Rather, the court finds that as sometimes happens in communications, Mr. Bailey came away from the conversation having heard something different from what Mr. Gibson said. For his own reasons, not explained at trial, Mr. Bailey decided to do something he rarely does: accept the representation without a retainer.

The law firm and Mr. Gibson then entered into two agreements: a criminal defense fee agreement and a promissory note. The fee agreement provided that Mr. Gibson would pay a $15,000.00 retainer, as well as an hourly rate of $250.00 for Mr. Bailey's time and $150.00 for associate attorney time to the extent that the law firm expended more than 60 hours on the case. He also agreed to pay $60.00 an hour for paralegal and investigator time, together with expenses and interest at 1-½% if he did not pay any amount billed within 30 days of the billing. The promissory note stated in relevant part that, on or before October 26, 2000, Mr. Gibson would pay the $15,000.00 retainer with interest at 12% per year after October 26, 1999. The law firm almost never accepts such promissory notes.

By all accounts, Mr. Bailey did an excellent job of representing Mr. Gibson at trial, obtaining an acquittal after a five-day jury trial. In March 2000, Mr. Bailey sent Mr. Gibson a

bill for $26,577.01. Mr. Gibson did not object to the amount, but did not pay it because his circumstances did not permit it.

B. The Law Firm's State Court Lawsuit Against Mr. Gibson

In October 2001, the law firm sued Mr. Gibson in state court in a three-count complaint. Count one alleged that the law firm performed under the contract but that Mr. Gibson did not perform, having failed, neglected and refused to pay; count two again alleged that Mr. Gibson failed, refused and neglected to pay; and count three alleged that Mr. Gibson entered into the contract with fraudulent intent knowing that he was not going to pay. The law firm asked for punitive damages on count three.

On April 5, 2002, the state court entered a default judgment against Mr. Gibson on counts one and two, only, in the amount of $26,577.01 plus interest at the rate of 1-½% per month from March 10, 2000 forward, and costs for the claim on counts one and two. The sole statement in that judgment as to count three is this sentence: "A Hearing shall be held as to Count Three for punitive damages on the 12th day of April, 2002 at 2:30 p.m." The law firm prepared this entry for signature by visiting Judge Joseph Cirigliano, at the judge's request.

The April hearing never took place, for reasons unstated. Also unexplained is how the case next appeared on the state court docket of April 6, 2005, three years later. A judgment entry from that date states in full:

> This matter came on for hearing on April 4, 2005 upon the issue of punitive damages. Upon agreement of the parties, it is hereby ORDERED, ADJUDGED and DECREED that punitive damages shall be and hereby are awarded Plaintiff against Defendant in the amount of Thirty Two Thousand Dollars ($32,000.00). It is further ORDERED, as agreed to by the parties, that such punitive damages award shall be vacated upon payment of the full amount of compensatory damages previously awarded in this matter.

> Defendant may pay off such compensatory damages in monthly installments, but in no event is he to pay less than One Hundred Dollars per month beginning May 1, 2005 and the first of every month thereafter, with a payment One Hundred Dollars to also be made on Friday, April 8, 2005.
>
> /s/ Judge Joseph E. Cirigliano

Again, the law firm prepared this entry for signature by the judge.

Mr. Gibson appeared at that hearing, unrepresented, and agreed to everything because he thought that Mr. Bailey did an excellent job for him. He tried to cooperate in response to the judge's questions, stating that he thought he could meet the payment schedule. As he recounted this at trial, he stated that he is ashamed that he was not able to pay the bill and he feels it is morally wrong not to pay, but he is not able to pay the bill which–as of January 14, 2014, with interest–had reached $259,512.09.

IV. THE POSITIONS OF THE PARTIES

The law firm's amended complaint alleges that the debt is not dischargeable under 11 U.S.C. § 523(a)(2), (4), and (6). At trial, the law firm relied on these two alleged misrepresentations: (1) the statements made by Mr. Gibson during the first meeting at the jail; and (2) the statements made to the judge by Mr. Gibson that he would make payments under the default judgment. The amended complaint also references collateral estoppel. At trial, the law firm asked that $26,000.00 of the amount owed be declared nondischargeable, plus any extra amount the court wished to add to that.

Mr. Gibson's position is that he hoped to be able to pay the $15,000.00 retainer plus whatever else the bill might ultimately be, but he did not make any representation that he would pay the bill from anticipated summer earnings away from his shop. He also argues that the two

state court judgments are not entitled to collateral estoppel effect.

V. DISCUSSION

A. Dischargeability of the Debt

A chapter 7 debtor is discharged from most obligations, with certain exceptions. The law firm asserts that the judgment debt is excepted from discharge under Bankruptcy Code § 523(a)(2), (4), and (6). The law firm has the burden of proving its case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

1. 11 U.S.C. § 523(a)(2)

Bankruptcy Code § 523(a)(2)(A) excepts from discharge a 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(a)(2)(A). To exclude a debt from discharge under this provision, a creditor must prove that:

> (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.

Rembert v. AT&T Universal Card. Servs., Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998) (footnote omitted).

As found above, Mr. Gibson did not make any material misrepresentation to Mr. Bailey.

Additionally, § 523(a)(2)(B) makes a debt nondischargeable where the debtor obtained money by using a written statement that is (1) materially false; (2) respecting the debtor's financial condition; (3) on which the creditor reasonably relied; and (4) that the debtor provided with intent to deceive. *See* 11 U.S.C. § 523(a)(2)(B). Here, Mr. Gibson did not use any written statement to incur the debt. The documents signed by Mr. Gibson reflect the existence of the debt, but they are not written statements respecting his financial condition as contemplated by this statute.

2. 11 U.S.C. § 523(a)(4)

Section 523(a)(4) excepts from discharge debts for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]" The term "fiduciary capacity" is narrowly construed and limited to express or technical trusts and excludes constructive trusts which arise as a result of the wrongdoing. *Patel v. Shamrock Floorcovering Servs., Inc. (In re Patel)*, 565 F.3d 963, 968 (6th Cir. 2009).

The law firm states in its brief that the punitive damages were awarded, among other things, for fraud or defalcation while acting in a fiduciary capacity. There is no evidence that Mr. Gibson acted as a fiduciary for his lawyer in connection with a trust; it is the lawyer who acted as a fiduciary for Mr. Gibson.

3. 11 U.S.C. § 523(a)(6)

Under § 523(a)(6), a 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[.]" A plaintiff must show both willful injury and malicious injury to establish nondischargeability under this provision. *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." *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 923 (B.A.P. 6th Cir. 2000). "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).

The evidence showed that Mr. Gibson admired Mr. Bailey and appreciated his efforts on his behalf. There was no evidence that he acted willfully and maliciously to injure him. The law firm did not prove that the debt falls within any of these fraud exceptions.

The court need address only briefly the second contention that Mr. Gibson's statement to the state court judge that he would make payments under the default judgment constitutes a fraud that would make the consent judgment nondischargeable. The plaintiff does not tie this argument to any particular Code section. As found above, the plaintiff did not prove that this statement was a material misrepresentation. The statement cannot, therefore, support the § 523 action.

B. The Judgments[3]

The remaining question is whether the two state court judgments bar Mr. Gibson from defending against this action based on issue preclusion.

"Issue preclusion refers to the effect of a judgment in foreclosing litigation of a matter that has been actually litigated and decided." *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 703 (6th Cir. 1999). "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 redetermine all the underlying facts." *Phillips v. Weissert (In re Phillips)*, 434 B.R. 475, 485 (B.A.P. 6th Cir. 2010). Therefore, issue preclusion applies in dischargeability proceedings and may serve to bar relitigation of issues relevant to dischargeability that were previously decided in state court. *Grogan*, 498 U.S. at 284 n. 11.

In determining this issue, the Ohio judgments are given the same preclusive effect they would be given under state law based on the full faith and credit requirements of 28 U.S.C. § 1738. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 373 (1985). Under Ohio law, issue preclusion "prevents parties or their privies from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit." *Thompson v. Wing*, 637 N.E. 2d 917, 923 (Ohio 1994). Issue preclusion applies:

> when a 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 [issue preclusion] is asserted was a party in privity with a party to the prior action."

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[3] The law firm's trial brief does not make any legal argument about the judgments and issue preclusion, nor did counsel present one at trial. Although the court could find the argument waived based on that, it will nevertheless address it.

Fordu, 201 F.3d at 704 (quoting *Thompson*, 637 N.E. 2d at 923). The party asserting issue preclusion has the burden of demonstrating that its requirements are satisfied. *Knott v. Sullivan*, 418 F.3d 561, 586 (6th Cir. 2005) (citing *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 985 (Ohio 1983)).

The first requirement is that a fact or issue must have been actually and directly litigated in the prior action.[4] A consent judgment is treated the same as a litigated judgment for the purposes of issue preclusion under Ohio law. *Gilbraith v. Hixson*, 512 N.E.2d 956, 959 (Ohio 1987); *Packer, Thomas & Co. v. Eyster*, 709 N.E.2d 922, 928 (Ohio Ct. App. 1998). On the other hand, the Ohio Supreme Court has not addressed the issue of whether a default judgment meets this requirement and there is disagreement on that issue. *See Staskus v. Gene Weiss' Place for Fitness,*145 F.3d 1333 at *1 (6th Cir. 1998) (unpublished opinion) (discussing Ohio law and noting that the preclusive effect of a default judgment depends on whether there was an express adjudication of the issue); *Sill v. Sweeney (In re Sweeney),* 276 B.R. 186, 192 (B.A.P. 6th Cir. 2002) (predicting that default judgments may have preclusive effect under Ohio law as to an issue that is the subject of an "express adjudication" and that an unanswered complaint and a default judgment based on it are not by themselves such an adjudication); *but see Strodtbeck v. Radke (In re Strodtbeck)*, No. 11-1153, 2012 WL 3916483 at *4 (Bankr. N.D. Ohio Sept. 7, 2012) (predicting that the Ohio Supreme Court would adopt the Restatement's view that issues are not "actually litigated" insofar as the judgment is based on the defendant's default). The

[4] In addressing the preclusive effect of the judgments, a distinction must be drawn between the state court's express determination of the amount of debt, which is binding here, and any factual determination regarding dischargeablity. *Staskus v. Gene Weiss' Place for Fitness*, 145 F.3d 1333 at *2 (6th Cir. 1998) (unpublished opinion); *National City Bank v. Plechaty (In re Plechaty)*, 213 B.R. 119, 128-29 (B.A.P. 6th Cir. 1997).

issue need not be resolved here, however, because as discussed above the default judgment does not contain findings of fact or rule on any issue relevant to dischargeability.

The second requirement is that an act or issue must have been passed upon or determined in the prior action. The default judgment states that the debtor was in default and awards judgment in the amount of $26,577.01, together with interest and costs, on counts 1 and 2 of the state court complaint. As found above, those counts merely allege that Mr. Gibson breached the fee agreement by failing to pay. However, even if these findings were to be given preclusive effect, they have no relevance as to whether the debt is nondischargeable for fraud.

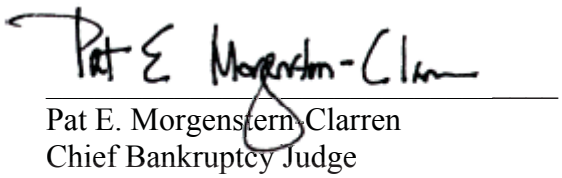
The law firm points to count three in an attempt to find preclusion on the fraud issue. That does not, however, provide the missing elements. While the law firm did raise fraud in count three, the default judgment does not grant judgment on that count; it simply sets a hearing date.

Consideration of the consent judgment yields the same result. Although it is entitled to preclusive effect, it does not include any finding of fact or resolve any issue which would support nondischargeability of the debt. The judgment merely settles the issue of punitive damages by providing for an award of punitive damages, which award is to be vacated upon payment of the previous award.

Neither the default judgment nor the consent judgment, therefore, is entitled to preclusive effect that the debt is nondischargeable.

VI. CONCLUSION

For the reasons stated, the plaintiff did not meet its burden of proving that the debt owed to it by the debtor David Gibson is nondischargeable. A separate judgment will be entered to reflect this decision.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

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In re:	)	Case No. 13-13197
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K. RONALD BAILEY & ASSOCIATES CO., L.P.A.,	)	Adversary Proceeding No. 13-1146
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DAVID LEE GIBSON, JR.,	)	**JUDGMENT**
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion entered this same date, judgment is entered in favor of the defendant-debtor.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge