

Dated: August 08, 2012
The following is SO ORDERED:




David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

Billy L. Murray and
Leigh Anne Massey-Murray,

Case No. 11-23991

Debtors.

Chapter 7

S.S. No. xxx-xx-2015 and xxx-xx-6342

Court Square Center, LLC,

Plaintiff.

v.

Adv. Proc. No. 11-00287

Billy L. Murray and
Leigh Anne Massey-Murray,

Defendants, the above-named Chapter 7
Debtors.

MEMORANDUM AND ORDER RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
COMBINED WITH NOTICE OF THE ENTRY THEREOF

INTRODUCTION

In this Rule 7001(6) adversary proceeding the plaintiff, Court Square Center, LLC, (“Plaintiff”), filed a motion for summary judgment, pursuant to Fed. R. Bankr. P. 7056, against the above-named defendants, the chapter 7 debtors, Mr. Bill L. Murray and Ms. Leigh Anne Massey-Murray (“Defendants,” “Mr. Murray,” or “Ms. Murray”). Plaintiff ultimately seeks a judicial determination that judgment debts arising out litigation in the Chancery Court of Shelby County, Tennessee, (“State Court”) are on-dischargeable under 11 U.S.C. § 523(a)(4) and § 523(a)(6).

The issue here for judicial determination is whether particular debts determined by the State Court’s order granting a “motion for partial summary judgment” and based on the plaintiff’s claims of breach of contract, conversion, and unjust enrichment are debts resulting from embezzlement under § 523(a)(4) and/or are debts resulting from willful and malicious injuries under § 523(a)(6) such that the debts are excepted from the defendants’ discharges.

By virtue of 28 U.S.C. § 157(b)(2)(I), this dischargeability action under 11 U.S.C. § 523(c) is a core proceeding. The court has subject matter jurisdiction under 28 U.S.C. §§ 1334(a)-(b) and 157(a)-(b) and Miscellaneous Order No. 84-30 of the United States District Court for the Western District of Tennessee. Based on statements of counsel for the parties, review of the State Court record, and this chapter 7 case record as a whole, the following shall constitute the bankruptcy court’s findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

BACKGROUND FACTS

The relevant background facts may be briefly summarized as follows. Plaintiff and Mr. Murray entered into a business consulting agreement in 2005, which was later extended by a 2007 agreement. In accordance with this agreement Mr. Murray was to purchase equipment and provide consulting services for an Italian deli and grocery to be established and located in a building being renovated by the plaintiff in downtown Memphis, Tennessee. In relation to that agreement, plaintiff advanced Mr. Murray the sum of \$127,791.67 to purchase equipment for the project. Mr. Murray deposited this money into a bank

account in the name of Ms. Murray. Monies in this bank account were used to purchase equipment for the project and also to pay for the defendants' personal expenses. The business project eventually fell through; and the plaintiff demanded a refund of the money advanced to Mr. Murray. Defendants refused to refund the monies, instead arguing that they were entitled to at least a portion of the funds.

Plaintiff then filed a civil action complaint in the Shelby County Chancery Court on July 31, 2008, which was amended on February 6, 2009. In the amended complaint, plaintiff alleged six different claims: breach of contract, breach of duty of good faith and fair dealing, conversion, breach of fiduciary duty, unjust enrichment/quantum meruit/money had and received, and civil conspiracy. Furthermore, the State Court complaint alleged the conversion and breach of fiduciary duty were done "wrongfully, intentionally, fraudulently, maliciously, and recklessly." On June 30, 2010, the plaintiff was awarded a partial summary judgment against the defendants for damages totaling \$87,891.91 on the claims of breach of contract, conversion, and unjust enrichment. The State Court did not make a determination on the claim for fraudulent breach of fiduciary duty, and this claim is still pending in State Court. The State Court's order did not reference a specific finding into the wrongful, intentional, fraudulent, malicious, and reckless actions of the defendants. It also appears from the State Court record that the defendants were not represented by counsel at the time of the hearing on the motion for partial summary judgment, as Mr. Murray appeared pro se acting on behalf of himself and his wife.

On June 19, 2011, the defendants filed this § 302 chapter 7 bankruptcy case with the assistance of counsel. Plaintiff, soon thereafter, filed a motion for relief from the automatic stay seeking to have the automatic stay modified under § 362(d) to allow the State Court to hear and determine the claim for fraudulent breach of fiduciary duty.¹ Defendants timely objected to the motion for relief from the stay and indicated that the State Court has already liquidated the claims and the only remaining determination would be on the issue of dischargeability. On July 5, 2011, the plaintiff filed a timely complaint in the bankruptcy court that was amended and corrected on July 12, 2011, seeking to determine the

¹ Plaintiff/movant's § 362(d)(1) motion for relief from the automatic stay will be dealt with in a separate order to be entered simultaneously herewith.

dischargeability of its particular debts pursuant to Fed. R. Bankr. P. 7001(6) and 11 U.S.C. § 523(a)(4) and § 523(a)(6).² Specifically, the plaintiff sought to have the debt determined nondischargeable under §§ 523(a)(4) and (6). On June 22, 2012 and after considerable and lengthy negotiations and attempts to settle this adversary proceeding, plaintiff filed the instant motion for summary judgment seeking to have its particular debts declared nondischargeable under § 523(a)(4) and (6). Plaintiff filed an accompanying brief, statement of facts, and numerous exhibits. Defendants filed an objection thereto on July 31, 2012.

SUMMARY JUDGMENT

Rule 7056 of the Federal Rules of Bankruptcy Procedure provides that Rule 56 of the Federal Rules of Civil Procedure applies in adversary proceedings. A grant of summary judgment requires the court to find that no genuine dispute as to any material fact exists to be tried. Such motions should be granted with caution. Resolving all inferences in favor of the non-moving party, the court traditionally must find that no reasonable grounds for dispute exists on any genuine issue before granting a motion for summary judgment. *See, for example, In re Autostyle Plastics, Inc.*, 269 F.3d 726 (6th Cir. 2001); *see also Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Rule 7012(c) of the Federal Rules of Bankruptcy Procedure provides for a judgment on the pleadings.

Here, the bankruptcy court must determine whether the findings by the State Court are sufficient to trigger and appropriately apply the doctrine of collateral estoppel to the plaintiff's dischargeability complaint; and, thus, whether the motion for summary judgment is appropriate: *i.e.*, whether no genuine dispute exists as to any material facts or that a judgment on the pleadings is appropriate.

COLLATERAL ESTOPPEL

Collateral estoppel³ principles apply in discharge exception proceedings under § 523(a). *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991). Federal courts shall refer to the preclusion law of the state in

² The amended complaint also sought to have the debt determined to be nondischargeable under § 523(a)(2)(A); however, the motion for summary judgment relied solely on §§ 523(a)(4) and (6) and did not rely on § 523(a)(2).

³ Collateral estoppel, issue preclusion, and claim preclusion are alternate legal terms for the same legal idea. This court will refer to this legal idea as "collateral estoppel."

which the judgment is rendered. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (citing 28 U.S.C. § 1738). Collateral estoppel in Tennessee requires proof of the following elements: (1) the issue is identical to the issue decided in an earlier suit; (2) the issue was actually litigated and decided on its merits in the earlier suit; (3) the judgment in the earlier suit is final; (4) the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier suit; and (5) the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded. *Beaty v. McGraw*, 15 S.W.3d 819, 824 (Tenn. Ct. App. 1998). If these elements are met, even a default judgment has preclusive effect under Tennessee law. *In re Bursack*, 65 F.3d 51, 54 (6th Cir. 1995) (citing *Lawhorn v. Wellford*, 168 S.W.2d 790, 792 (Tenn. 1943)); see also *In re Calvert*, 105 F.3d 315 (6th Cir. 1997).

Plaintiff asserts that collateral estoppel principles bar the bankruptcy court from relitigating the facts supporting the determination of dischargeability under § 523(a)(4) and(6) because the State Court resolved all factual disputes when it rendered judgment for breach of contract, conversion, and unjust enrichment. Defendants assert, among other things, that the factual issues in the State Court judgments are not identical to the facts required to prove dischargeability under § 523(a)(4) and (6); therefore, the first element of collateral estoppel cannot be satisfied and a hearing in the bankruptcy court should be scheduled. Though the parties hereto dispute whether the factual issues are identical, the parties do not dispute any other elements of collateral estoppel. The issues in the State Court, other than the fraudulent breach of fiduciary duty, were actually litigated. Furthermore, there is no dispute that the State Court judgments are final and that both parties are asserted parties to both the State Court litigation and the litigation before this bankruptcy court. Therefore, the only collateral estoppel issue that must be determined by this court at this time is whether the issues raised and determined by the State Court and the requirements to determine dischargeability under § 523(a)(4) and/or (6) are sufficiently the same.

In this case, the State Court awarded damages for breach of contract, conversion, and unjust enrichment. The claims for breach of contract and unjust enrichment as plead in the amended State Court complaint did not allege any actions by the defendants that would result in a willful and malicious injury

under § 523(a)(6) or embezzlement under § 523(a)(4). Conversion is the only claim both in the amended State Court complaint and determined by the State Court that was plead as wrongful, intentional, fraudulent, malicious, and reckless. The claim for breach of fiduciary duty also was plead this way; however, this claim was not determined by the state court and currently is pending due to the bankruptcy automatic stay. Therefore, the question now becomes whether conversion under Tennessee law automatically gives rise to a willful and malicious injury under § 523(a)(6) or embezzlement under § 523(a)(4).

Conversion is the appropriation of another's property to one's own use and benefit by the exercise of dominion over it, in defiance of the true owner's rights. *Paehler v. Union Planters Nat. Bank*, 971 S.W.2d 393 (Tenn. App. 1997)(citing *Mammoth Cave Prod. Credit Ass'n v. Olham*, 569 S.W. 2d 833, 836 (Tenn. App. 1977); see also *Barger v. Webb*, 391 S.W.2d 664, 665 (Tenn. 1965); *Wright v. Linebarger Googan Blair & Sampson, LLP*, 782 F.Supp.2d 593, 613 (W.D. Tenn. 2011); *Kinnard v. Shoney's, Inc.*, 100 F. Supp.2d 781, 797 (M.D. Tenn. 2000).

Section 523(a)(6) requires a judgment to be for an injury that is both willful and malicious. The absence of one creates a dischargeable debt.” *In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999). The statute in essence applies “tort” language when it requires an actor to intend the consequences of his act or believe that the consequences are substantially certain to result. *Id.* at 464 (citing Restatement (Second) of Torts § 8A, at 15 (1964)). Willful and malicious requires a showing beyond mere recklessly or negligently inflicted injuries. *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 61 (1998). Under § 523(a)(4), a “creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud.” *In re Bucci*, 493 F.3d 635, 644 (6th Cir. 2007)(quoting *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir.1996)).

Here, the State Court order found conversion under applicable Tennessee law; however, the court did not make additional findings as to the exact and full nature of the conversion that would give rise to a nondischargeable debt for willful and malicious injury in bankruptcy. Although the plaintiff plead that

the conversion was the result of wrongful, intentional, fraudulent, malicious, and reckless conduct, the statement of undisputed facts submitted to the State Court judge and used to determine the plaintiff's motion for partial summary judgment made no specific reference to any acts intended to actually injure the true owner or any acts that were fraudulent, malicious, and reckless. Moreover, the record indicates that the defendants believed they had a right to a portion of the monies that they held. This court additionally notes that the defendants were not represented by counsel at the hearing on the motion for summary judgment before the State Court. As the order determining the motion for partial summary judgment was based on the undisputed facts and the undisputed facts make no reference to acts that are willful and malicious or fraudulent and as the State Court order made no express finding beyond mere conversion, this court is unclear as to the nature of the acts that gave rise to the conversion and determines a genuine dispute of material fact exists as to whether the conversion was done willfully and maliciously. By virtue of *Davis v. Aetna Acceptance Co.*, 293 U.S. 329 (1934), the court notes that a willful and malicious injury does not follow as of course from every act of conversion without specific reference to the totality of the circumstances surrounding the acts in question. There may be a conversion which is innocent or technical, or unauthorized assumption of dominion without willfulness and malice. Not every tort is a willful and malicious injury as contemplated in § 523(a)(6) of the Bankruptcy Code.

Furthermore and for the same reasons, conversion does not necessarily indicate embezzlement for purposes of § 523(a)(4). Embezzlement requires the circumstances to indicate fraud. As the statement of undisputed facts submitted to the State Court judge made no reference to fraudulent acts and the State Court order made no express finding beyond mere conversion, there is a genuine dispute as to whether the acts of the defendants that lead to finding of conversion under Tennessee law are of a nature that would allow them to be nondischargeable as embezzlement under § 523(a)(4).

CONCLUSION

Considering a totality of the particular facts and circumstances and applicable law, this court denies the plaintiff's motion for summary judgment; however, the plaintiff's motion for relief from the automatic stay is granted to modify the stay so as to allow the State Court to determine the claim for

fraudulent breach of fiduciary duty.⁴ Once all the State Court matters involving these parties are finalized, a copy of the final order should be filed by the attorneys for the parties in the bankruptcy court whereupon a status conference will be scheduled.

ORDER AND NOTICE

Based on the forgoing, IT IS ORDERED AND NOTICE IS HEREBY GIVEN.

The Bankruptcy Court Clerk is directed to cause a copy of this Memorandum, Order, and Notice to be sent to the following entities:

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⁴ As noted, the plaintiff/movant's § 362(d)(1) motion for relief from the stay will be more specifically addressed in a separate order to be entered in the main case.