Dated: March 25, 2024
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
Christie Phillips Case No. 23-20571
Debtor Chapter 7

Charles Todd Hart,
Plaintiff,

v. Adv. Proc. No. 23-00054

Christie Phillips,
Defendant.

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S COMPLAINT SEEKING NONDISCHARGEABILITY OF DEBT, ORDERING DISBURSEMENT OF FUNDS AND PAYMENT OF DEFENDANT'S COSTS AND ATTORNEY'S FEES

This matter is before the Court on the Complaint [DE 1] of Charles Todd Hart, Plaintiff, to deny the dischargeability of a judgment debt pursuant to the exceptions to discharge set forth in 11 U.S.C. § 523(a)(2) and (a)(6), and the Debtor/Defendant's Response [DE 4] to the Complaint.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (I). Accordingly, the Court has both the statutory and constitutional authority to hear and determine these proceedings subject to the statutory appellate provisions of 28 U.S.C. § 158(a)(1) and Part VIII ("Bankruptcy Appeals") of the Federal Rules of Bankruptcy Procedure. This decision constitutes the Court's findings of fact and conclusions of law under FED. R. CIV. P. 52, made applicable to this contested matter by FED. R. BANKR. P. 7052. Regardless of whether or not specifically referred to in this decision, the Court has examined the submitted materials, considered statements of counsel, considered the testimony given in this matter, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the Court hereby determines that Plaintiff failed to satisfy his burden to establish that the debt falls within one of the enumerated exceptions to discharge set forth in Bankruptcy Code § 523(a), and orders Defendant to turn over to Plaintiff the remainder of the insurance funds assigned to Plaintiff pursuant to the parties' agreement, less the amount of Defendant's Court-approved costs and attorney's fees incurred in defending this adversary proceeding pursuant to Bankruptcy Code § 523(d).

DISCUSSION OF BACKGROUND FACTS AND PROCEDUAL HISTORY OF THE CASE

The facts of this case as they pertain to the issue of dischargeability are undisputed. Defendant's insured residence suffered wind damage on or about December 11, 2020, and Defendant contracted with Plaintiff Charles Todd Hart d/b/a Hart Family Construction Co. to make the needed repairs covered under her homeowner's insurance policy. In addition to the repair agreement, Defendant executed an assignment of insurance proceeds whereby she agreed to assign

the proceeds of her homeowner's insurance claim to Plaintiff as consideration for the repair work. [Hart Family Construction Company Work Authorization and Insured's Authorization to Restore Items and Bill Insurance Company, Trial Exh. 1]. The Authorization, dated December 28, 2020, states in pertinent part:

> I hereby assign the proceeds of the Insurance Policy to ("HFC") to pay for their [sic] work pursuant to this Work Authorization, and I authorize my Insurance Company to pay ("HFC") directly from the proceeds under the Insurance Policy for all sums due to ("HFC"), under this Work Authorization. In consideration of the assignment of the Insurance Policy needs [sic], Owner will not be required to deposit an amount equal to the estimate amount due under this Work Authorization with ("HFC"). I intend that the Insurance Company will pay ("HFC") directly, but in the event that my name is included on the payment, I give ("HFC") the right to endorse the check for me, if I am unavailable. The ACV (actual cash value) payment from the insurance policy for repairs is due at the start of the project. ("HFC") will collect the recoverable depreciation and the deductible upon completion of the project. The Owner/Insured agrees to pay ("HFC") for any and all additional work outside of the insurance approved scope of work. Delivery of the invoice for services rendered by ("HFC") under this Work Authorization will serve as notice to the Insurance Company to authorize payment from the proceeds of the Insurance Policy of the Insurance Company directly to ("HFC"). Owner/Insured is responsible for payment under the Work Authorization. If the Insurance Company does not pay ("HFC") directly, the Owner/Insured hereby agrees that payment is due within 7 business days. I will pay for any work not covered by the Insurance Company and the order will be placed on (COD) cash on delivery basis. I agree to tender payment upon delivery. . . .

[Trial Exh. 1] As contemplated under the Work Authorization, the parties contracted for additional work amounting to $8,290 that would not be included in Defendant's insurance claim. Plaintiff submitted an initial repair estimate of $48,600.18 to the Defendant's insurance carrier, which was approved. The insurance company then sent a check to Defendant in the amount of $46,600.18, representing the amount approved for the necessary repairs less the Defendant's $2,000 deductible. [Trial Exh. 5 & 11] The check was made payable to Defendant Christie Phillips, mortgagee The

Bank of Fayette County, and Plaintiff Hart Family Construction Co. [Trial Exh. 11] Despite the Plaintiff's allegations in the Complaint that "Defendant kept the entire insurance proceeds and refused to pay the Plaintiff any monies," [DE 1, pp. 2,3] the evidence showed that during the course of the repair work, Defendant presented Plaintiff with two draws on the insurance proceeds, as requested by Plaintiff, in the form of a cashier's check dated January 22, 2021 in the amount of $23,300.09 [Trial Exh. 2], and a cashier's check dated January 29, 2021 in the amount of $15,000. [Trial Exh. 3]. Plaintiff testified that at some point during the repair work, he supplemented his initial estimate and requested additional funds from the insurance company, raising the total estimate for the job to $62,316.49. [Trial Exh. 4, pp.4, 7] Plaintiff sent an invoice to Defendant dated April 19, 2021, reflecting the additional fees and showing the remaining balance owed as $27,724.16. [Trial Exh. 6] It is unclear whether the additional amounts were ultimately approved by the insurance adjuster, and there was no evidence presented as to the issuance of a second check for the additional insurance proceeds requested by Plaintiff.

The parties testified that relations began to break down and that Defendant disputed the workmanship and completeness of the work. Although Plaintiff admitted that some damage had occurred to the premises during the work that he was willing to repair, the contracted work was complete. Defendant refused to pay Plaintiff the remaining $8,300.09 from the insurance proceeds, but testified that she has the funds on hand, less approximately $1,000 that she paid another contractor to complete the work. This leaves approximately $7,300 from the insurance proceeds in Defendant's possession, still to be disbursed.

Plaintiff filed a suit in state court on October 5, 2021 on a Complaint on Sworn Account and/or Breach of Contract. [Trial Exh. 10] The Complaint sought a judgment against Defendant in the amount of $27,724.16, plus interest, attorney's fees and costs. Defendant failed to Answer or

otherwise plead, and failed to respond to Plaintiff's First Request for Admissions. [Trial Exh. 7] Plaintiff's Motion for Default Judgment was granted [see Order Granting the Plaintiff's Renewed (Second) Motion for Default Judgment, Trial Exh. 8] and an Order of Final Judgment against Defendant was then accordingly entered December 14, 2022 for $41,478.50.[1] [Trial Exh. 9] Neither the Complaint nor the Judgment contained allegations nor findings of fraud.

Defendant commenced her Chapter 7 bankruptcy case on February 3, 2023, and Plaintiff commenced this adversary proceeding on May 10, 2023. The adversary Complaint alleges that the judgment debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and/or (B), and (a)(6), as it is alleged to be a debt incurred for services obtained by Defendant's falsehood or actual fraud, use of a statement in writing that is materially false regarding Defendant's financial condition, or constitutes willful and malicious injury to another. [See DE 1, pp. 3-4] Defendant's Answer denies the allegations of fraud and contends that "Debtor did not commit fraud and did not make false representations." [DE 4, p.5] A trial was held on January 25, 2024, and the Court heard testimony from both parties. After the trial, Defendant amended her bankruptcy schedules to reflect the $7,300 cash that remains from the insurance proceeds, and the Court asked the Chapter 7 trustee to advise the Court of the trustee's position regarding the cash asset now listed on Schedule A/B of the Defendant's bankruptcy petition. [Bankruptcy Case 23-20571 DE 30, 31] Subsequently, the Chapter 7 trustee has formally abandoned such property. [Bankruptcy Case 23-20571 DE 33]
It is against this factual and procedural backdrop that the Court makes its determination.

[1] The Rooker-Feldman Doctrine precludes this Court's review of the state court judgment.

LAW AND ANALYSIS

The few exceptions to discharge of individual debts in bankruptcy are enumerated in Bankruptcy Code § 523(a). Plaintiff bases his Complaint on § 523(a)(2)(A) and (B), and (a)(6), which provide, in pertinent part, as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –
> (2) for money, property [or] services . . . to the extent obtained by –
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtors or an insider's financial condition;
> (B) use of a statement in writing –
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, [or] services . . . reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive.
> . . .
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(2)(A), (B), and (a)(6). The Court notes that the creditor, the Plaintiff in this case, bears the burden of proving by a preponderance of the evidence that the debt is excepted from discharge under § 523(a) of the Bankruptcy Code, and that exceptions to discharge are narrowly construed in favor of the debtor in order to promote the central purpose of the bankruptcy discharge, which is to provide relief to the "honest but unfortunate debtor." *Meyers v. Internal Revenue Serv. (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999), citing *Grogan v. Garner*, 498 U.S. 279, 286-87, 290-91 (1991).

The Court first examines Plaintiff's allegations of falsehoods and actual fraud under § 523(a)(2)(A). It is well established that:

> Under § 523(a)(2)(A), a mere promise to pay a debt does not render the debt nondischargeable; to hold otherwise would severely undercut the bankruptcy discharge. Instead, § 523(a)(2)(A) requires fraudulent conduct, which at its core means that, *at the time the debt*

> *is incurred*, the debtor did not have the intention of repaying the debt.

Rust v. Tellam (In re Tellam), 323 B.R. 661, 664 (Bankr. N.D. Ohio 2005) (emphasis added; internal citation omitted). The *Tellam* Court went on to state:

> [A] broken promise to repay a debt, without more, will not sustain a cause of action under § 523(a)(2)(A). Instead, central to the concept of fraud is the existence of scienter which, for purposes of § 523(a)(2)(A), requires that it be shown that at the time the debt was incurred, there existed no intent on the part of the debtor to repay the obligation. . . . [The] test asks whether the debtor, having present knowledge as to the falsity of the representations, acted with the present intent to deceive the creditor.

Id., quoting *EDM Machine Sales v. Harrison (In re Harrison)*, 301 B.R. 849, 854 (Bankr. N.D. Ohio 2003). The Court finds that, based on the evidence presented, Defendant lacked the requisite scienter at the time she procured Plaintiff's services and signed the assignment of insurance proceeds, and the resulting debt was incurred. To the contrary - and despite Plaintiff's allegations in his Complaint that he received no payment from the insurance proceeds - Defendant tendered upon Plaintiff's requests two cashier's checks totaling $38,300.09 for work satisfactorily completed as the project progressed. There is no evidence that Defendant procured the services of Plaintiff with no intention of paying for the work or with an intent to deceive, manipulate or defraud.[2] Defendant testified that she is still holding the remaining insurance proceeds, seemingly unsure how to disburse the funds in light of her dissatisfaction with and dispute about the completion of Plaintiff's work on her home. For these reasons the Court finds that Plaintiff has failed to establish by a preponderance of the evidence that the debt should be excepted from discharge under Bankruptcy Code § 523(a)(2)(A).

[2] It is well settled within this Circuit that the debtor's intent to deceive the creditor is a necessary element for excepting a debt from discharge under § 523(a)(2)(A). *See Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998) (citing *Longo v. McLaren (In re McLaren),* 3 F.3d 958, 961 (6th Cir. 1993)).

Although Plaintiff has not specifically alleged Defendant's conversion of the insurance proceeds, the Court notes that, for the sake of argument, even if Defendant's conduct constitutes conversion under Tennessee law, in order for the debt to be nondischargeable, the Bankruptcy Court "must make the additional finding that the conversion occurred in such a manner as to render it nondischargeable under § 523(a)(2). . . . " *See E & S USA, Inc. d.b.a K & F Beauty Supply v. Garaga (In re Garada)*, No. 13-30214, Adv. Proc. No. 13-00442 at p. 8 (Bankr. W.D. Tenn. Jan. 16, 2014). The Court makes no such finding.

As to Plaintiff's allegations based on Bankruptcy Code § 523(a)(2)(B), the Court finds this exception to discharge inapplicable to the facts of this case. There is no evidence that Defendant presented a materially false statement in writing to Plaintiff regarding her financial condition, or that Defendant presented any such statement with the intent to deceive.

The Court next examines the facts of this case under the "willful and malicious injury" exception to discharge as prescribed in Bankruptcy Code § 523(a)(6), set forth above. It is long established in this Circuit that, for a debt to be nondischargeable under § 523(a)(6), the injury alleged must be both willful and malicious. *Markowitz v. Campbell (In re Markowitz),* 190 F.3d 455, 463 (6th Cir. 1999). "The absence of one creates a dischargeable debt." *Id.*

> "Willful" conduct, for purposes of § 523(a)(6), requires actual intent to cause injury, not merely a deliberate or intentional act that leads to injury. The Sixth Circuit utilizes only a subjective standard [to measure intent], asking whether the debtor himself was motivated by a desire to inflict injury. The debtor must desire to cause the consequences of his act, or believe that the consequences are substantially certain to result from it. "Malicious" means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm.

Scism v. Wise (In re Wise), No. 2:19-bk-51715-RRM, No. 2:22-ap-05005-RRM, 2023 WL 6396020 at *8 (Bankr. E.D. Tenn. Sept. 29, 2023) (slip op.) (internal citations and quotations

omitted) (citing *MarketGraphics Research Grp., Inc, v. Berge (In re Berge)*, 953 F.3d 907, 916 (6th Cir. 2020), *In re Markowitz* at 464, and *Wheeler v. Laudani,* 783 F.2d 610, 615 (6th Cir. 1986)). As in this case, the *Wise* Court was faced with a debtor's breach of contract and reasoned:

> [A] party may intentionally breach a contract with the knowledge that an injury may result, but the nature of the injury is in large part foreseeable and assumed as a part of the risk of doing business. The injury is real, but it is not 'malicious' in the sense that it deserves exception from discharge under the Bankruptcy Code. . . . Mr. Wise did act "intentionally" in ceasing to make any more payments on the loan. . . . However, an intentional or deliberate act alone does not constitute willful and malicious conduct under § 523(a)(6).

Id. at *9 (internal quotations and citations omitted). The *Wise* Court went on to elaborate that

> [t]he Sixth Circuit Court of Appeals in a 2004 unpublished, non-precedential decision stated that "[c]onsistent with *Geiger*, we have held that a breach of contract cannot constitute the willful and malicious injury required to trigger § 523(a)(6)." *Steier v. Best (In re Best)*, 109 F. App'x 1, 8 (6th Cir. 2004) (citing *Salem Bend Condo. Assn. v. Bullock-Williams (In re Bullock-Williams),* 220 B.R. 345, 347 (B.A.P. 6th Cir. 1998)). . . . The circuit court explained why the debtors' conduct in breaching the contract was not a "willful and malicious injury by the debtor." [T]he injury must invade the creditor's legal rights. Section 523(a)(6)'s term "willful" . . . means a deliberate or intentional invasion of the legal rights of another, because the word 'injury' usually connotes legal injury (*injuria*) in the technical sense, not simply harm to a person. *In re Geiger,* 113 F.3d 848, 852 (8th Cir. 1997), *aff'd*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998); accord *In re McKnew*, 270 B.R. 593, 640 (Bankr. E.D. Va. 2001); *In re Russell*, 262 B.R. 449, 454 (Bankr. N.D. Ind. 2001). The conduct "must be more culpable than that which is in reckless disregard of a creditors' economic interests and expectancies, as distinguished from legal rights. Moreover, knowledge that legal rights are being violated is insufficient to establish malice." *In re Mulder,* 306 B.R. 265, 270 (Bankr. N.D. Iowa 2004) (citation omitted).

Id. This Court hereby adopts this reasoning and finds that Defendant's breach of the parties' contract, if any, by her failure to remit a final, disputed payment, fails to establish a "willful and malicious injury" as contemplated for exception of the debt from discharge pursuant to § 523(a)(6).

At the trial, Plaintiff and his attorney repeatedly emphasized the fact that the Defendant failed to turn over the insurance check as contemplated by the Defendant's assignment of the insurance proceeds in the Work Authorization [Trial Exh. 1]. Plaintiff's counsel offered a copy of the front of the check into evidence. [Trail Exh. 11] As the Court has noted, the check was made payable to Defendant Christie Phillips, Mortgagee The Bank of Fayette County, and Plaintiff Hart Family Construction Co. Plaintiff did not proffer a copy of the back of the check, but the Court must assume that Plaintiff endorsed the check and handed it over to Defendant, as standard banking practices and commercial paper procedures require all payees to endorse a check before it can be negotiated. Plaintiff has alleged no forgery nor fraud regarding his endorsement of the insurance check. Based on the foregoing analysis, the Court finds that Plaintiff has failed to establish that the judgment debt is nondischargeable under Bankruptcy Code § 523(a)(6).

Further, Bankruptcy Code § 523(d) provides:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d). The facts of this case establish, at most, a breach of contract action, and the Court accordingly finds that Defendant is entitled to recover her costs and attorney's fees as set forth in § 523(d).

The Court further finds that, based on the provisions of the Defendant's assignment of the insurance proceeds to Plaintiff, and the Defendant's testimony that she is holding the funds in trust, Defendant shall disburse to Plaintiff the remaining insurance proceeds of $7,300 less any amount awarded to Defendant for costs and attorney's fees pursuant to Bankruptcy Code § 523(d).

Defendant's attorney is hereby ordered to submit for the Court's approval his affidavit itemizing Defendant's attorney fees, expenses and costs incurred in defending this adversary proceeding as it pertains to the allegations based on 11 U.S.C. §523(a)(2).

CONCLUSION

Based on the facts presented, the Court finds that Plaintiff's Complaint seeking to except the judgment debt from discharge pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), and (a)(6) is denied. Pursuant to the parties' agreement assigning the insurance proceeds to Plaintiff, Defendant is ordered to disburse the remaining $7,300 proceeds in her possession to Plaintiff, less any attorney's fees and costs awarded to Defendant pursuant to 11 U.S.C. § 523(d).

The Bankruptcy Court Clerk shall serve a copy of this Opinion and Order on the following interested parties:

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