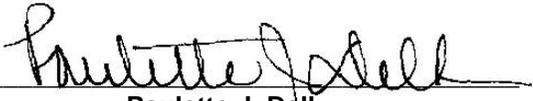




Dated: December 03, 2012
The following is SO ORDERED:


Paulette J. Delk
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

BENJAMIN DAVID GILLILAND

Debtor.

Case No. 12-22873 PJD
Chapter 7

PHYLLIS PIKE

Plaintiff,

V.

Adv. Proc. No. 12-00334

BENJAMIN DAVID GILLILAND

Defendant..

MEMORANDUM OPINION AND ORDER

The matter before the court arises out of the competing summary judgment motions of Phyllis Pike (“Pike”) and Benjamin David Gilliland (“Debtor”) relative to Pike’s adversary complaint (“Complaint”) against the Debtor, which seeks a determination that a certain judgment

debt (“Debt”) is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and/or (B) and (a)(6). Having considered all pleadings submitted by the parties, statements of counsel from the hearing on September 25, 2012, and the record as a whole, the court rules as follows:

By virtue of 28 U.S.C. § 157(b)(2)(A) and (I) this is a core proceeding. The court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(a), and venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Relevant facts may be summarized as follows: On or about October 6, 2008, Pike contracted with Debtor to provide improvements and repairs to Pike’s residence. After Debtor had begun to provide the services, Pike became dissatisfied with the services rendered, and Pike refused to pay what Debtor determined was owed him based on the services rendered. On May 27, 2009, Debtor filed a complaint against Pike in state court for \$2,852.66 based on several theories including breach of contract. Pike answered the complaint, and filed a counter-complaint in which she sought \$100,000.00 in actual damages and \$500,000.00 in punitive damages based on multiple theories including breach of contract/warranty, fraud and/or misrepresentation, violation of the Tennessee Consumer Protection Act, quiet title and/or declaration of mechanic’s and materialman’s lien as null and void. On March 18, 2011, after a two day trial, the state court entered a final judgment in which it dismissed Debtor’s complaint, and granted judgment in favor of Pike in the amount of \$60,000.00 including attorney’s fees for a violation of the Tennessee Consumer Protection Act. A subsequent order of July 20, 2011 granted an additional \$3,810.90 in discretionary costs to Pike.

Debtor filed this Chapter 7 case on March 15, 2012. Pike filed the dischargeability Complaint on May 7, 2012, and Debtor filed an Answer on May 30, 2012. On August 24, 2012, Pike filed a Motion for Summary Judgment and Motion for Judgment on the Pleadings. On August 27,

2012 Debtor filed a Motion for Summary Judgment and/or Motion to Dismiss for Failure to State a Claim, along with a Memorandum in Support of Debtor's Motion for Summary Judgment and Alternatively Response in Opposition to Plaintiff's Motion for Summary Judgment. Pike's Motion for Summary Judgment relies on the effect of the state court judgment under the doctrine of collateral estoppel. Pike argues that the state court judgment established that the Debt is excepted from discharge under 11 U.S.C. § 523(a)(2)(A) and/or (B) and (a)(6). In the motions for summary judgment before the court, both parties concede that no genuine issue of material fact exists and this court finds none. Therefore, the determinative issue is whether the Debt created by the state court order meets the requirements under 11 U.S.C. § 523(a)(2)(A) or (B) or § 523(a)(6) to be held a nondischargeable debt.

A motion for summary judgment requires the court to view the evidence in the light most favorable to the debtor.¹ Only if the court determines that there is no genuine issue as to any material fact, **and** based on those undisputed facts, the court finds that the movant is entitled to judgment under the applicable law, may the court grant summary judgment. *Highland Capital, Inc. v. Franklin Nat. Bank*, 350 F.3d 558, 564 (6th Cir. 2003). The burden of proving that there is no genuine issue of material fact **and** that the law entitles the movant to judgment falls on the movant. *See In re Crownover*, 417 B.R.45, (Bankr. E.D. Tenn. 2009).

Pike has submitted the state court judgment as evidence that the debt is excepted from discharge under either 11 U.S.C. § 523(a)(2)(A) or (B) or § 523(a)(6), and as support for her view that the doctrine of collateral estoppel bars this court from relitigating the issues in a dischargeability

¹ Under Rule 9014(c) of the FED. R. BANKR. P., Rule 56 of the FED. R. CIV. P. is made applicable in bankruptcy cases through Rule 7056 of the FED. R. BANKR. P.

determination. In the state court counter-complaint filed by Pike, which resulted in a two day trial, Pike raised and litigated several issues regarding Debtor's actions including those based on "fraud and/or misrepresentation," and those based on "intentional, willful, malicious and/or reckless" conduct.²

"Collateral estoppel...refers to the effect a prior judgment has in foreclosing a party from relitigating issues of fact that were determined in a prior court proceeding." Hon. Nancy C. Dreher & Hon. Joan N. Feeney, *Bankruptcy Law Manual*, § 2:29 (5th ed. 2011). The Supreme Court, in *Grogan v. Garner*, determined that collateral estoppel principles apply to dischargeability proceedings. 498 U.S. 279 (1991). These principles may apply to either party. "Often collateral estoppel is applied offensively against a debtor to preclude the debtor from relitigating facts that were previously determined elsewhere. However, the debtor may also defensively preclude issues from being litigated. The creditor is bound by the issue of issue preclusion just as the debtor would be." *Bankruptcy Law Manual*, § 2:29.

Plaintiff's collateral estoppel argument hinges on the findings of the state court. The March 18, 2011 Order of Final Judgment, which Pike attached to her Complaint, states, in relevant part, as follows:

2. That the Defendant's counter-complaint shall be granted and the Defendant/Counter-Plaintiff, Phyllis Pike, shall be granted a total judgment against the Plaintiff/Counter-Defendant, Ben David Gilliland d/b/a Point of View Design in the amount of \$60,000 which is inclusive of an award of attorney fees for violations of the Tennessee Consumer Protection Act.

Chancery Court Order of Final Judgment, No. 09-1119-1, p.1. (March 18, 2011).

² See Pike's Answer to Complaint and Counter-Complaint for Rescission, Damages, and Injunctive Relief and Petition to Quiet Title and To Declare Mechanic's and Materialman's Lien Null and Void filed in Chancery Court No. 09-1119-1.

The transcript of the trial, which Debtor has attached to his Memorandum as Exhibits B-1, B-2 and B-3, provides more information on the court's findings. The transcript is particularly helpful in determining whether the Debt falls within a discharge exception relied upon by Pike in her Motion for Summary Judgment. Pike relies upon the discharge exception for debts arising from "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; use of a statement in writing—that is materially false; respecting the debtor's or an insider's financial condition; on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and that the debtor caused to be made or published with intent to deceive;" 11 U.S.C. § 523(a)(2)(A) and (B). In the alternative, Pike relies on the discharge exception "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). Relevant portions of the trial transcript reveal that the trial judge, Chancellor Walter Evans, found as follows:

...I'm not so sure that Mr. Gilliland represented to her [Pike] at the time of their discussions or negotiations that he was a licensed contractor. ...

* * *

...but it sounds like to the Court that Ms. Pike assumed that he was licensed, more so than Mr. Gilliland representing that he was licensed to do the particular work. ...

* * *

So, the Consumer Protection Act would be applicable, and the Court finds that the fact that Mr. Gilliland wasn't a licensed contractor to do the work he contracted, did, in fact, violate the Consumer Protection Act. But the Court does not find that his execution of the agreement was with any intent to defraud. The Court is of the opinion that it borders more on—what I think Mr. Snider characterizes as—negligence misrepresentation.

* * *

...So what the Court has done is just looked at the total picture here and considering any and all credits, any and all setoffs that should have been made, considering the violation of the Consumer Protection Act where Ms. Pike would have been entitled to recover for damages, attorney fees, or whatever that she would be entitled to, the Court is of the opinion that a judgment should be rendered in favor of Ms. Pike for a total sum of \$60,000, which would include any and all claims, setoffs, and otherwise that exist between both of the parties. ...

Trial Transcript pp 324-325, 327-328.

Pike's argument regarding 11 U.S.C. § 523(a)(2)(A) and the violation of the Tennessee Consumer Protection Act was made by the plaintiffs in *In re Allen*, 2011 WL 1048241 (Bankr. E.D. Tenn.), The court in *In re Allen* discussed this argument, and relevant portions of that discussion are set out below:

Under Tennessee state law, acting as a general contractor without a valid license is “construed to constitute an unfair or deceptive act or practice affecting the conduct of trade or commerce under the Tennessee Consumer Protection Act of 1977.” Tenn. Code Ann. § 62-6-136(b). The plaintiffs argue that because the debtor's unlicensed activity as a contractor constitutes a deceptive act under state law, it is also a *per se* fraudulent misrepresentation under the Bankruptcy Code.

The plaintiffs' argument is not supported by case law. Section 523(a)(2) “requires a showing of actual or positive fraud, not merely fraud implied by law.” *In re Rembert*, 141 F.3d at 281 (quoting *Anastas v. Am. Savings Bank (In re Anastas)*, 94 F.3d 1280, 1286 (9th Cir. 1996).... In contrast, deceptive acts under the Tennessee Consumer Protection Act are not necessarily knowing or intentional; negligent misrepresentations also qualify. *Fayne v. Vincent*, 301 SW.3d 162, 177 (Tenn. 2009).

Id. at 4.

As discussed in *Allen*, case law does not support a finding of dischargeability under § 523(a)(2)(A) for a *per se* violation of the Tennessee Consumer Protection Act. Like the

plaintiffs in Allen, Pike cannot prevail on her § 523(a)(2)(A) claim.

Pike's argument that the judgment Debt is nondischargeable under 11 U.S.C. § 523(a)(2)(B) has no merit at all. No where does Pike show evidence of a written statement respecting Debtor's or an insider's financial condition on which Pike reasonably, or unreasonably, relied. It is clear that neither the counter-complaint nor the judgment addresses this issue.

Pike also relies on 11 U.S.C. § 523(a)(6). In order to prove willful and malicious injury under that subsection, the creditor must prove that the Debtor **intentionally** committed the acts leading to the creditor's injury, **and** that the Debtor **intended** those acts to cause injury to the creditor. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). The transcript of the trial is clear that, although Pike characterized Debtor's actions as willful and malicious in the counter-complaint in relation to her argument that she should be entitled to punitive damages, the court did not award punitive damages and did not find that Debtor intentionally acted nor that he intended his actions to cause injury to Pike.

Debtor has argued in his Motion for Summary Judgment that the issues of fraud, misrepresentation, and willful and malicious actions and injury were raised and litigated in the state court, and the state court found only a *per se* violation of the Tennessee Consumer Protection Act, which is insufficient for a finding of nondischargeability. The court agrees with Debtor that a *per se* violation of the Tennessee Consumer Protection Act is insufficient for a finding of nondischargeability under 11 U.S.C. § 523(a)(2)(A) or (B) or § 523(a)(6). Further, the state court found no intent to defraud. Thus, Debtor has met his burden of proving that the applicable law entitles him to judgment.

In light of the foregoing, the court: (1) finds that Pike has not met her burden of proving that

the issues necessary to a finding of nondischargeability were determined in the state court, and that Pike is not entitled to judgment as a matter of law; (2) denies Pike's motion for summary judgment;³ (3) denies Pike's motion for judgment on the pleadings and (4) grants summary judgment in favor of Debtor with regard to Pike's entire Complaint. For the foregoing reasons, the Debt must be and is hereby discharged.

IT IS SO ORDERED.

Cc: Debtor
Attorney for Debtor
Plaintiff
Attorney for Plaintiff
Case Trustee
U.S. Trustee

³ In her Complaint, Pike sought attorneys' fees pursuant to 11 U.S.C. § 523(d). But even if Pike had been successful in her Complaint, she would not have been entitled to "a reasonable attorney's fee" as provided in § 523(d), because "a reasonable attorney's fee" under that provision is only awarded to the **debtor** "if a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2)" and the creditor is unsuccessful. In this case, the Debt is not a "consumer debt" as that term is defined at 11 U.S.C § 101(8), since the Debt was incurred by Debtor in connection with his business and not "primarily for a personal, family, or household purpose."