

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

WILLIAM CARL THOMPSON,

Debtor.

No. 01-20180
Chapter 7

LISA BUCK and husband,
DAVID BUCK,

Plaintiffs,

vs.

WILLIAM CARL THOMPSON,

Defendant.

Adv. Pro. No. 01-2020

M E M O R A N D U M

APPEARANCES :

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This 11 U.S.C. § 523(a)(6) action is before the court upon the motion of plaintiff Lisa Buck¹ for summary judgment based upon the doctrine of collateral estoppel. For the reasons addressed below, the motion will be granted. This is a core proceeding. See 28 U.S.C. § 157 (b)(2)(I).

I.

The debtor William Carl Thompson filed for bankruptcy relief under chapter 7 on January 19, 2001, and the plaintiffs Lisa and David Buck commenced this adversary proceeding on April 13, 2001. In a joint pretrial statement filed December 2, 2002, the parties stipulated that the debtor and Mrs. Buck are uncle and niece and that on May 7, 1997, "the debtor was charged with 'simple assault' on the person of his niece, Lisa Buck." After a trial in the Jefferson County, Tennessee Criminal Court, a jury found the debtor guilty of assault under TENN. CODE ANN. § 39-13-101. The plaintiffs filed a civil action against the debtor, and on April 29, 1999, a default judgment was entered against

¹Inexplicably, the motion for summary judgment is filed only by plaintiff Lisa Buck and the motion does not even list Mr. Buck in the caption as a plaintiff. Nonetheless, Mr. Buck remains a party to this proceeding as no action has been taken to dismiss him from this matter.

the debtor in favor of Lisa Buck² in the sum of \$14,449 for medical expenses and \$15,000 for pain and suffering. After the debtor filed a motion for a new trial, an agreed order was entered on February 27, 2002, which reduced the judgment to \$11,674.88 for medical expenses and \$12,000 for pain and suffering.

As set forth in the parties' joint pretrial statement, plaintiff Lisa Buck contends that she "received a willful and malicious injury by an assault of the debtor" and that her judgment against the debtor is nondischargeable under § 523(a)(6) of the Bankruptcy Code. She also asserts that the debtor's criminal conviction "is res judicata to establish certain elements of a willful and malicious injury, specifically that the injuries inflicted upon the plaintiff were both wrongful and without just cause or excuse." "Plaintiff further contends that the Agreed Order entered in the state court civil suit is res judicata as to damages and amount of the debt." In response, the debtor denies that his conviction under TENN. CODE ANN. § 30-13-101 "amount[s] to a willful and malicious injury per se" and that the facts establish a willful and malicious injury.

Presently before the court is plaintiff Lisa Buck's motion

²The court is puzzled as to why the default judgment order granted only Mrs. Buck a judgment. Apparently, Mr. Buck abandoned his loss of consortium claim.

for summary judgment filed December 19, 2002, and the debtor's response in opposition thereto. The parties have attached to their briefs copies of the criminal judgment entered against the debtor in the criminal action and the documents in the state court civil action consisting of the complaint, the Judgment By Default, the debtor's Motion For New Trial, and the February 27, 2002 Agreed Order.³

II.

In *Brown v. Felsen*, 442 U.S. 127 (1979), the United States Supreme Court held that the doctrine of res judicata does not apply to dischargeability proceedings in bankruptcy. The court expressly left open the question of whether issues resolved by a state court should be given collateral estoppel effect in bankruptcy dischargeability proceedings, but subsequently answered this question in the affirmative in *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991). See *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 318 (6th Cir. 1997). "The doctrine of collateral estoppel 'precludes relitigation of

³None of these documents are original, certified copies nor have they been properly submitted by affidavit. Nonetheless, because there has been no objection to the court's consideration of the documents, any inadequacy as to their authenticity is deemed waived. See, e.g., 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE 2722 n.38 (2d ed. 1983) and cases cited therein.

issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment even if decided as part of a different claim or cause of action.'" *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6th Cir. 1999)(citing, *inter alia*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 n.23 (1979)("[T]he whole premise of collateral estoppel is that once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed.")).

As directed by the Sixth Circuit Court of Appeals, collateral estoppel applies when "(1) the law of collateral estoppel in the state in which the issue was litigated would preclude relitigation of such issue, and (2) the issue was fully and fairly litigated in state court." *In re Markowitz*, 190 F.3d at 461. In Tennessee, "collateral estoppel bars relitigation of an issue if it was raised in an earlier case between the same parties, actually litigated, and necessary to the judgment of the earlier case." *Rally Hill Productions, Inc. v. Bursack (In re Bursack)*, 65 F.3d 51, 54 (6th Cir. 1995) (citing *Massengill v. Scott*, 738 S.W.2d 629, 632 (Tenn. 1987)). Accordingly, the court will examine the issues in this § 523(a)(6) action and compare them with the issues raised in the state criminal and civil proceedings. If the issues are identical, were actually

litigated, and necessary to the judgments in the state court actions, "then collateral estoppel would bar relitigation of those issues in the bankruptcy court." *First Nat'l Bank of Centerville, Tenn. v. Sansom*, 142 F.3d 433, *2 (6th Cir. Feb. 2, 1998).

11 U.S.C. § 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." With respect to the willful requirement, the Supreme Court held in *Kawaauhau v. Geiger* that because the word "willful" in § 523(a)(6) modifies the word "injury," "nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." See *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). "Negligent or reckless acts ... do not suffice." *Id.* at 64. The court observed that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts" because "[i]ntentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'" *Id.* at 61-62. The Sixth Circuit has interpreted *Geiger* to mean "that unless 'the actor desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it,' ... he has not committed a 'willful and malicious injury' as

defined under § 523(a)(6).” *In re Markowitz*, 190 F.3d at 464. The second component of § 523(a)(6), that the injury be malicious in addition to willful, “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.” *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986).

TENN. CODE ANN. § 39-13-101, entitled “Assault,” provides:

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

(b) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor.⁴

The criminal judgment entered against the debtor indicates that he was indicted for “Assault (bodily injury),” a Class A misdemeanor but that he was convicted of “Assault (physical contact)” under TENN. CODE ANN. § 39-13-101, a Class B misdemeanor.⁵

⁴TENN. CODE ANN. § 39-13-101 was amended in 2002, but the quoted version is the one in effect at the time of the debtor’s criminal conviction.

⁵In their joint pretrial statement, the parties submitted as a statement of uncontested fact that “[t]he debtor ... was found guilty by a jury of a misdemeanor, “Assault (bodily injury),” a
(continued...)

From this information, the court assumes that the debtor was convicted of subdivision (a)(3) of TENN. CODE ANN. § 39-13-101, the only Class B misdemeanor in this section, which as quoted above, defines "assault" as "[i]ntentionally or knowingly caus[ing] physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative."

Unmistakably, TENN. CODE ANN. § 39-13-101(a)(3) supplies the willful element of § 523(a)(6) which requires a deliberate or intentional injury, in that the debtor was convicted of "intentionally or knowingly" causing injury, i.e., extremely offensive or provocative physical contact. On the other hand, § 39-13-101(a)(3) fails to satisfy § 523(a)(6)'s malice requirement. There is nothing in the language of the statute, and the court has been unable to find any authority so stating, that a conviction for assault as defined by this provision necessarily includes a determination that the actions were "in conscious disregard of one's duties or without just cause or excuse," the Sixth Circuit's definition of malice for purposes of § 523(a)(6). *Cf. Mitchell v. Mitchell (In re Mitchell)*, 256 B.R. 256, 259 (Bankr. N.D. Ohio 2000)(debtor's guilty plea to

⁵(...continued)
violation of T.C.A 39-13-101." Because the copy of the judgment indicates that the debtor was convicted of "Assault (physical contact)," the parties' stipulation in this regard will be disregarded.

aggravated assault does not satisfy malice component of § 523(a)(6) because malice is not an element of the criminal offense). Accordingly, plaintiff Lisa Buck's motion for summary judgment will be denied to the extent that it is based on the issue preclusive effect of the debtor's criminal conviction. See *In re Markowitz*, 190 F.3d at 463 ("From the plain language of the statute, the [debt] must be for an injury that is both willful and malicious. The absence of one creates a dischargeable debt.").

The court will next examine the preclusive effect of the civil judgment held by plaintiff Lisa Buck against the debtor. In the state court complaint filed by the plaintiffs, the following allegations are made:

III⁶

On or about May 5, 1997 plaintiffs were at a home located in White Pine, Tennessee for a family meeting regarding the welfare of plaintiff, Lisa Buck's grandparents. Defendant became irrate [sic] during this meeting and physical [sic] attacked and assaulted plaintiff, Lisa Buck, causing injuries for which she sought medical treatment at great expense.

IV

Plaintiffs aver that the defendant did willfully and wantonly assault and batter the plaintiff, Lisa Buck both verbally and physically with the intention

⁶The first two paragraphs of the complaint simply identified the parties and listed their addresses.

of inflicting serious physical harm and injury. Plaintiffs further aver that such attack was without any warning, reason or provocation.

V

The plaintiffs would further aver and show unto the Court that they have suffered damages as a direct and proximate cause of negligent acts and intentional torts of the defendant

These allegations show that the plaintiffs raised in their state court civil action both the willfulness and maliciousness of the injuries sustained by Mrs. Buck. The assertion that the debtor "willfully" assaulted Lisa Buck with "the intention of inflicting serious physical harm and injury" is a contention that the debtor intended the consequences of his act and thus meets § 523(a)(6)'s "willful" requirement. See *Geiger*, 523 U.S. at 61 ("nondischargeability takes a deliberate or intentional injury"); *In re Markowitz*, 190 F.3d at 464 (actor must desire to cause consequences of his act or believe that the consequences are substantially certain to result from it).

Furthermore, the complaint's allegation that the attack was "without any warning, reason or provocation" satisfies the malice element of § 523(a)(6). See *Wheeler*, 783 F.2d at 615 (malice "means in conscious disregard of one's duties or without just cause or excuse"). In *In re Moffitt*, the bankruptcy court held that a jury's finding that the debtor's actions were "with

conscious disregard" was virtually identical to the definition of malice under § 523(a)(6). See *Gonzalez v. Moffitt (In re Moffitt)*, 254 B.R. 389, 396 (Bankr. N.D. Ohio 2000), *aff'd*, 252 B.R. 916 (B.A.P. 6th Cir. 2000). In *In re Abbo*, the issue before the Sixth Circuit was whether a state court jury's finding that the debtor's actions were malicious precluded further consideration of the issue in the debtor's § 523(a)(6) dischargeability action. *Abbo v. Rossi, McCreery & Assocs., Inc. (In re Abbo)*, 168 F.3d 930, 931 (6th Cir. 1999). The court answered the question in the affirmative, observing that the jury instructions defined "malice" as an "'attitude or state of mind that makes a person knowingly do an act for an improper or wrongful purpose,' including the 'wrongful act intentionally done and without probable cause.'" *Id.* The *Abbo* court also concluded that a separate abuse of process judgment was entitled to preclusive effect under § 523(a)(6) where the jury instructions required proof that the debtor "'used the legal process for an ulterior purpose' and that he 'intentionally' and properly filed charges against the plaintiff to 'annoy and aggravate' him, causing direct injury to the plaintiff." *Id.* at 932. This court does not find these instructions to be significantly different from the "without any warning, reason or provocation" allegation in the present case.

In summary, the willfulness and maliciousness of the injury sustained by Mrs. Buck were raised in the state court civil action. In addition, these issues were "necessary to the judgment" entered in that case because the sole basis of the lawsuit was the debtor's assault and battery against Mrs. Buck; there were no alternative allegations of negligence⁷ or recklessness. Lastly, the issues were actually litigated. The Sixth Circuit recognized in *Bursack*, which involved a Tennessee state court judgment, that even default judgments satisfy Tennessee's actually litigated requirement. *In re Bursack*, 65 F.3d at 54 (citing *Lawhorn v. Wellford*, 168 S.W.2d 790, 792 (Tenn. 1943))("A judgment taken by default is conclusive by way of estoppel in respect to all such matters and facts as are well pleaded and properly raised, and material to the case made by declaration or other pleadings, and such issues cannot be relitigated in any subsequent action between the parties and their privies.")). And, in actuality, the judgment originally entered against the debtor was not a true default judgment. The Judgment By Default states that although the debtor did not file

⁷The first sentence in paragraph V of the complaint does state that the plaintiffs "have suffered damages as a direct and proximate cause of the negligent acts and intentional torts of the defendant." Notwithstanding this statement, nowhere in the complaint is a negligent act described nor are there any allegations concerning a breach of duty of care.

an answer to the complaint, he appeared at the hearing on the plaintiffs' motion for default judgment and testified on his own behalf. The order recites that the court granted the motion for default judgment and awarded damages "upon the testimony of the parties' [sic] in open Court." See *Harper v. United States*, 987 F. Supp. 1025, 1029 (E.D. Tenn. 1996) ("The requirement of collateral estoppel that the issue be 'actually litigated' does not require that the issue be thoroughly litigated. Collateral estoppel may apply 'no matter how slight was the evidence on which a determination was made, in the first suit, of the issue to be collaterally concluded.'").

The court realizes, of course, that after entry of the default judgment, the debtor filed a Motion for New Trial, and that subsequently the parties entered into an Agreed Order which amended the Judgment By Default. The request for a new trial was based on the assertions that the debtor "ha[d] a defense to the action insofar as damages, in that the medical bills are not related to any injury that the plaintiff might have sustained," that the debtor did not have "the benefit of counsel," and that the plaintiffs "should have to prove that the medical expenses were reasonable and related, and that the medical expenses were reasonably necessary." Thus, the debtor raised no objection to the assault and battery allegations in the complaint. In

addition, the Agreed Order recites that the only amendments to the Judgment By Default are a reduction in the amount of damages and the addition of the statement that "the judgment will draw interest at the statutory rate from the date of the original judgment." The Agreed Order recites that with the exception of these changes "the Motion for New Trial is otherwise denied." Therefore, it was the intention of the parties that the Judgment By Default would stand except as amended by the terms of the Agreed Order.

III.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. See *National Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997). Having determined that plaintiff Lisa Buck is entitled to a judgment as a matter of law based on the doctrine of

collateral estoppel, the court will enter contemporaneously with the filing of this memorandum opinion an order granting Mrs. Buck summary judgment. Because the complaint's only basis for nondischargeability was the judgment held by plaintiff Lisa Buck, the court's order will also provide that the complaint is dismissed as to plaintiff David Buck.

FILED: February 28, 2003

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE