ENTERED ON DOCKET
DEC 02 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 05-61838
Dessie Marlene Morris,	CHAPTER 7
Debtor.	JUDGE MASSEY
Tambria R. Stinson,	
Plaintiff,	
v.	ADVERSARY NO. 05-9031
Dessie Marlene Morris,	
Defendant.	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff Tambria Stinson brought this adversary proceeding to determine the dischargeability of a debt owed by Debtor and Defendant Dessie Marlene Morris embodied in a money judgment entered by the Superior Court of Cobb County, Georgia prior to the commencement of this bankruptcy case. Plaintiff moves for summary judgment, asserting that the state court judgment conclusively establishes that the debt in question arose from a willful and malicious injury to Plaintiff's property and therefore that the debt is not dischargeable pursuant to 11 U.S.C. § 523(a)(6).

The Court entered an Order on September 11, 2005, explaining why the state court judgment does not have res judicata effect on the issue of dischargeability and suggesting that

although the doctrine of collateral estoppel might be applicable, it was not clear that the parties had actually litigated the issues relevant to section 523(a)(6) of the Bankruptcy Code. In that Order, the Court set a hearing on the motion and subsequently permitted the parties to file additional briefs concerning the basis for entry of the judgment in state court. Plaintiff filed an amendment to her motion, attaching additional documents filed in the state court. Defendant has not responded to the motion for summary judgment in any way whatsoever.

In the complaint that Plaintiff filed against Defendant and others in the Cobb County Superior Court under Civil Action File No. 99-1-07977-24, she alleged that the defendants in that suit, including Ms. Morris, intentionally damaged certain real property belonging to Plaintiff. Specifically, she alleged in paragraph 3 of the state court complaint that

> The Defendants, while acting jointly, intentionally, willfully, and maliciously trespassed upon and/or damaged the property of the Plaintiff in the amount of $2,767.34. This damage resulted from these Defendants willfully and intentionally breaking windows, breaking sheetrock, breaking the front door, damaging the locks, damaging the carpet, and damaging the landscaping including placing trash, oil, and other debris intentionally and willfully on the property at 151 Long Drive, Marietta, Cobb County, Georgia.

State Court Complaint, ¶3, attached to the complaint in this adversary proceeding and to Plaintiff's Amendment to Motion for Summary Judgment to Supplement Record with Approval of Court filed on October 7, 2005. As other attachments to Plaintiff's Amendment to her summary judgment motion show, the Superior Court entered an Order on April 20, 2004, in which that Court stated that Defendant Morris' answer had been struck for failure to properly serve and file the answer and in which that Court recited that it held a trial on the issue of damages in which Defendant Morris participated. The Court awarded damages in the amount of $2,767.34 against all Defendants, including Ms. Morris and further awarded attorney's fees in the

amount of $2,000.00 for stubborn litigiousness. Having participated in the state court case, Defendant Morris had an adequate opportunity to contest the amount of damages and the entry of the default judgment, which she could have appealed.

Defendant Morris is deemed to have admitted the factual allegations in paragraph 3 of the state court complaint quoted above as to liability because the Cobb County Superior Court struck her answer.

The doctrine of collateral estoppel prohibits the relitigation of issues that have already been adjudicated in a prior lawsuit. *See Grogan v. Garner*, 498 U.S. 279, 284, n. 11 (1991). It is well established that the principals of collateral estoppel apply to dischargeability proceedings in a bankruptcy court. *See id.* Under some circumstances and depending on the applicable law, a default judgment may be entitled to collateral estoppel effect to prevent relitigation in the bankruptcy court of issues underlying the determination of dischargeability. *See In re Bush*, 62 F.3d 1319, 1323, n. 6 (11th Cir. 1995); *see also Sterling Factors, Inc. v. Whelan,* 245 B.R. 698, 704 (N.D. Ga. 2000). In determining the preclusive effect, if any, of a prior state court judgment, a bankruptcy court must apply the collateral estoppel law of the state that issued the prior judgment. *See In re St. Laurent*, 991 F.2d 672, 675-76 (11th Cir. 1993).

Under Georgia law, courts may apply the doctrine of collateral estoppel if the following four conditions exist: (1) there must be an identity of issues between the first and second actions; (2) the issue must have been actually and necessarily litigated in the first action; (3) determination of the issue must have been essential to the prior judgment; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the earlier

proceeding. *See Sterling Factors,* 245 B.R. at 704; *see also In re Graham,* 191 B.R. 489, 495 (Bankr. N.D. Ga 1996).

Section 523(a)(6) of the Bankruptcy Code provides:

> (a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

The Eleventh Circuit has explained the elements of a claim for relief under this section:

> We have interpreted "willful" to require "a showing of an intentional or deliberate act, which is not done merely in reckless disregard of the rights of another." *Lee v. Ikner (In re Ikner),* 883 F.2d 986, 991 (11th Cir.1989); *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1263 (11th Cir.1988). As used in section 523(a)(6), "malicious" means " 'wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will.' " *In re Ikner*, 883 F.2d at 991 (*quoting Sunco Sales, Inc. v. Latch (In re Latch)*, 820 F.2d 1163, 1166 n. 4 (11th Cir.1987)). Malice may be implied or constructive. Id. ("Constructive or implied malice can be found if the nature of the act itself implies a sufficient degree of malice."). In other words, "a showing of specific intent to harm another is not necessary." Id.

In re Walker, 48 F.3d 1161, 1163 -1164 (11th Cir. 1995) (footnote omitted),

The Cobb County Superior Court has found that Defendant Morris intentionally damaged Plaintiff's property. This is the same issue presented under section 523(a)(6) concerning whether the injury was willful. Defendant participated in the state court litigation and hence had a full and fair opportunity to contest this issue. The fact that her answer was struck and that judgment was entered by default does not change this result. As a matter of law, the issue was actually and necessarily litigated, notwithstanding that no evidence was presented on it because Defendant's

conduct led the state court to strike her answer and to determine the claim of liability in Plaintiff's favor.

> Collateral estoppel precludes the relitigation of issues "already adjudicated between the parties or their privies in a prior action." (Citations and punctuation omitted.) *Block v. Woodbury*, 211 Ga.App. 184, 185(1), 438 S.E.2d 413 (1993). No question exists that the issue of whether Walker had permission was "adjudicated" in the prior action. "A judgment by default properly entered against parties sui juris operates as an admission by the defendant of the truth of the definite and certain allegations and the fair inferences and conclusions of fact to be drawn from the allegations of the declaration. Conclusions of law, and facts not well pleaded and forced inferences are not admitted by a default judgment." (Citations and punctuation omitted.) *Stroud v. Elias*, 247 Ga. 191, 193(1), 275 S.E.2d 46 (1981).

American States Ins. Co. v. Walker, 223 Ga.App. 194, 195, 477 S.E.2d 360, 362 (Ga.App. 1996). The finding that Defendant deliberately damaged Plaintiff's property was essential to the state court judgment. Hence, all of the elements of collateral estoppel are present and preclude Defendant from contesting the issue of whether she willfully inflicted damage on Plaintiff's property

The second factual element that a plaintiff must show under section 523(a)(6) is that the act resulting in injury to the plaintiff was "malicious." As indicated above, this requirement is met by a showing that a defendant had no just cause or excuse for the acts causing the injury. Here, nothing in the Superior Court's Order shows the circumstances concerning the damages to the premises. The use of the word "malicious" in the Superior Court's Order does not satisfy this element because that statement is a conclusion of law. Even if the use of that word amounted to a finding of fact in part, it is still conclusory and undefined.

Plaintiff did not directly allege in the complaint here or in the state court that Defendant had any valid reason justifying her conduct. Nonetheless, both complaints can be read as

asserting there is no defense to the tort of deliberately destroying property. Nothing in the record shows that Plaintiff has any basis for knowing any excuse that Defendant might provide for her conduct. In short, whether there is a just cause or excuse for her conduct is an affirmative defense about which only Defendant has the knowledge to raise. Because Defendant in her answer did not assert an excuse for her conduct but merely denied she damaged the property, the Court infers that she had no just cause or excuse for her conduct in damaging Plaintiff's property. She did not contend, for example, that she was a firefighter putting out a fire. Moreover, under Bankruptcy Local Rule B.L.R. 7007-1(b) provides:

> (c) Response to Motion. Any party opposing a motion shall file and serve the party's response, responsive memorandum, affidavits, and any other responsive material not later than ten days after service of the motion, except that the time to respond to a motion for summary judgment shall be 20 days. Failure to file a response shall indicate no opposition to the motion.

Defendant's failure to file a response to the motion means that the motion is deemed unopposed, which is to say she does not contest that she had no just cause or excuse for what she did.

The Superior Court's Order awarded damages for the tortious conduct in the amount of $2,767.34 and awarded an additional $2,000 for attorney's fees because that Court found that Debtor had been stubbornly litigious in resisting Plaintiff's claim.

> Attorney fees are routinely included in the non-dischargeable debt under § 523(a)(6) when they are included in a judgment for damages due to willful and malicious injury and are ancillary to that judgment. Jennen v. Hunter (In re Hunter), 771 F.2d 1126, 1131 ("Ancillary obligations such as attorneys' fees and interest may attach to the primary debt; consequently, their status depends on that of the primary debt."); See e.g., Stokes v. Ferris (In re Stokes), 150 B.R. 388 (W.D.Tex.1992) (attorney fees were non-dischargeable because they were part of statutory damages under Texas' Deceptive Trade Practices Act); Dutton v. Schwartz, 21 B.R. 1014 (D.Mont.1982) (attorney fees were non-dischargeable because included as part of state court judgment based on willful and malicious conduct); Newsome v. Culp (In re Culp), 140 B.R. 1005, 1015 (Bankr.N.D.Okla.1992) (attorney

fees were non-dischargeable where provided for in a note which was itself found to be non-dischargeable).

In re Zentz, 157 B.R. 145, 150 (Bankr. W.D.Mo. 1993).

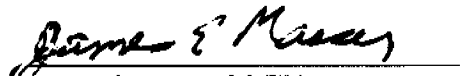
> Conduct that might be described as stubborn litigiousness or even bad faith might not be willful and malicious conduct. But, the purpose of O.C.G.A. § 13-6-11 is not to reimburse a plaintiff for the attorney's fees a plaintiff incurs because of the defendant's bad faith or stubborn litigiousness. The elements of O.C.G.A. § 13-6-11 are merely triggers that permit the recovery of attorney's fees as separate, special damages flowing from the underlying tort. "Section 13-6-11 does not create an independent cause of action. [It] ... merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of damages." Brown v. Baker, 197 Ga.App. 466, 467, 398 S.E.2d 797 (1990). Because a court may award expenses of litigation under O.C.G.A. § 13-6-11 to a party only if it permits the party to recover other damages, Connell v. Houser, 189 Ga. App. 158, 375 S.E.2d 136 (1988), it is plain that these special damages flow from the underlying tort and not from the conduct described in the O.C.G.A. § 13-6-11.
>
> The cases applying O.C.G.A. § 13-6-11 consistently view attorney's fees as a separate category of special damages for the underlying tort. The Georgia Court of Appeals has distinguished between awards of attorney's fees based on "bad faith" and those for "stubborn litigiousness" or for causing "unnecessary trouble and expense," but in all of the cases the rationale is that the defendant inflicted additional and needless costs or damage on the plaintiff that can said to have been the consequence of the underlying tort.

In re Ellerbee, 177 B.R. 731, 746 (Bankr. N.D.Ga. 1995), *aff'd* Order of May 31, 1995 in case no. 95-00459-1-CV-JEC (N.D. Ga.), *aff'd* 78 F.3d 600 (Table) (11th Cir. 1996), *cert. den.* 519 U.S. 947, 117 S.Ct. 357, 136 L.Ed.2d 249, 65 USLW 3306, 65 USLW 3308 (1996).

For these reasons, it is

ORDERED that Plaintiff's motion for summary judgment is GRANTED with respect to the amount of damages awarded by the state court for the intentional tort in the amount of $2,767.34 and for attorney's fees in the amount of $2,000.00.

Dated: December 1, 2005.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE