IT IS ORDERED as set forth below:

Date: March 27, 2008

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In Re:	:	Case No. 06-68805-MGD
Catherine Lam,	:	Chapter 7
	:	Judge Diehl
SmithKline Beecham Corp., d/b/a Glaxosmithkline,	:	
Plaintiff,	:	Adversary Proceeding
v.	:	No. 06-09096
Catherine Lam,	:	
Defendant.	:	

ORDER

Plaintiff SmithKline Beecham Corp. d/b/a Glaxosmithkline ("Plaintiff") filed this adversary proceeding seeking to have its claim against Catherine Lam ("Debtor") declared non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and 523(a)(6). On January 9, 2007, the Court partially granted Debtor's Motion to Dismiss (Docket No. 10). Plaintiff's § 523(a)(4)

embezzlement action and its original claim under § 523(a)(6) remain. Before the Court are cross-motions for summary judgment. On November 21, 2007, Plaintiff moved for summary judgment, and Debtor filed a timely Response (Docket Nos. 27 & 30). Debtor moved for summary judgment on December 3, 2007, Plaintiff filed a timely Response (Docket Nos. 29 and 31), and Debtor also filed a timely Reply (Docket No. 33). For the reasons set forth below, the Court denies Plaintiff's Motion for Summary Judgment and grants Debtor's Motion for Summary Judgment.

This is a core matter under 28 U.S.C. § 157(b)(2) and jurisdiction and venue are proper.

The material facts are undisputed.[1] Debtor was Plaintiff's employee for approximately three years. (Plaintiff's Statement of Facts, Docket No. 27, ¶ 5). During Debtor's employment, she made 401(k) contributions to her employer-sponsored account. (Plaintiff's Statement of Facts, Docket No. 27, ¶ 8). In August of 2001, Debtor entered into a severance agreement with Plaintiff pursuant to which Debtor was to receive $5,113 less applicable withholdings. (Plaintiff's Statement of Facts, Docket No. 27, ¶ 4). In February of 2002, Debtor received a check from Plaintiff in the amount of $53,932.29 as a result of a clerical error. (Plaintiff's Statement of Facts, Docket No. 27, ¶¶ 11-12). The check represented a gross distribution of $85,113, less applicable withholdings. Debtor cashed the check on February 20, 2002 and properly declared these monies as income for tax purposes. (Plaintiff's Statement of Facts, Docket No. 27, ¶ 13).

[1] On January 15, 2008, Debtor filed a Motion to Strike Plaintiff's Statement of Facts based on its failure to comply with Local Rule 7056-1. Plaintiff filed a timely response. Debtor's motion is denied.

Debtor first received notification of Plaintiff's error in June 2002 when she received a letter from Plaintiff's representative. (Plaintiff's Statement of Facts, Docket No. 27, ¶ 14). Debtor was unaware of the mistake prior to that time, believing the check included sums from her retirement account. (Debtor's Statement of Facts, Docket No. 29, ¶¶ 2, 5, 7).[2] Debtor never returned the mistaken overpayment to Plaintiff.

Plaintiff filed a complaint for money damages against Debtor in the State Court of Fulton County alleging conversion and unjust enrichment. (Plaintiff's Statement of Facts, Docket No. 27, ¶ 28). In that action, Debtor was deposed, and Plaintiff moved for summary judgment. On March 14, 2006, the State Court of Fulton County entered judgment for Plaintiff in the principal amount of $47,480.00[3] on the basis of Plaintiff's unopposed summary judgment motion. (Plaintiff's Statement of Facts, Docket No. 27, ¶¶ 28, 30, 31). No findings of fact were issued in the order. (Plaintiff's Statement of Facts, Docket No. 27, Exhibit 10).

In accordance with Rule 56 of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, the Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

[2] While Plaintiff states that this fact is disputed, there is no evidence in the record which supports Plaintiff's position. Plaintiff argues in its supporting materials that Debtor's deposition testimony contradicts her sworn statement. The Court has reviewed the deposition, with specific reference to the excerpts cited by Plaintiff and no contradiction exists which would create a fact issue.

[3] This amount takes into account Debtor's 401(k) contributions and the amount agreed upon in the severance agreement.

Lastly, the moving party has the burden of establishing the right of summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Fla. Cir.1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

Plaintiff asserts as bases for a finding of nondischargeability: § 523(a)(6) and embezzlement under § 523(a)(4). Plaintiff urges the preclusive effect of the State Court of Fulton County's order and judgment based on collateral estoppel with respect to the § 523(a)(6) claim.

There is a presumption that all debts owed by the debtor are dischargeable unless the party contending otherwise proves, by competent evidence, nondischargeability. The burden is on the creditor to prove the exception. *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, (11th Cir. 1993). Courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301 (11th Cir. 1994); *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d at 680. The burden of proof for exceptions to discharge under section 523 is the preponderance of the evidence standard. *Grogan v. Garner*, 498 U.S. 279 (1991).

Section 523(a)(6) provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is nondischargeable. "The word 'willful'…

modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). A debt qualifying under section 523(a)(6) must show that the debtor had the specific intent to inflict the injury or that there was a substantial certainty that the injury would result because debts arising from reckless or negligently inflicted injuries are not within this exception to discharge. *Id.* "Malicious means wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will." *Reutrak Corp. v. Neal (In re Neal)*, 300 B.R. 86, 93-94 (Bankr. M.D. Ga. 2003) (citing *Hope v. Walker (In re Walker)*, 48 F.3d 1161 (11th Cir. 1995)).

Plaintiff asserts that Debtor's act of cashing her check was an intentional and deliberate act. As a matter of law, a mere act is insufficient for a finding of nondischargeability under section 523(a)(6) without establishing the requisite intent to injure. "[N]ondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to an injury." *Kawaauhau v. Geiger*, 523 U.S. at 61 (emphasis in original) ; *In re Walker*, 48 F.3d at 1164 (concluding that the debtor must have intended more than merely the act that results in injury). Debtor correctly contends that Plaintiff has failed to offer any evidence from which a trier of fact could conclude that Debtor cashed the check to deliberately or intentionally injure Plaintiff.

Plaintiff contends that Debtor's act of cashing the check in February 2002 was done with the intention of injuring Plaintiff or that Debtor knew it was substantially certain to cause injury. Plaintiff offers no evidence of either. Indeed, the undisputed testimony of Debtor is that she did not know of Plaintiff's error at the time she cashed the check. Plaintiff's argument that Debtor

"should have known" about the erroneous overpayment as a result of the level of her 401(k) contributions and salary amounts is only an allegation of the Debtor's negligence or, at most, recklessness. Nondischargeability under section 523(a)(6) requires proving an act that constitutes an intentional tort, "as distinguished from negligent or reckless torts." *Kawaauhau v. Geiger*, 523 U.S. at 61; *In re Robinson*, 340 B.R. 316, 332 (Bankr. E.D. Va. 2006). Plaintiff's argument that Debtor "should have known" about the overpayment does not rise to the level of "willful and malicious" injury required under § 523(a)(6).

Section 523(a)(4) makes a debt based on "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" nondischargeable. It is clear that the phrase "while acting in a fiduciary capacity" does not qualify the words "embezzlement" and "larceny." *John J. O'Connor, CPO, Inc. v. Booker (In re Booker)*, 165 B.R. 164 (Bankr. M.D.N.C. 1994); *In re Walker*, 7 B.R. 563, 564 (Bankr. M.D. Ga. 1980). The definitions of larceny and embezzlement in § 523(a)(4) are to be determined under federal common law. *Kaye v. Rose*, 934 B.R. 901 (7th Cir. 1991); *In re Wallace*, 840 F.2d 762 (10th Cir. 1988); *In re Langworthy*, 121 B.R. 903 (Bankr. M.D. Fla. 1990); *Allstate Life Ins. Co. v. Guerrerio*, 143 B.R. 605 (Bankr. S.D.N.Y. 1992).

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been lawfully entrusted or into whose hands it has lawfully come. *Moore v. United States*, 160 U.S. 268 (1895); *In re Phillips*, 882 F.2d 302, 304 (8th Cir. 1989). In order to establish a claim for embezzlement under section 523(a)(4), a plaintiff must prove that a debtor appropriated funds to his or her benefit, and that the debtor did so with fraudulent intent or deceit. *In re Weber*, 892 F.2d 534, 538 (7th Cir. 1989). Fraud in this sense means positive fraud

or fraud in fact. *See Neal v. Clark*, 95 U.S. 704, 709 (1878); *In re Brady*, 101 F.3d 1165, 1172-73 (6th Cir. 1996); *In re Kelley*, 84 B.R. 225, 231 (Bankr. M.D. Fla. 1988). Nondischargeability actions that require a finding of fraud typically rely on circumstantial evidence to prove the debtor's state of mind because "direct proof of intent is nearly impossible to find." *Power v. Robinson (In re Robinson)*, 340 B.R. 316, 330 (Bankr. E.D. Va. 2006) (citations omitted); *see also Universal Bank, N.A. v. Grause (In re Grause)*, 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000).

Plaintiff asserts that Debtor's implied knowledge of the overpayment coupled with Debtor's use of the funds, amounts to an intent to deceive. Again, Plaintiff submits no facts which would support the requisite intent element of embezzlement under section 523(a)(4). There is no evidence supporting actual fraud because Plaintiff produced no evidence that Debtor had possession of the overpayment after she first learned of the Plaintiff's error. "Absent intent to defraud, the misappropriation of funds will not constitute embezzlement." *In re Dempster*, 182 B.R. 790, 802 (Bankr. N.D. Ill. 1995); *In re Crook*, 13 B.R. 794, 798 (Bankr. D. Me. 1981) (debtor's disposition of money that had lawfully come into his hands did not indicate fraudulent intent); *In re Storms*, 28 B.R. 761, 765 (Bankr. E.D.N.C. 1983) (finding no obligation preventing debtor's use of funds). Therefore, Plaintiff's cause of action under section 523(a)(4) is insufficient as a matter of law.

Alternatively, Plaintiff contends that the Fulton County judgment supports entry of summary judgment in its favor. Collateral estoppel serves to prevent the re-litigating of issues previously contested and determined by a valid and final judgment of another court. *HSSM #7 Ltd. Pshp. v. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 892 (11th Cir. 1996). Collateral estoppel refers to the concept of "issue preclusion" whereby a judgment forecloses relitigation of a matter

that has been litigated and decided. *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986); *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 77 n.1 (1984). The doctrine of collateral estoppel is based on the efficient use of judicial resources and on a policy of discouraging parties from ignoring actions brought against them. *Gonzalez v. Moffitt*, 252 B.R. 916, 920 (B.A.P. 6th Cir. 2000). There is no controversy as to the general applicability of the doctrine of collateral estoppel in a discharge exception proceeding in bankruptcy court. *See Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991); *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 675 (11th Cir. 1993); *In re Yanks*, 931 F.2d 42, 43 n.1 (11th Cir. 1991); *In re Bilzerian*, 100 F.3d 886.

In applying the doctrine of collateral estoppel, typically a bankruptcy court applies the law of the state in which the judgment was rendered in determining its preclusive effect. *In re St. Laurent*, 991 F.2d 672; *Lusk v. Williams (In re Williams)*, 282 B.R. 267, 271-72 (Bankr. N.D. Ga. 2002); *In re Brownlee*, 83 B.R. 836, 838 (Bankr. N.D. Ga. 1988); *see also State Farm Fire & Cas. Co. v. Edie (In re Edie)*, 314 B.R. 6 (Bankr. D. Utah 2004); *Lincoln Trust v. Parker (In re Parker)*, 250 B.R. 512, 526 (M.D. Pa. 2000).

Under Georgia law, the following elements must be established before collateral estoppel may be invoked: (1) there must be an identity of issues between the first and second actions; (2) the duplicated issue must have been actually litigated in the prior proceeding; (3) determination of the issues must have been essential to the prior judgment; (4) the party to be estopped must have had a full and fair opportunity to litigate the issue in the course of the earlier proceeding to be estopped must have had a full and fair opportunity to litigate the issue in the course of the earlier proceeding. *League v. Graham (In re Graham)*, 191 B.R. 489, 495 (Bankr.

N.D. Ga. 1996); *Dement v. Gunnin (In re Gunnin)*, 227 B.R. 332, 336 (Bankr. N.D. Ga. 1998).

Plaintiff asserts that the State Court of Fulton County conversion judgment amounts to a willful and malicious injury within the meaning of section 523(a)(6)'s exception to discharge. However, the State Court of Fulton County's judgment does not provide a preclusive effect for two reasons. First, Plaintiff's action in the State Court of Fulton County included alternative pleadings of conversion and unjust enrichment. The judgment resulted from Plaintiff's unopposed summary judgment motion and contained no findings of fact. "[I]f the judgment fails to distinguish as to which of two or more independently adequate grounds is the one relied upon, it is impossible to determine with certainty what issues were in fact adjudicated, and the judgment has no preclusive effect." *In re St. Laurent*, 991F.2d 672, 675 (11th Cir. 1993); *In re Hooks*, 238 B.R. 880, 886 (Bankr. M.D. Ga. 1999); *see also Kelliher v. Stone & Webster, Inc.*, 75 F.2d 331, 335 (5th Cir. 1935) (concluding that "the judgment might have gone on either of several issues, there is no estoppel proved touching any of them"). The Plaintiff's assertion that the State Court of Fulton County judgment was based on conversion fails, and the attempt to assert its preclusive use to establish nondischargeability under § 523(a)(6) is equally unsuccessful.

Second, even if the State Court of Fulton County's judgment was based on conversion, that determination alone is insufficient to preclude litigation under section 523(a)(6). In Georgia, "conversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation." *In re Moir*, 291 B.R. 887, 892 (Bankr. S.D. Ga. 2003) (quoting *Adler v. Hertling*, 451 S.E.2d 91

(Ga. App. 1994)). Conversion does not necessarily include section 523(a)(6)'s intent element, and without findings of fact, there is no basis to impute the requisite willful and malicious intent to injure from the prior judgment.

"[A]n adjudication of conversion . . . may have collateral estoppel effect." *Grogan v. Garner*, 498 U.S. 279, 284-85 n. 11 (1991). However, not all judgments for conversion are "willful and malicious" because conversion can arise from reckless or negligent acts. *Kawaauhau v. Geiger,* 523 U.S. 57, 61 (1998) (explaining that "not every tort judgment for conversion is exempt from discharge); *In re Moir*, 291 at 892. The preclusive use of a conversion judgment requires a fact specific analysis "to determine whether the conversion is in the nature of an intentional tort or whether the conversion is a result of a negligent or reckless tort- but not willful or malicious." *Avco v. Fin. Servs. Of Billings v. Kidd (In re Kidd)*, 219 B.R. 278, 284 (Bankr. D. Mont. 1998). In *Via Christi Reg'l Med. Ctr. v. Budig (In re Budig)*, 240 B.R. 387 (D. Kan. 1999), the court held that a debtors' alleged conversion could not constitute willful and malicious injury "[b]ecause the debtors did not know the money belonged to [the plaintiff], they could not have had the necessary intent to cause willful injury." *Id.* at 400-01. Here, the Plaintiff also failed to establish the requisite intent to cause injury under § 523(a)(6) with regard to the attempted use of the prior judgment and the facts presented.

After careful consideration of the parties' arguments, the Court determines that based upon the undisputed material facts, Plaintiff's claims for nondischargeability are insufficient as a matter of law. Accordingly, it is **ORDERED** that Plaintiff's Motion for Summary Judgment is **DENIED**, and Debtor's Motion for Summary Judgment is **GRANTED.**

END OF DOCUMENT

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