IT IS ORDERED as set forth below:

Date: June 10, 2011

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
	:	Case No. 07-76630-pwb
BRIAN K. LEGGETT,	:	
Debtor.	:	
	:	
CSX TRANSPORTATION, INC.,	:	
Plaintiff,	:	
vs.	:	Adversary No. 08-6009-pwb
	:	
BRIAN K. LEGGETT,	:	
Defendant.	:	
	:	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

The Plaintiff, CSX Transportation, Inc. ("CSX"), seeks summary judgment that the debt of the Chapter 7 debtor, Brian K. Leggett ("Leggett") under a consent order for final judgment entered by the United States District Court for the Northern District of Georgia (the "Consent

Judgment")[1] is excepted from discharge under 11 U.S.C. § 523(a)(6). Under § 523(a)(6), a Chapter 7 discharge does not discharge a debtor from a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."

A debt is nondischargeable under § 523(a)(6), however, only if the bankruptcy court determines that the exception applies on a timely request of the creditor. 11 U.S.C. § 523(c)(1); Fed. R. Bankr. P. 4007(b). CSX timely filed its complaint seeking such a determination.

Contentions of the Parties

CSX seeks summary judgment on the ground that, under the doctrine of issue preclusion (sometimes referred to as collateral estoppel), the Consent Judgment establishes as a matter of law that the debt is for willful and malicious injury to its property and that, consequently, the debt is excepted from discharge under § 523(a)(6).[2] In this regard, the Consent Judgment reflects that Leggett, through affiliated entities, collected at least $1,930,058.93 on behalf of CSX as a collection servicer and converted it to his own use instead of remitting it to CSX he was obligated to do. (Consent Judgment ¶ 3(a) – (g) [Docket No. 29-3 at 2-3]).

Leggett asserts that the Consent Judgment does not contain findings of fact that he acted

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[1]"Consent Order for Final Judgment", entered in *CSX Transportation, Inc., v. B & L Financial, Inc.; B & L Financial Services, Inc., Capital Financial Holdings, Inc., and Brian Keith Leggett*, Civil Action File No. 1 02-CV-2190-WSD (Oct. 28, 2005) (District Court Docket No. 158). A copy of the consent order is attached as Exhibit "C" [Adversary Docket No. 29-3] to the Plaintiff's Statement of Undisputed Facts [Adversary Docket No. 29]. Final judgment was duly entered in accordance with the consent order. (District Court Docket No. 159). A copy of the final judgment is attached as Exhibit "D" to the Statement of Undisputed Facts [Adversary Docket No. 29-4].

[2]CSX also seeks a determination that the debt is excepted from discharge under 11 U.S.C. §§ 523(a)(2) and (a)(4), to which § 523(c)(1) also applies. CSX does not seek summary judgment on these grounds.

willfully and maliciously. Further, he asserts, a prior course of dealings with CSX permitted him to retain funds he collected for application to compensation to which he was entitled with regard to accounts assigned to him that CSX collected directly. (Affidavit of Brian K. Leggett [Adversary Docket No. 43]).

If true, Leggett's assertions that CSX effectively knew about and authorized his retention of funds would negate the "willful and malicious" elements that § 523(a)(6) requires for a debt to be excepted from discharge. *E.g., Hope v. Walker (In re Walker),* 48 F.3d 1161, 1164 (11th Cir. 1995) (Conduct is "malicious" if it is "wrongful and without just cause."); *Miller v. Held (In re Held),* 734 F.2d 628 (11th Cir. 1984) (Judgment for conversion not preclusive when debtor was acting under mistaken assumption that agreement with creditor justified his actions); *see Britt's Home Furnishing, Inc. v. Hollowell (In re Hollowell),* 242 B.R. 541, 546 (Bankr. N.D. Ga. 1999) ("[T]he concept that justification or excuse could negate a debtor's intent to injure appears to have been integrated into § 523(a)(6).").

CSX, however, asserts that the doctrine of issue preclusion prevents Leggett from asserting this defense because the Consent Judgment established that he acted willfully and maliciously.

For reasons set forth below, the Court concludes that the doctrine of issue preclusion does not apply here because the Consent Judgment does not establish that Leggett acted willfully and maliciously as § 523(a)(6) requires.

Discussion

A prior judgment may have preclusive effect in later litigation under two doctrines, traditionally referred to as the doctrines of *res judicata* and collateral estoppel. Modern

terminology, following the approach of the *Restatement (Second) of Judgments* (1982) [hereinafter "*Restatement (Second)*"], replaces the term "res judicata" with "claim preclusion" and the term "collateral estoppel" with "issue preclusion. The modern terms are more "analytically helpful" and "contribute to greater clarity of thought." Christopher Klein, Lawrence Ponoroff, & Sarah Borrey, *Principles of Preclusion and Estoppel in Bankruptcy Cases,* 79 AMER. BANKR. L. J. 839, 843 (2005) [hereinafter "*Principles of Preclusion*"], *citing* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed. 2003). The Supreme Court has adopted this approach. *E.g., New Hampshire v. Maine,* 532 U.S. 742, 748-49 (2001).

The doctrine of *claim preclusion* prevents the relitigation of a *claim* that the prior judgment adjudicated. This principle prevents relitigation of a claim, broadly defined under a transactional test that includes matters that have been litigated and matters arising out of the same transaction that could have been raised in the original litigation. *See Principles of Preclusion* at 847. The Supreme Court has held that claim preclusion does not apply in dischargebility litigation when the bankruptcy court must make a determination of dischargeability. *Brown v. Felsen,* 442 U.S. 127 (1979).

The doctrine of *issue preclusion* prevents the relitigation of an *issue* that was necessarily adjudicated in rendering the prior judgment. The Supreme Court has recognized that issue preclusion applies in dischargeability litigation. *Grogan v. Garner,* 498 U.S. 279 (1991). Because a federal District Court entered the judgment in question here, federal principles of issue preclusion apply. *CSX Transportation, Inc. v. Brotherhood of Maintenance of Way Employees,* 327 F.3d 1309, 1316 (11th Cir. 2003).

Application of issue preclusion in dischargeability litigation requires the existence of three elements that require consideration here. First, the issue at stake must be identical to the one involved in the prior litigation. Second, the issue must have been actually litigated in the prior litigation. Third, the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.[3] *E.g., Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush)*, 62 F.3d 1319, 1322 (11th Cir. 1995); *Halpern v. First Georgia Bank (In re Halpern)*, 810 F.2d 1061, 1064 (11th Cir. 1987).[4]

The court first addresses the actual litigation requirement. A consent judgment satisfies the actual litigation requirement if the intention of the parties, as manifested in the judgment or other evidence, is that the consent judgment operate as a final adjudication of the factual issues. *E.g., Halpern,* 810 F.2d at 1064-1065.

With regard to the intent of the parties, the Consent Judgment states, at ¶ 8 [Adversary Docket 29-3 at 6-7]:

> Defendant Leggett has also by stipulation expressly acknowledged and agreed that the findings and conclusions set forth in paragraph 3 of this Consent Order for Final Judgment are intended to operate as a final adjudication of

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[3]A fourth requirement is that the burden of persuasion in the dischargeability litigation must not be significantly higher than the burden of persuasion in the prior litigation. *E.g., Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush)*, 62 F.3d 1319, 1322 (11th Cir. 1995). This is not an issue here because the burden of persuasion in both the District Court litigation and in this dischargeability litigation is preponderance of the evidence. *E.g., Grogan v. Garner,* 498 U.S. 279 (1991).

[4]Although *Halpern* involved a prior state court judgment, the court discussed issue preclusion in the context of federal case law and did not rely on, or even mention, state law in its analysis.

CSXT's claims that are the subject hereof and will collaterally estop Defendant Leggett from denying any of the facts or law established therein and that these findings and conclusions will conclusively establish that the liability which he is adjudged in this Consent Order for Final Judgment to owe to CSXT will be excepted from discharge in any bankruptcy case in which he is a debtor because his liability to CSXT constitutes conduct that is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6).

Other provisions of the Consent Judgment likewise reflect that the parties anticipated the possibility of litigation in a later bankruptcy case. Thus, each of paragraphs 3(h), (i), and (j) [Adversary Docket 29-3 at 4-5] refer to a paragraph of 11 U.S.C. § 523(a) and effectively state that Leggett's conduct meets their requirements. They state:

(h) The CSXT Funds converted by Defendant Leggett were obtained by and through actions of Defendant Leggett that, with respect to a determination of the non-dischargeability of the liability found herein, fall within the meaning and definition of 11 U.S.C. § 523(a)(2);

(i) The CSXT Funds converted by Defendant Leggett were obtained by Defendant Leggett by actions that, with respect to a determination of the non-dischargeability of the liability found herein, fall within the definition and meaning of 11 U.S.C. § 523(a)(4) while Defendant Leggett was acting in a fiduciary capacity to CSXT and as the principal actor of B & L;

(j) The actions of Defendant Leggett in converting the CSXT Funds, with respect to a determination of non-dischargeability of the liability found herein,

constituted willful and malicious injury by Defendant Leggett to CSXT and its property as specified by 11 U.S.C. § 523(a)(6).

Collectively, these provisions manifest the parties' intention that the Consent Judgment would have preclusive effect in later litigation in a bankruptcy case, specifically with regard to the dischargeability of the debt under the referenced paragraphs of § 523(a). Consequently, the Consent Judgment satisfies the actual litigation requirement for application of issue preclusion.

The Court thus turns to the other two elements. Under principles of *claim* preclusion applicable to consent judgments, the provisions just discussed might have preclusive effect because the claim preclusive effect of a consent judgment is determined by reference to what claims the parties intended to be definitively adjudicated, determined in accordance with the express terms of the consent judgment. *See, e.g., Norfolk Southern Corp. v. Chevron U.S.A., Inc.,* 371 F.3d 1285 (11th Cir. 2004). But the question here is *issue* preclusion because, as already noted, principles of claim preclusion do not apply in dischargeability litigation. The Bankruptcy Code itself requires this conclusion with regard to dischargeability litigation involving the paragraphs of § 523(a) involved in this proceeding because § 523(c)(1) requires the bankruptcy court to adjudicate such claims of nondischargeability because §§ 524(a) and (c) prohibit waiver of the discharge of a debt. *See, e.g., Klingman v. Levinson,* 831 F.2d 1292, 1296 n. 3 (7th Cir. 1987) ("For public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy.").

In the context of dischargeability litigation, issue preclusion properly applies to the determination of facts that the bankruptcy court considers as evidence of nondischargeability. *E.g., Halpern v. First Georgia Bank (In re Halpern),* 810 F.2d 1061, 1063-64 (11th Cir. 1987).

The provisions of paragraphs 3(h) – (j) and 8 in the Consent Judgment quoted above constitute conclusions with regard to a claim of nondischargeability but are not findings of fact that could have issue preclusive effect. Moreover, questions of nondischargeability were not before the District Court and, indeed, could not have been because no bankruptcy case was pending at the time. Similarly, because dischargeability issues were not before the District Court, these provisions were not, and could not have been, necessary and essential to the judgment.

Because the provisions of the Consent Judgment discussed so far are not entitled to issue preclusive effect, the proper inquiry for the Court becomes to determine whether any other provisions of the Consent Judgment establish any facts that are entitled to issue preclusive effect in this proceeding because they involve the same issues and were necessary to the judgment.

The following factual recitations in paragraphs 3(a) through 3(g) of the Consent Judgment [Adversary Docket No. 29-3 at 3-4] meet these requirements for issue preclusion. Thus, paragraphs 3(a) through 3(g) establish:

(1) that Leggett was the principal actor, principal corporate officer, and sole director and shareholder of B & L and that they provided collection services to CSX (¶ 3(a));

(2) that he was CSX's collection agent and fiduciary with the obligation to collect monies on CSX's behalf and remit them to CSX on a timely basis (¶ 3(b));

(3) that he and B & L, while acting as CSX's collection agent, collected, retained, and never remitted at least $1,930,058.93 in CSX funds (¶ 3(c));

(4) that final judgment was entered against B & L in the amount of $3,158,035.81 on CSX's claims for breach of contract, breach of obligation of good faith and fair dealing, breach of fiduciary duty, common law and statutory conversion, statutory attorney's fees, constructive

trust, and accounting (¶ 3(d));

(5) that Leggett exercised complete dominion and control over B & L, commingled B & L funds with his own on a systematic and regular basis, did not hold regular corporate meetings of B & L or observe other corporate formalities, utilized B & L to collect and retain the CSX funds, and thereafter never remitted the CSX funds to CSX and expended them for his own personal uses (¶ 3(e));

(6) that he wrongfully and knowingly converted and misappropriated the CSX funds in violation of common law and O.C.G.A. § 51-10-6 (¶ 3(f)); and

(7) that he systematically and regularly exercised complete dominion and control and abused the corporate forms of B & L with respect to wrongfully retaining the CSX funds such that the veil between him and B & L is pierced (¶ 3(g)).

These facts do not establish that Leggett acted "willfully and maliciously" within the meaning of § 523(a)(6). The factual finding in paragraph 3(f) is that Leggett "wrongfully and knowingly converted and misappropriated the CSXT Funds in violation of common law and O.C.G.A. § 51-10-6." "Wrongfully and knowingly" is not the same as "willful and malicious" within the meaning of 11 U.S.C. § 523(a)(6). As noted above, an essential element for a determination that a debtor acted willfully and maliciously is that he acted without just cause or excuse. *E.g., Hope v. Walker (In re Walker),* 48 F.3d 1161, 1164 (11th Cir. 1995); *Miller v. Held (In re Held),* 734 F.2d 628 (11th Cir. 1984); *see Britt's Home Furnishing, Inc. v. Hollowell (In re Hollowell),* 242 B.R. 541 (Bankr. N.D. Ga. 1999). The Consent Judgment does not include factual findings that Leggett acted without just cause or excuse.

Leggett's affidavit [Adversary Docket No. 43] sufficiently puts this factual issue in

dispute. If Leggett was acting under the assumption, albeit mistaken, that CSX had authorized his retention of CSX's funds, his conduct may not be "willful and malicious" within the meaning of 11 U.S.C. § 523(a)(6). *E.g., Miller v. Held (In re Held),* 734 F.2d 628 (11th Cir. 1984). This material fact is, therefore, in dispute, and the Court cannot grant summary judgment in favor of CSX on its § 523(a)(6) claim.

Although the Court must deny CSX's motion for summary judgment on its § 523(a)(6) claim, it is appropriate to grant summary judgment in part. Under Fed. R. Civ. P. 56(g), *applicable under* Fed. R. Bankr. P. 7056, "[i]f the court does not grant all the relief requested by the motion, it may enter an order stating any material fact . . . that is not genuinely in dispute and treating the fact as established in the case." Accordingly, the Court will grant partial summary judgment to CSX, determining that the facts as set forth in paragraphs 3(a) through (g) shall be treated as established for purposes of determining whether CSX's claim is excepted from discharge under 11 U.S.C. § 523(a)(6).[5]

Based on, and in accordance with, the foregoing, it is hereby **ORDERED and ADJUDGED** as follows:

1. CSX's motion for summary judgment is **DENIED in part and GRANTED in part.**

2. The motion is denied to the extent that it seeks judgment that its claim that its debt is excepted from discharge under 11 U.S.C. § 523(a)(6).

3. Partial summary judgment is granted in favor of CSX to the extent of determining

[5]The parties have not presented the question of the extent, if any, to which such facts are entitled to issue preclusive effect with regard to CSX's alternative claims that the debt is excepted from discharge under 11 U.S.C. § 523(a)(2) or (a)(4). The Court accordingly makes no ruling on the issue preclusive effect of the Consent Judgment with regard to the alternative claims.

that, for purposes of adjudicating whether its claim is excepted from discharge under 11 U.S.C. § 523(a)(6), the facts as stated in paragraphs 3(a) through (g) of the Consent Judgment shall be treated as established in this action.

4. The Court will conduct a status conference on **July 19, 2011**, at **11:00 a.m.**, in Courtroom 1401, U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia, to consider pre-trial matters and the scheduling of this adversary proceeding for trial on remaining issues. Counsel may participate by telephone by contacting the Court's Courtroom Deputy Clerk.

The Clerk is directed to serve copies of this Order on counsel for the Plaintiff and the Defendant.

[End of Order]