

IT IS ORDERED as set forth below:

Date: November 9, 2012



James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	}	CASE No.: 11-85623-JRS
WENDELL WRIGHT,	}	
	}	Chapter 7
Debtor.	}	

KARIM ZIYAD as assignee for	}	
AVF CONSTRUCTION, LLC,	}	ADVERSARY PROCEEDING
	}	
Plaintiff,	}	No. 12-05173-JRS
	}	
v.	}	
	}	
WENDELL WRIGHT,	}	
	}	
Defendant.	}	

ORDER

This case involves a remodeling project gone awry. The question before the Court is whether that was Debtor's intention from the start as part of a fraudulent scheme or whether he thereafter willfully and maliciously injured the Plaintiff or his property. Wendell Wright, the

Debtor, hired AVF Construction, LLC (“AVF”) to perform renovations at a house located at 2970 Harlow Lane, Decatur, GA 30034 (the “Property”). Following what Wright suggests was a communication breakdown and breach by AVF, he cancelled the contract. AVF obtained a state court judgment for payment for the work that was performed and attorneys’ fees. A few months later, Wright filed for Chapter 7 protection.

AVF assigned its claim to Karim Ziyad, who appears to be a principal of AVF and was the primary party with whom Wright dealt at AVF. Ziyad then brought the instant adversary proceeding, seeking to have his claim declared nondischargeable pursuant to § 523(a)(2) and (6),¹ alleging that Wright incurred this debt by committing fraud and/or willful and malicious injury.

Ziyad filed a Motion for Summary Judgment (the “Motion”) [Doc. 14], which is now before the Court. In the Motion, Ziyad argues that Wright incurred his debt through fraudulent means, making it nondischargeable pursuant to § 523(a)(2). Ziyad asserts that the state court already adjudicated the fraud issue, precluding this Court from considering the issue pursuant to the doctrine of collateral estoppel. Also, Ziyad claims that Wright’s debt to him is nondischargeable pursuant to § 523(a)(6) because Wright committed a willful and malicious injury by destroying a check made payable to the two of them jointly. Finally, Ziyad argues that Wright is not entitled to a discharge at all pursuant to § 727(a)(4). This Court will not consider this final argument because leave of court was not granted to amend the complaint to include a count under § 727(a)(4) because it was not pled timely, as more fully explained in this Court’s

¹ All Code references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

Order dated October 15, 2012. [Doc. 30]. Wright filed a response to the Motion with supporting materials, and the Motion is ripe for adjudication.²

Summary Judgment Standard

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party. *Id.* The Court “should resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his favor.” *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437 (11th Cir. 1991) (citations and punctuation omitted). The court may not weigh conflicting evidence or make credibility determinations. *Hairston v. Gainesville Sun Publ'g. Co.*, 9 F.3d 913, 919 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (1994) (en banc).

For issues upon which the moving party bears the burden of proof at trial, he must affirmatively demonstrate the absence of a genuine issue of material fact as to each element of his claim on that legal issue. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). He must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. *Id.* If the moving party makes such a showing, he is entitled to summary judgment unless the non-moving party comes forward with significant, probative evidence demonstrating the existence of an issue of material fact. *Id.*

² Plaintiff filed a Notice of Objection to the Challenged Testimony [Doc. 35] wherein he objected to portions of Defendant's affidavit and documents. To the extent the Court relied upon that Affidavit or those documents in this Order, the Plaintiff's objections thereto are overruled.

Factual Background

Keeping the above standard in mind, the Court lays out the following facts based on the parties' submissions. Wright met Ziyad in January 2009 to discuss performing renovations to the Property. (Wright aff. ¶ 1). In February 2009, Wright entered into a written, signed contract with AVF to perform certain renovations on the Property at a proposed cost of \$31,498.00. (Wright aff. ¶ 2; Ziyad aff. ¶ 5). These renovations were to be financed by a HUD 203k loan³ from Wells Fargo Bank. (SMF ¶ 18). To obtain this loan, Wright was required to hire a general contractor licensed in Georgia. (SMF ¶ 19). Wright thus hired AVF as his general contractor to perform the renovations financed by the HUD 203k loan. (SMF ¶ 20).

Wright asserts that shortly after he signed the contract with AVF, he realized that the monthly payments on the loan would exceed his budget. (Wright aff. ¶ 3). Wright informed Ziyad that under his budget, he could not afford more than \$22,000 in renovations. (Wright aff. ¶ 4). A few weeks later, Wright claims Ziyad submitted a new proposal for \$21,666.13 to Wells Fargo. (Wright aff. ¶ 5). Wright contends he did not see the new proposal until the closing of the loan on the Property on April 20, 2009. (Wright aff. ¶ 5). He asserts that he did not approve or agree to the changes in the scope of work in the new proposal—despite the fact that he signed it—because he thought his contract with AVF allowed for changes in the scope of work that would protect him from work being performed without his approval. (Wright aff. ¶ 6). Wright and Ziyad communicated several times in May 2009 regarding the scope of the work to be performed. (Wright aff. ¶ 7).

In early June 2009, Wright asserts he asked Ziyad to replace several toilets so that the water could be turned on and granted him access to the Property for that purpose. (Wright aff. ¶

³ A HUD 203k loan is a loan guaranteed by the federal government which allows the borrower to finance both the acquisition of a residential property and its renovation, as opposed to obtaining two separate loans.

8). While at the Property, AVF began renovations and performed demolition work, including: removing all carpet, padding, and tack strips on floors and stairs throughout the home; demolishing and removing kitchen cabinets, sink, faucet, and countertops; priming walls throughout the home; and installing concrete backer board in the kitchen and bathroom. (SMF ¶ 22b–f; Ziyad aff. ¶ 6). Wright claims he had not given AVF permission to begin this work at that time. (Wright aff. ¶ 9). A few days later, Wright sent Ziyad a letter notifying him that he was thereby terminating AVF as the contractor for the renovation project. (Wright aff. ¶ 10).

Shortly thereafter, AVF invoiced \$7,926.83 Wright for services rendered. (SMF ¶¶ 2h, 21). Wright received an initial draw check in the amount of roughly \$7,500 from Wells Fargo Bank to fund the initial phase of the renovation project. (SMF ¶¶ 2c, 23). This check was made payable to both Wright and AVF. (SMF ¶ 24). Wright shredded and disposed of this check, which he claims he did at the direction of Wells Fargo because he terminated Plaintiff from the job. (SMF ¶ 17, 25 and Def.’s Answers to Pl.’s First and Continuing Request for Admissions, ¶ 11). Aside from paying \$225 for the toilets installed, Wright did not pay for the services AVF provided. (Ziyad aff. ¶ 8). AVF then filed a materialman’s lien on Wright’s home. (Ziyad aff. ¶ 9).

On July 24, 2009, AVF sued Wright in the Superior Court of Dekalb County, Georgia for common law fraud and deceit, negligent misrepresentation, theft by deception, theft by conversion, and theft by conversion of payments for real property improvements, as well as for litigation expenses and punitive damages (the “Superior Court Action”). (SMF ¶ 3). Ziyad filed a motion for summary judgment in that action, to which Wright did not file any opposition. On August 11, 2010 that court entered summary judgment in favor of AVF for \$14,927.00, which Wright did not appeal (the “Superior Court Order”). (SMF ¶ 4; Ziyad aff. ¶ 12). The fraud

allegations in the Superior Court Action are identical to those asserted in this adversary proceeding. (SMF ¶ 5).

I. Fraud Under § 523(a)(2)(A)

In order to have his debt declared nondischargeable pursuant to § 523(a)(2)(A), Ziyad must demonstrate that Wright obtained the renovation services by “false pretenses, a false representation, or actual fraud.” 11 U.S.C. § 523(a)(2)(A). The plaintiff bears the burden of proving this exception to the general rule that debts are discharged in bankruptcy. *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986) *abrogated on other grounds by Grogan v. Garner*, 498 U.S. 279 (1991). In order to satisfy his burden under § 523(a)(2)(A), the plaintiff-creditor “must prove that: (1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation.” *Securities and Exchange Commission v. Bilzerian (In re Bilzerian)*, 153 F.3d 1278, 1281 (11th Cir. 1998) (footnote omitted).

Ziyad principally argues that he is entitled to summary judgment under the doctrine of collateral estoppel because the Superior Court Action was decided in his favor. Collateral estoppel—also known as issue preclusion—prevents parties from re-litigating an issue that was already decided in a prior case. *Bush v. Balfour Beatty Bahamas, Limited (In re Bush)*, 62 F.3d 1319, 1322 (11th Cir. 1995). This doctrine applies to bankruptcy discharge exception proceedings. *Grogan v. Garner*, 498 U.S. 279, 285 n. 11 (1991). For collateral estoppel to apply, four elements must be met:

1. The issue in the prior action and the issue in the bankruptcy court are identical;
2. The bankruptcy issue was actually litigated in the prior action;
3. The determination of the issue in the prior action was a critical and necessary part of the judgment in that litigation; and
4. The burden of persuasion in the discharge proceeding must not be significantly heavier than the burden of persuasion in the initial action.

Bush v. Balfour Beatty Bahamas, Limited (In re Bush), 62 F.3d 1319, 1322 (11th Cir. 1995) (citation omitted). The fraud and conversion issues in the Superior Court Action are identical to the issues here, although the Superior Court Action also included a count for negligent misrepresentation. And the burden of persuasion here is no different than in that prior case. But for collateral estoppel to apply here, the fraud and conversion issues must have been actually litigated and must have been a critical and necessary part of the judgment in the Superior Court Action.

The Superior Court Order did not address the fraud issue specifically and certainly did not provide reasoning indicating that a determination of fraud was critical and necessary to the judgment. As explained above, the Superior Court Action involved multiple counts: common law fraud and deceit, negligent misrepresentation, theft by deception, theft by conversion, theft by conversion of payments for real property improvements, litigation expenses and punitive damages. The Superior Court Order did not specify which of these counts forms the basis for the judgment other than its granting of the request for attorneys fees and denial of the request for summary judgment on the punitive damages count. In granting summary judgment, the Superior Court reasoned that Wright’s “failure to respond to the Requests for Admission had the effect of admitting the matters contained therein” and “[b]ased upon these admissions there are no material facts in dispute as to the principal amount owed under the contract, \$7,926.83 and attorneys fees in the amount of \$7,000.00.” Thus the Superior Court Order merely granted Plaintiff a judgment for the principal amount owed under a contract along with attorney’s fees. It made no findings of fact regarding whether Wright committed any fraudulent acts. In fact—and to the contrary—the Superior Court Order expressly denied summary judgment on AVF’s request for punitive damages, to which AVF claimed it was entitled based on the very same fraud and

intentional and malicious behavior it alleges in the matter before this Court. Therefore, this Court cannot conclude that a determination of fraud was made at all, let alone that it was critical and necessary to the judgment in the Superior Court Action. Thus, collateral estoppel does not apply here. And because this element is not satisfied, the Court need not decide whether the matter was actually litigated.

Furthermore, at this juncture, without being able to rely on collateral estoppel, Plaintiff has not shown that there are sufficient undisputed, material facts that would entitle him to a judgment as a matter of law under § 523(a)(2)(A).

II. Willful and Malicious Injury Under § 523(a)(6)

In order to have this debt declared nondischargeable pursuant to § 523(a)(6), Ziyad must prove that Wright willfully and maliciously injured him or his property. 11 U.S.C. § 523(a)(6). The Eleventh Circuit interprets “willful” to require “a showing of an intentional or deliberate act, which is not done merely in reckless disregard of the rights of another.” *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1163 (11th Cir. 1995) (citations and punctuation omitted). But the defendant debtor “must have intended *more than merely the act* that results in injury.” *Id.* at 1164. (emphasis added). Instead, “section 523(a)(6) requires a deliberate or intentional *injury*.” *Id.* at 1165 (emphasis added). Thus, “a debtor is responsible for a ‘willful’ injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury.” *Id.* at 1165.

Further, the Eleventh Circuit defines “malicious” as “wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will.” *Id.* at 1164 (citations and punctuation omitted). To prove an act was done maliciously, a plaintiff does not need to prove that the defendant had the specific intent to harm him. *Id.* (citation omitted). In sum, although a

plaintiff must show that a defendant's act was intended to or substantially certain to cause injury for it to be considered willful, he does not need to show that it was motivated by personal animus for it to be considered malicious.

Here, questions of fact remain regarding whether Wright inflicted an injury on Ziyad or his property willfully and maliciously within the meaning of § 523(a)(6). At this point, the only fact that Ziyad has offered in support of this claim is that Wright destroyed a check that Wells Fargo made payable to both of them jointly.⁴ Little doubt exists that Wright intentionally tore up this check, but questions of material fact remain regarding whether his willful purpose in doing so was to injure Ziyad or whether that act was substantially certain to cause him injury.⁵ Similarly, questions of fact remain regarding whether Wright destroyed the check maliciously. Wright claims Ziyad was not entitled to the check because of Ziyad's alleged breach and that he destroyed the check at the direction of a Wells Fargo representative. These facts, if accepted as true, would lead to the conclusion that Wright did not act maliciously. Because these genuine disputes of material fact exist, summary judgment is inappropriate.

Conclusion

For these reasons, Plaintiff Ziyad's Motion for Summary Judgment is DENIED.

[END OF DOCUMENT]

⁴ In the Motion, Ziyad does not appear to argue that collateral estoppel applies to his claim under § 523(a)(6). Even if he had made this argument, it would fail for the same reasons that collateral estoppel does not apply to his claim under § 523(a)(2), as explained above.

⁵ For example, the question of whether Wells Fargo could or would have issued a replacement check or whether Ziyad could have obtained payment some other way—in which case he would not have been injured—remains unanswered.