UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G08-20892-REB
ISAAC W. SWOFFORD,	:	
Debtor.	:	
ATLANTA CONTRACT GLAZING, INC.,	:	ADVERSARY PROCEEDING NO. 08-2053
Plaintiffs,	:	
v.	:	CHAPTER 7
ISAAC W. SWOFFORD,	:	
Defendant.	:	JUDGE BRIZENDINE

ORDER GRANTING MOTION TO DISMISS COMPLAINT

Before the Court is the motion of Defendant-Debtor to dismiss the complaint filed by Plaintiff herein on July 18, 2008 that commenced the above-named adversary proceeding. The complaint focuses on a certain obligation owed by Debtor to Plaintiff as evidenced by a state court default judgment in the amount of $142,247.50, which includes punitive damages and an award of attorney's fees, that arises in connection with glass work Plaintiff performed as a subcontractor under an agreement with Debtor. Plaintiff alleges it was never paid for this work and that its judgment should be excepted from Debtor's discharge herein under 11 U.S.C. § 523(a)(6). In his motion to dismiss, Debtor contends, among other things, that Plaintiff's complaint fails to state a claim upon which relief can be granted inasmuch as the debt in question did not result from a willful and malicious injury.

Under Fed.R.Civ.P. 12(b)(6), applicable herein through Fed.R.Bankr.P. 7012, a complaint may

not be dismissed "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.'" *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001), quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). In the complaint, Plaintiff alleges that Debtor as a general contractor agreed to pay certain invoices for work completed by Plaintiff and that Debtor provided the property owner an affidavit stating the invoices had been paid. Based upon this affidavit, the owner paid over certain funds to Debtor when Debtor, in fact, had not paid the invoices. Plaintiff contends that Debtor caused willful and malicious injury by allowing Plaintiff to perform its work, but then refusing to pay Plaintiff when it received monies regarding same based on Debtor's false and misleading affidavit to the property owner.

In its brief in support of the motion to dismiss, Debtor maintains that Plaintiff cannot establish an entitlement to relief on its complaint because he cannot show that Debtor intended an injury to Plaintiff or property of Plaintiff in executing the affidavit in issue. At most, the allegations, if proven, could support a claim arising from a contract dispute or a lien waiver. Neither of these, however, would be sufficient to except the obligation in question from discharge herein under 11 U.S.C. § 523(a)(6).

In response, Plaintiff argues in its brief that since Debtor would not have been paid by the property owner but for the false representation in Debtor's affidavit, Plaintiff had an equitable interest in those funds. As such, Debtor's failure to remit them over to Plaintiff "constitutes a willful and malicious conversion" (Plaintiff's Brief at 4). *See Wolfson v. Equine Capital Corp. (In re Wolfson)*, 56 F.3d 52 (1995). Plaintiff states it is not seeking relief herein on a theory of breach of contract, but as an intentional tort resulting from Debtor's harming of its recognizable property interest in the funds at issue.

As held in *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), willful and malicious injury under Section 523(a)(6) "is confined to debts 'based on what the law has for

generations called an intentional tort,'" done with an actual intent to cause injury as opposed to acts done intentionally that result in injury. *See also Hope v. Walker (In re Walker)*, 48 F.3d 1161 (11th Cir. 1995). This distinction is important because reckless conduct resulting in injury that evidences an entire want of care or conscious indifference to the consequences is not sufficient under the legal standard established in this exception to discharge. Stated differently, Section 523(a)(6) addresses only those situations in which a debtor desired the injury caused by his conduct. It does not reach a debtor's failure to meet a duty of care that results in injury to someone else. *See generally Herndon v. Brock (In re Brock)*, 186 B.R. 293 (Bankr. N.D.Ga. 1995); *Myrick v. Ballard (In re Ballard)*, 186 B.R. 297, 299-301 (Bankr. N.D.Ga. 1994).

As discussed in *Woolley v. Woolley (In re Woolley)*, 288 B.R. 294, 301-02 (Bankr. S.D.Ga. 2001), whereas *Geiger* generally narrowed the scope of this provision to "trespassory intentional torts," the state of mind of a debtor regarding same has been subject to further interpretation in the case law. Reviewing recent decisions on this issue, the court in *Woolley* examined the Eleventh Circuit precedent in the *Walker* case and concluded that sufficient evidence of a "debtor's personal substantial certainty" with regard to the injury resulting from his or her act remains necessary under Section 523(a)(6), as opposed to a purely objective or reasonable person test that risks reinstating the "previously rejected 'reckless disregard standard.'" 288 B.R. at 302; *accord Miller v. J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998) (allowing either an objective or a subjective finding to satisfy willful and malicious injury). Thus, with respect to willfulness, it must be shown that a debtor "acted with the desire to cause" the resulting harm to a targeted person, acted "with knowledge that injury will occur" to such person, or acted in the belief that harm was "substantially certain to result" either through evidence of "subjective motive" regarding same or when "no other plausible inference" can otherwise be drawn from

the record that the debtor had such knowledge. *See Woolley*, 288 B.R. at 302 (cites omitted).

Given this legal standard for the necessary state of mind to support nondischargeability under Section 523(a)(6), the question is whether there are facts Plaintiff can prove that would support his allegations that the debt in question should be excepted from discharge. Courts construing this provision in light of the foregoing standard have concluded that it extends to instances of an intentional breach of contract *only* when such an act is attended by *tortious* conduct that meets the test of willful and malicious injury. *See e.g. Lockerby v. Sierra*, 535 F.3d 1038, 1041-42 (9th Cir. 2008); *Prewett v. Iberg (In re Iberg)*, 395 B.R. 83 (Bankr. E.D.Ark. 2008). A knowing or an intentional breach, or even a breach of contract informed by malice, is simply not enough to obtain relief under Section 523(a)(6). Along with the breach, there must also be an intentional tort.

Plaintiff appears to concede this point, asserting that Debtor did in fact commit the tort of conversion. To make a claim using this legal argument, however, Plaintiff would need facts showing that it held a legally recognizable interest in the funds paid by the property owner to Debtor and then a conversion of those funds. Contrary to Plaintiff's assertion, the existence of the affidavit in and of itself does not show facts necessary to support such a claim. A review of the pleadings reveals no basis for determining the existence of such interest, for instance, as through imposition of a constructive trust. Further, all of the allegations in the state court action address contract issues or unjust enrichment.

In sum, it appears that Plaintiff is unable to prove any facts that would support relief consistent with its allegations because an actionable claim under Section 523(a)(6) requires facts showing that Debtor injured Plaintiff or property of Plaintiff through an intentional tort. Even *Wolfson*, as cited by Plaintiff, seems to require such a decision herein for in that case, the property (and its proceeds), which were determined to have been converted, had in fact been pledged as collateral by the debtor-defendant

therein to the plaintiff-creditor. 56 F.3d at 53-54. While Plaintiff may have had an expectation of being paid by Debtor, its claim to the specific funds paid to Debtor, even if paid based on representations by Debtor that were untrue, does not rise to the level of a protected property right such that Debtor's use of those monies for purposes other than to pay its debt to Plaintiff makes out a cause for relief under Section 523(a)(6).

Accordingly, based on the foregoing, it is

ORDERED that Defendant-Debtor's motion to be dismiss be, and the same hereby is, **granted**; and it is, therefore,

FURTHER ORDERED that the complaint as filed in the above-styled adversary proceeding be, and the same hereby is, **dismissed** and this proceeding shall be closed.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff, counsel for Defendant-Debtor, the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 23rd day of December, 2008.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE