IT IS ORDERED as set forth below:

Date: January 29, 2016

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 15-61378-WLH
SHEHNAZ ALI VIRANI, a/k/a Shehnaz Alivirani,	CHAPTER 7
Debtor.	JUDGE WENDY L. HAGENAU
GIRISH MODI,	
Plaintiff.	
v.	ADV. PROC. NO. 15-5331
SHEHNAZ ALI VIRANI,	
Defendant.	

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Court on the Motion for Partial Summary Judgment on Counts I, II and IV filed by Girish Modi [Docket No. 38] and the Defendant's Objection thereto. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This matter is a core proceeding under 28 U.S.C. § 157(b)(I) as a complaint to determine the dischargeability of debts.

The Plaintiff's Motion for Summary Judgment is the latest of Mr. Modi's attempts to obtain relief in this bankruptcy case. The Court has previously denied his motion to have the bankruptcy case dismissed or converted to one under Chapter 11 of the Bankruptcy Code. This adversary proceeding seeks a determination that the debt to Mr. Modi is non-dischargeable under 11 U.S.C. § 523(a)(2) and (a)(6), and a determination that the Debtor is not entitled to a discharge under 11 U.S.C. § 727(a)(2), (3), (4) and (5). This Motion for Partial Summary Judgment is only as to the dischargeability of the debt under 11 U.S.C. § 523, and does not involve the application of 11 U.S.C. § 727.

Undisputed Facts

Mr. Modi attached to his motion a statement of Undisputed Material Facts, many of which were in fact disputed by the Debtor. The Court has already held an evidentiary hearing in connection with Mr. Modi's Motion to Dismiss this case and entered an order denying the Motion to Dismiss [Docket No. 31] including Findings of Fact. These Findings of Fact are incorporated herein. The Court finds the following of Mr. Modi's facts to be undisputed and relevant to the issues:

1. Mr. Modi made two personal loans totaling $50,000 to the Debtor Shehnaz Ali Virani and her husband Ramzan Ali Virani in November and December 2012.

2. Pursuant to the terms of the notes, the Debtor and her husband ("the Viranis") were to make monthly payments totaling $550. The second promissory note included a provision that an auditorium inside the event hall owned by SH Mart Inc. would be called "Girish Modi Auditorium" and that Mr. Modi would be provided exclusive rights to take photos and videos of events at the event hall.

3. The Viranis defaulted on the notes and Mr. Modi proceeded with a cause of action in the Superior Court of Gwinnett County.

4. The Gwinnett Superior Court case was ordered to mediation by the Gwinnett Superior Court and the mediation was held in August 2014. The mediation resulted in an agreement that the Viranis would pay Mr. Modi a total of $65,000 in monthly installments of $300. Even though the Debtor was not present at the mediation, she agreed to be bound by the mediation agreement.

5. On January 8, 2015, the Superior Court of Gwinnett County entered a final judgment against the Viranis in accordance with the terms of the mediation agreement. The judgment required the monthly $300 payment to Mr. Modi and provided that, if a payment was not received by the 6th of the month, the Viranis would be in default and Mr. Modi could seek a writ of fieri facias.

6. After entry of the judgment, Mr. Modi received the payments for February and March. The April payment was delivered to Mr. Modi one day late. Mr. Modi moved the Gwinnett Superior Court for an order of default to which the Viranis objected. Nevertheless, the Court entered the order of default and a writ of fieri facias was obtained by Mr. Modi.

7. This Chapter 7 petition was filed on June 19, 2015. The Debtor's husband filed a Chapter 13 petition on the same date, Case No. 15-61364, which was dismissed on September 15, 2015.

Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056(c). "The substantive law [applicable to the case] will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for

summary judgment has the burden of proving there are no disputes as to any material facts. Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. When reviewing a motion for summary judgment, a court must examine the evidence in the light most favorable to the nonmoving party and all reasonable doubts and inferences should be resolved in favor of the nonmoving party. Hairston, 9 F.3d at 918.

Dischargeability

Exceptions to discharge are narrowly construed and the burden is on the creditor to prove non-dischargeability by a preponderance of the evidence. Duncan v. Bucciarelli (In re Bucciarelli), 429 B.R. 372, 375 (Bankr. N.D. Ga. 2010).

11 U.S.C. § 523(a)(2)(A)

To prove a debt was incurred through false representation under Section 523(a)(2)(A), a creditor must show by a preponderance of the evidence: (1) that the debtor made a false representation with the intent to deceive the creditor; (2) that the creditor relied on the representation; (3) that the reliance was justified; and (4) that the creditor sustained a loss as a result of the representation. Hebbard v. Camacho (In re Camacho), 411 B.R. 496, 505 (Bankr. S.D. Ga. 2009) (citing In re Bilzerian, 100 F.3d 886, 892 (11th Cir. 1996); In re St. Laurent, 991 F.2d 672, 676 (11th Cir. 1993)).

Mr. Modi contends that the debt owed him was incurred as a result of false representation. The Debtor has admitted owing the debt, but for the debt to be non-dischargeable, it must have arisen as a result of false representation. The representation at issue must relate to existing or past facts, as opposed to mere speculations or declarations about future events. New Austin Roosevelt Currency Exchange, Inc. v. Sanchez (In re Sanchez), 277 B.R.

904, 908 (Bankr. N.D. Ill. 2002) (citations omitted). A debtor's representations related to future actions are not false representations under Section 523(a)(2), absent a showing the debtor never intended to perform the future act at the time the statement was made. See e.g. Bucciarelli, 429 B.R. at 375. Mr. Modi contends that, because the Debtor defaulted under the notes at issue, she had no intent to repay the loan when it was made. A failure to repay, alone, is not equivalent to a false representation. The only undisputed fact in this case is that the loan was in default. Why the loan was in default and what the parties intentions were at the time the loan was made is the subject of a factual dispute which the Court will need to determine after trial.[1]

Mr. Modi also contends the loans were obtained based on false representations regarding the Debtor's financial condition and that of her husband and his business. However, Section 523(a)(2)(A) specifically excludes oral statements related to a debtor's financial condition as a basis for non-dischargeability. Misrepresentations relating to a debtor's financial condition must be in writing to cause a claim to be non-dischargeable. 11 U.S.C. § 523(a)(2)(B). Mr. Modi has not asserted that any of the alleged misrepresentations regarding the Debtor's financial ability to repay were in writing. Even if the Debtor had affirmatively lied about her current assets, liabilities and income, such oral statements would directly relate to her financial condition and therefore would not constitute material misrepresentations for purposes of Section 523(a)(2)(A). See Lamar, Archer & Cofrin LLP v. Appling (In re Appling), 500 B.R. 246, 251 (Bankr. M.D. Ga. 2013).

Because the undisputed facts do not show as a matter of law that Debtor incurred Mr. Modi's debt as a result of false representations or as a result of written misrepresentations regarding her financial condition, the Court DENIES Mr. Modi's Motion for Summary Judgment on this ground.

[1] Mr. Modi's Statement of Undisputed Facts states at a footnote that the parties dispute the application of payments made by the Viranis.

11 U.S.C. § 523(a)(6)

Next, Mr. Modi contends the debt is non-dischargeable under 11 U.S.C. § 523(a)(6). Mr. Modi's argument here turns on not only the Debtor's alleged misrepresentations made in connection with obtaining the loan but also the actions of the Viranis after the dispute arose. The Viranis and Mr. Modi complain about how the state court litigation was conducted and each other's post-default conduct.

Under 11 U.S.C. § 523(a)(6), a debt is excepted from discharge if it is the result of willful and malicious injury by the debtor to another entity or to the property of another entity. The term "willful" means intentional and deliberate; malicious means wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill will. Lee v. Ikner (In re Ikner), 883 F.2d 986, 990 (11th Cir. 1989). The Supreme Court in Kawaauhau v. Geiger, 523 U.S. 57 (1998), held that Section 523(a)(6) only encompasses acts done with the actual intent to cause injury. Id. at 61, 64. The word "willful" modifies injury such that non-dischargeability requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Id. Because the term "willful" means intentional and deliberate, willfulness cannot be established by reckless conduct. Id. See also Ikner, 883 F.2d at 990-91 ("wanton" conduct causing car wreck not "intentional" under § 523(a)(6)); Kane v. Stewart Tilghman Fox & Bianchi, P.A. (In re Kane), 755 F.3d 1285, 1293 (11th Cir. 2014) ("'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.'") (quoting Maxfield v. Jennings (In re Jennings), 670 F.3d 1329, 1334 (11th Cir. 2012)). "Malice" under Section 523(a)(6) can be constructive or implied, e.g., Ikner, 883 F.2d at 991, and "[t]o establish malice, 'a showing of specific intent to harm another is not necessary,'" Jennings, 670 F.3d at 1334 (quoting Ikner, 883 F.2d at 991).

As with dischargeability claims under 11 U.S.C. § 523(a)(2), for a debt to be non-dischargeable under Section 523(a)(6), the debt must have been incurred as a result of the willful and malicious injury.[2] Health & Welfare Plan for E'ees of South Md. Elec. Coop, Inc., 236 B.R. 183, 188 (Bankr. D. Md. 1999) ("A successful cause of action pursuant to section 523(a)(6) requires the Plaintiffs to prove that the debt arose from willful harm done with intent to cause injury") (emphasis added). Willful and malicious behavior after the debt is incurred is not sufficient to make the debt non-dischargeable. Here, Mr. Modi's primary allegations involve post-default actions of the parties. The actions of the Debtor in connection with the execution of the loan are disputed, as discussed above. The only undisputed fact is that the Debtor owes Mr. Modi the debt. As a result, Mr. Modi is not entitled to judgment as a matter of law on the non-dischargeability of the debt under 11 U.S.C. § 523(a)(6) and the Court DENIES his motion for partial summary judgment. The Court will need to hold a trial to determine if the debt is non-dischargeable under 11 U.S.C. § 523(a)(6).

Collateral Estoppel

Next, Mr. Modi alleges he is entitled to summary judgment under a separate count of his Complaint entitled Collateral Estoppel. First, collateral estoppel is not a cause of action. Instead, it is a rule which allows the Court to rely upon facts found in connection with prior judgments for purposes of determining facts in another cause of action. In this case, for Mr. Modi to rely upon collateral estoppel, he must do so to establish certain elements of his non-dischargeability claims under Sections 523(a)(2) and (a)(6). The only judgment upon which Mr. Modi could be relying is the judgment of the Superior Court determining the Debtor and her husband to be liable to Mr. Modi in the amount of $65,000. While Mr. Modi did not include the judgment in his Motion for Summary Judgment, the Order and Judgment was admitted as an

[2] 11 U.S.C. § 523: "A discharge … does not discharge an individual debtor from any debt - … for willful and malicious injury …"

exhibit at the hearing on Mr. Modi's Motion to Dismiss and the Court can therefore rely upon it. The Order and Judgment simply states, "Plaintiff shall have judgment against Defendants, jointly and severally, in the total amount of $65,000 to be paid in monthly installments of $300 and due on the first day of each month …". The remainder of the order deals with the mechanics of how payments are to be made and disposes of various pending motions. The Order and Judgment does not make any findings of fact, nor does it state the basis on which the judgment is entered, other than incorporation of the parties' mediation agreement.

The doctrine of collateral estoppel seeks to prevent the re-litigation of issues previously contested and determined by a valid and final judgment in another court. Newton v. Lemmons (In re Lemmons), 2005 WL 6487216 (Bankr. N.D. Ga. 2005). The doctrine of collateral estoppel applies to non-dischargeability proceedings. Id. (citing Grogan v. Garner, 498 U.S. 279, 284 n. 11 (1991)). When reviewing a state court judgment under the doctrine of collateral estoppel, a federal court must accord the judgment the same preclusive effect as it would be given under the law of the state in which the judgment was rendered. Id.

This Court must, therefore, turn to Georgia law to determine the preclusive effect of the judgment against the Debtor. Camacho, 411 B.R. at 501. Under Georgia law, a party may only assert the doctrine of collateral estoppel when the following elements have been satisfied: (1) identity of the parties is the same; (2) identity of the issues is the same; (3) actual and final litigation of the issue in question occurred; (4) the adjudication was essential to the earlier action; and (5) the parties had a full and fair opportunity to litigate the issues in question. In re Lemmons, 2005 WL 6487216.

There is no doubt the parties are the same in the state court judgment and in this dischargeability action. The Court also finds the parties each had a full and fair opportunity to litigate the matter and chose to resolve it through mediation in a consent judgment.

Mr. Modi's collateral estoppel argument fails, though, on the remaining criteria for the use of collateral estoppel. As an initial matter, Mr. Modi must establish there was an identity of issues between the state court judgment and the dischargeability action. Mr. Modi has not submitted the complaint to the Court, but has described it in his Statement of Undisputed Facts as a complaint for fraud and breach of contract. The state court judgment simply grants judgment to the plaintiff without identifying on which count or counts the judgment may have been granted. While a judgment for fraud may have the collateral estoppel effect of establishing certain elements of non-dischargeability under 11 U.S.C. § 523(a)(2)(A), a judgment for breach of contract establishes none of the elements required for establishing non-dischargeability under 11 U.S.C. § 523(a)(2)(A) or (a)(6). Because the state court judgment provides no basis on which this Court can determine whether the Debtor's liability was based on fraud or breach of contract, this Court cannot determine that the same issues are present in both causes of action. See St. Laurent, 991 F.2d at 676 ("If the judgment fails to distinguish as to which of the 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").

Similarly, the Court cannot determine what findings were essential to the judgment. Where a trial court issues a single monetary award, with no findings, the prior award is not entitled to preclusive effective, because any portion of the complaint could have supported the monetary award. In re Labidou, 2009 WL 2913483 at *6 (Bankr. S.D. Fla. Sept. 8, 2009). Finally, the single monetary judgment also prohibits the Court from determining whether the issues of fraud were actually litigated. "Georgia case law does not disclose any analytical framework for determining whether a matter was actually litigated. However, 'as a general rule, when a question of fact is put in issue by the pleadings, is submitted to the trier of fact for its determination, and is determined, that question of fact has been 'actually litigated'." Valesk v.

Williams (In re Williams), 282 B.R. 267, 272 (Bankr. N.D. Ga. 2002) (citations omitted). While Mr. Modi may have pled fraud in his complaint, because the judgment does not state the basis on which it is granted, the Court cannot determine if the issue of fraud was determined and therefore actually litigated.

While a state court judgment can provide a basis on which certain facts determined in connection with the state court judgment are binding on the bankruptcy court, the state court does not have jurisdiction or authority to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(2) or (a)(6). Because the judgment in the state court case is a single monetary judgment with no findings of fact and no explanation as to the basis on which the judgment is granted, the only binding effect of the judgment is that the Debtor's liability to Mr. Modi is determined by the judgment. This Court cannot give collateral estoppel effect to any other portion of the judgment.

Conclusion

For the foregoing reasons, Mr. Modi's Motion for Partial Summary Judgment on Counts I, II and IV is DENIED. A trial will be set on this matter at the conclusion of the discovery period.

END OF ORDER

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