



IT IS ORDERED as set forth below:

Date: September 22, 2015

**W. Homer Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
FREEMAN E. FULLER,	:	BANKRUPTCY CASE
	:	NO. 14-11888-WHD
	:	
Debtor.	:	
	:	
PATRIOT FIRE PROTECTION, INC.,	:	ADVERSARY PROCEEDING
	:	NO. 14-1063
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
FREEMAN E. FULLER,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
	:	BANKRUPTCY CODE
Defendant.	:	

ORDER

Before the Court is the Motion for Summary Judgment (hereinafter the "Motion"), filed by Patriot Fire Protection, Inc. (hereinafter the "Plaintiff"). The Motion arises in

connection with a complaint to determine the dischargeability of a particular debt (hereinafter the “Complaint”). This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); § 1334.

FINDINGS OF FACT

The Defendant worked for the Plaintiff as a fire extinguisher technician from October 1, 1999, through August 31, 2009, when the Plaintiff terminated the Defendant’s employment. Complaint, Exh. A, Order Granting Partial Summary Judgment to Patriot Fire Protection, Inc., *Patriot Fire Protection, Inc. v. Fuller, et al.*, 09-CV-4619-M (Sup. Ct. Ga. Jan. 18, 2012) (hereinafter “Exh. A”), at 2-4.¹ While working for the Plaintiff, the Defendant signed a non-competition agreement (the “Agreement”). *Id.* at 2-3. Following his termination, the Defendant began working for Atlanta Area Extinguisher Services, Inc. (hereinafter “AAES”) and breached the terms of the Agreement by soliciting business and performing services for clients that he serviced while employed by the Plaintiff. *Id.* at 4.

In a single complaint filed with the Superior Court of Henry County (hereinafter the “Superior Court”), the Plaintiff sued the Defendant for breach of the Agreement and sued AAES for tortious interference with business relations. Plaintiff’s Statement of

¹ As discussed further below, through the application of collateral estoppel, the factual findings that were necessary to the Superior Court’s entry of summary judgment on the issue of the Defendant’s liability for breach of the Agreement have been established for purposes of this action.

Undisputed Facts, Exh. 3, Order and Final Judgment, *Patriot Fire Protection, Inc. v. Fuller*, 09-CV-4619-M (Sup. Ct. Ga. Oct. 31, 2013), at 1.

In January 2010, the Superior Court issued an interlocutory injunction “which enjoined and restrained [sic] [the Defendant] from initiating any further contact or communication with any client of Plaintiff whom [the Defendant] served, or whom [the Defendant] learned of, while in the employee [sic] of Plaintiff for the purpose of inviting, encouraging, or requesting the transfer of any accounts from Plaintiff; and using, disclosing, or transmitting, for any purposes, information obtained from the records of Plaintiff or concerning its customers, including but not limited to, for purposes or [sic] soliciting or accepting business or account transfers from any customer formerly serviced by [the Defendant] while employed by Plaintiff.” Plaintiff’s Statement of Undisputed Facts, Exh. 1, Order, *Patriot Fire Protection, Inc. v. Fuller*, 09-CV-4619-M (Sup. Ct. Ga. Mar. 19, 2010), at 1. On March 19, 2010, the Superior Court found the Defendant in willful contempt of this interlocutory injunction and ordered that the Defendant could purge himself of the contempt by paying the Plaintiff \$500 within ten days. *See id.* at 2.

Subsequently, the Superior Court granted partial summary judgment in favor of the Plaintiff against the Defendant, finding that the Defendant had breached the terms of the Agreement by servicing the Plaintiff’s clients. The Superior Court found the Defendant liable to the Plaintiff for “damages suffered by the breach” and attorney’s fees.

See Exh. A at 3, 4, 6-7.

The Superior Court first denied the Plaintiff's motion for summary judgment as to the claim of tortious interference with business relations against AAES, *see id.* at 8, but later granted the motion upon reconsideration, finding AAES liable for tortious interference with business relations and reserving for trial the issue of damages suffered by the Plaintiff, *see* Complaint, Exh. B, Order Granting Motion for Reconsideration, *Patriot Fire Protection, Inc. v. Fuller, et al.*, 09-CV-4619-M (Sup. Ct. Ga. Oct. 31, 2013), at 11. To have held AAES liable for tortious interference, the Superior Court must necessarily have found that AAES: (1) acted improperly and without privilege; (2) acted purposely and with malice with the intent to injure; (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff; and (4) caused the plaintiff to suffer some financial injury. *See id.* at 9-11.

On November 3, 2013, the Superior Court determined the amount of damages suffered by the Plaintiff as a result of the Defendant's breach of the Agreement and as a result of AAES' tortious interference. Specifically, in a directed verdict, the Superior Court entered judgment "in favor of the Plaintiff and against [the Defendant and AAES], jointly and severally, in the principal amount of \$85,709.33," plus attorney's fees and court costs of \$34,084.17, and post-judgment interest at the legal rate. Complaint, Exh. C, Order and Final Judgment, *Patriot Fire Protection, Inc. v. Fuller, et al.*, 09-CV-4619-

M (Sup. Ct. Ga. Nov. 6, 2013), at 4.

Following the Defendant's filing of a voluntary petition under Chapter 7 of the Bankruptcy Code,² the Plaintiff filed the Complaint, asserting, among other claims, that the judgment debt owed by the Defendant to the Plaintiff is nondischargeable, pursuant to section 523(a)(6) of the Bankruptcy Code. On July 13, 2015, the Plaintiff filed the instant motion for summary judgment, which the Defendant opposes.

CONCLUSIONS OF LAW

The Complaint seeks a determination that the judgment debt owed by the Defendant to the Plaintiff as a result of his breach of the Agreement is nondischargeable, pursuant to section 523(a)(6) of the Bankruptcy Code. In support of its motion for summary judgment, the Plaintiff argues that the Superior Court's findings of fact and conclusions are law regarding the debt are entitled to preclusive effect and support the conclusion that the debt is nondischargeable. In opposition, the Defendant submits that, although the Defendant is precluded from re-litigating his liability for breach of contract and the amount of the damages, the Superior Court made no findings of fact or conclusions of law with regard to the Defendant's conduct that are relevant to the issue of whether the debt arose from a "willful and malicious injury" caused by the Defendant. As the Plaintiff has submitted no other evidence regarding the willfulness or the

² 11 U.S.C. §§101, et seq.

maliciousness of the injury, the Defendant argues, the Court cannot grant summary judgment in favor of the Plaintiff.

A. *Summary Judgment Standard*

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy proceedings under Rule 7056 of the Federal Rules of Bankruptcy Procedure), this Court will grant summary judgment only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Hairston v. Gainesville Sun Publ'shg Co.*, 9 F.3d 913, 918-19 (11th Cir. 1993). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* 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), and the Court will read the opposing party's pleadings liberally, *Anderson*, 477 U.S. at 249.

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 Cir. 1985). The moving party must identify those evidentiary

materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the moving party makes a prima facie showing that it is entitled to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact that precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991).

B. *Section 523(a)(6) and Collateral Estoppel*

Section 523(a)(6) of the Bankruptcy Code renders nondischargeable any debt for willful and malicious injury by the debtor. 11 U.S.C. § 523(a)(6). Like other exceptions to discharge, the provisions of section 523(a)(6) warrant narrow construction. *See Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986). The Plaintiff bears the burden of establishing nondischargeability. *Hunter*, 780 F.2d at 1579.

To establish the nondischargeability of a debt under § 523(a)(6), a plaintiff must prove the following elements by a preponderance of the evidence: (1) that the debtor caused an injury to the plaintiff or the plaintiff's property interest; (2) that the injury resulted in a debt; (3) that the debtor's actions were willful; and (4) that the debtor's actions were malicious. *See Maxfield v. Jennings (In re Jennings)*, 670 F.3d 1329, 1334 (11th Cir. 2012); *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

“The word ‘willful’ in [523](a)(6) 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, 61 (1998) (emphasis in original). Accordingly, the plaintiff must establish that the debtor intended the injury, not just the act. In the absence of proof that the debtor had the subjective intent to cause injury, the court can infer the debtor’s intent to injure the plaintiff where the “defendant had a subjective motive to inflict injury or believed his conduct was substantially certain to cause injury.” *Hot Shot Kids, Inc. v. Pauley (In re Pervis)*, 512 B.R. 348, 376 (Bankr. N.D. Ga. 2014) (Hagenau, J.); *see also In re Smithey*, 2005 WL 6490601, at *12 (Bankr. N.D. Ga. Feb. 9, 2005) (Murphy, J.); *In re Crumley*, 2011 WL 7068913, at *3 (Bankr. N.D. Ga. Aug. 10, 2011) (Brizendine, J.) (“[I]t must be shown that a debtor either 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 be drawn from the record than that the debtor entertained such knowledge.’”); *In re Shelmidine*, 519 B.R. 385, 392-93 (Bankr. N.D.N.Y. 2014).

“‘Malicious’ means ‘wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will.’” *Jennings*, 670 F.3d at 1334 (quoting *In re*

Walker, 48 F.3d 1161, 1163 (11th Cir. 1995)); *see also In re Greene*, 2013 WL 6911376, at *3 (Bankr. N.D. Ga. Dec. 24, 2013) (Diehl, J.).

The Plaintiff asserts that collateral estoppel prevents the Defendant from re-litigating the issue of whether the Defendant's knowing breach of the Agreement resulted in a willful and malicious injury to the Plaintiff. Collateral estoppel, or issue preclusion, prevents parties from re-litigating issues previously decided by another court of competent jurisdiction. *See In re Bilzerian*, 100 F.3d 886, 892 (11th Cir.1996). This can include disputes over the dischargeability of debts in a bankruptcy proceeding. *See Grogan*, 498 U.S. at 284 n.11; *Bilzerian*, 100 F.3d at 892. To determine whether a state court judgment is entitled to preclusive effect, a federal court applies the law of the state in which the judgment was rendered. *See In re Williams*, 282 B.R. 267, 271-72 (Bankr. N.D. Ga. 2002) (Mullins, J.).

In this case, the order and judgment at issue were rendered by a Georgia court. "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 and necessarily litigated in the prior court proceeding; (3) determination of the issue must have been essential to the prior judgment; and (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." *In re*

Cunningham, 355 B.R. 913, 918 (Bankr. N.D. Ga. 2006) (citing *Dement v. Gunnin (In re Gunnin)*, 227 B.R. 332, 336 (Bankr. N.D. Ga. 1998)).

Here, the Defendant concedes that the Superior Court's judgment is entitled to preclusive effect with regard to liability and damages, but argues that the judgment contains nothing that would support a finding that the debt is nondischargeable. The Court agrees.

The Plaintiff's Superior Court complaint against the Defendant sought: 1) actual damages resulting from the Defendant's breach of the Agreement; and 2) attorney's fees. The Superior Court granted partial summary judgment in favor of the Plaintiff, finding the Defendant liable for breaching the terms of the Agreement and for attorney's fees. Following a jury trial, the Superior Court directed a verdict and issued a judgment against the Defendant for damages and attorney's fees because payment of such fees by the Defendant was provided for in the Agreement. As to the Defendant, therefore, the Superior Court found that the Defendant breached the Agreement and that the breach resulted in damages, but made no finding as to whether the Defendant's breach of the Agreement was also "willful and malicious" within the meaning of section 523(a)(6). In other words, the Superior Court made no findings or conclusions with regard to whether the Defendant had the subjective intent to injure the Plaintiff or whether he acted with the substantial certainty that his solicitation of certain customers would injure the Plaintiff or

the Plaintiff's property.³

The Court agrees with the Defendant that the Superior Court's judgment establishes only that the Defendant breached the Agreement and that the breach caused a certain amount of damage to the Plaintiff. The facts necessary to find a defendant liable for breach of contract, even where the breach was knowing and intentional, do not necessarily support the legal conclusion that the injury caused by such a breach was "willful and malicious" within the meaning of section 523(a)(6). *See In re Swofford*, 2008 WL 7842040 (Bankr. N.D. Ga. 2008) (Brizendine, J.).

Here, the Superior Court was only required to find that the Defendant breached the Agreement; not that he intended to harm the Plaintiff. The findings made in the Superior Court's judgment, therefore, are simply not enough to support a conclusion of nondischargeability. *See, e.g., In re Lemmons*, 2005 WL 6487216, at *5 (Bankr. N.D. Ga. Dec. 20, 2005) (Diehl, J.) (refusing to rely on the preclusive effect of a verdict determining liability for a debt when there was "no indication in the record before the Court that the jury . . . was instructed to consider Debtor's subjective intent to cause injury or the probability of injury"); *Lewis v. Lowery (In re Lowery*, 440 B.R. 914 (Bankr.

³ On March 19, 2010, the Superior Court also entered an order finding that the Defendant was in "willful contempt" of the Superior Court's preliminary injunction, which had enjoined and restrained the Defendant from initiating contact or communication with certain of the Plaintiff's clients. Again, however, nothing in the record before this Court indicates that the Superior Court considered whether the Defendant violated the injunction with the intent to injure the Plaintiff.

N.D. Ga. 2010) (Hagenau, J.). The Plaintiff relies upon the Superior Court's finding that AAES was liable for tortious interference with a business relationship, which necessarily required the Superior Court to find that AAES (rather than the Defendant), "maliciously" injured the Plaintiff by encouraging the Defendant to breach the Agreement. However, the Superior Court made these findings with regard to AAES' conduct, rather than the Defendant's conduct, and they can have no bearing on whether the damages caused by the Defendant's breach of the Agreement constitute a "willful and malicious injury" inflicted upon the Plaintiff *by the Defendant*. Furthermore, the Plaintiff raised the claim for tortious interference against only AAES (not the Defendant) and, therefore, the Defendant was not a party to this claim, as required for the application of collateral estoppel. *See Bridgestone Firestone, Inc. v. Green*, 198 Ga. App. 858, 859-60 (Ga. Ct. App. 1991) ("Appellants are not entitled to judgment on the basis of . . . collateral estoppel because complete identity or privity of parties is required . . .").

As the Superior Court made no finding that the Defendant acted willfully or maliciously, the Court is left only with a finding that the Defendant breached his contractual obligation. A "knowing breach of contract generally does not satisfy the malicious element of § 523(a)(6) absent 'some aggravating circumstance evidencing conduct so reprehensible as to warrant denial of the fresh start to which the honest but unfortunate debtor would normally be entitled under the Bankruptcy Code.'" *Rescuecom*

Corp. v. Khafaga (In re Khafaga), 419 B.R. 539, 550 (Bankr. E.D.N.Y. 2009); *JB Constr., Inc. v. King (In re King)*, 403 B.R. 86, 95 (Bankr. D. Idaho 2009) (holding that debtor's breach of a covenant not to compete did not cause willful and malicious injury because the defendant's conduct was not also tortious under state law). Whether a debtor's conduct satisfies the requirement of "aggravating circumstances" generally requires a "fact-specific determination made on a case-by-case basis." *Id.*; see also *In re Ketaner*, 149 B.R. 395, 401 (Bankr. E.D. Va. 1992).

The Court notes that some courts have found that a debtor's repeated violations of a court injunction constitute an "aggravating circumstance" that would support a finding of the nondischargeability of damages arising from what would otherwise be a mere breach of contract. See, e.g., *Bundy Am. Corp. v. Blankfort*, 217 B.R. 138, 144-45 (Bankr. D. Mass. 1998) (holding that a breach of contract does not result in a "malicious" injury without "some aggravating circumstance" and finding that, while the portion of a debt owed by the debtor as damages for breach of contract and copyright and trademark infringement was dischargeable, the sanctions awarded for continued contempt of a district court's injunction were nondischargeable, as the debtor's knowing, intentional, and continuous violation of the court's injunction constituted aggravating circumstances). While this Court may, upon consideration of all of the evidence in this case, determine that the Defendant's violation of the Superior Court's injunction constitutes an

aggravating circumstance that would transform the Defendant's conduct into more than the breach of a contract, the Court declines to do so at the summary judgment stage. Even if the Court were inclined to do so, the record lacks sufficient evidence from which the Court could determine which portion of the debt owed by the Defendant was caused by the Defendant's violation of the injunction, as opposed to his breach of the Agreement.

In short, it is the Plaintiff's burden to prove that the Defendant owes the Plaintiff a debt caused by a willful and malicious injury. The Court cannot determine whether the Defendant's actions caused such an injury from the facts established by the Superior Court's orders and judgment. The Plaintiff must present additional evidence, either through a renewed motion for summary judgment or at trial.

CONCLUSION

For the reasons stated above, the Plaintiff's Motion for Summary Judgment must be, and hereby is, **DENIED** without prejudice to the filing of a renewed motion.

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