UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Maria H. George, Case No. 8:09-bk-07653-CED
Chapter 7

Debtor.
_____/

Scott P. George,

Plaintiff,

v. Adv. No. 8:09-ap-00445-CED

Maria H. George,

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON COMPLAINT TO DETERMINE EXCEPTION TO DISCHARGE

The issue in this adversary proceeding is whether the Defendant is entitled to the discharge of a state court judgment obtained by her former husband on claims of defamation *per se* and invasion of privacy. Section 523(a)(6) of the Bankruptcy Code excepts from discharge debts incurred for "willful and malicious injury." The Court previously granted Plaintiff a partial summary judgment determining that the injury to Plaintiff was malicious, and holding that the standard for determining whether the injury was willful is whether the Defendant subjectively knew that her actions were substantially certain to cause injury to the Plaintiff. For the reasons set forth below, the Court finds that the Defendant subjectively knew that her actions were substantially certain to cause injury to the Plaintiff. Accordingly, the Court finds that the injury was both willful and malicious, and will enter final judgment in favor of the Plaintiff, determining that his state court judgment is excepted from discharge.

Findings of Fact

The Defendant in this action is the Debtor, Maria George ("Maria"). The Plaintiff is her former husband Scott George ("Scott"). Maria holds a Bachelor of Arts degree in psychology, was enrolled in a PhD program in neuroanatomy in Bloomington, Indiana, and, while married to Scott, attended law school. During their marriage, Maria and Scott lived in Chicago, Illinois, where Scott was employed as a stockbroker and they raised their four children. As a couple, Scott and Maria enjoyed a very comfortable lifestyle and an active social life, which contributed to Scott's business and financial successes. Scott and Maria divorced in 1999. The divorce was acrimonious; Scott and Maria engaged in litigation over financial and child custody issues.

In 2002, Maria mailed a document to a number of Scott's then business partners throughout the country (the "2002 Publication"). The 2002 Publication ascribed certain unscrupulous conduct to Scott. In 2003, Scott filed a lawsuit against Maria in the Circuit Court of Cook County, Illinois (the "Illinois Action") in which he alleged that he had been injured by Maria's disseminating the 2002 Publication, and that he had suffered severe damage to his name and reputation, resulting in a loss of income. In 2004, while the Illinois Action was ongoing, Maria mailed another document (the "2004 Publication") to at least 100 investment banking firms in Chicago, including Scott's potential employers.[1] The 2004 Publication included an 8-inch x 10-inch glossy photograph of Maria.

After Maria mailed the 2004 Publication, Scott filed a third amended complaint in the Illinois Action, alleging that both the 2002 Publication and the 2004 Publication included statements that imputed to Scott: (a) an inability to perform or want of integrity in the discharge of his duties or employment; and (b) a lack of ability in his trade, profession and business. Scott sought damages for defamation *per se* for the 2002 Publication, for defamation *per se* for the 2004 Publication, for invasion of privacy – false light, and for tortious interference with prospective economic advantage.

In October 2006, at the conclusion of an eight-day jury trial, judgment was entered in the Illinois Action for Scott on his claims of defamation *per se* and invasion of privacy – false light arising out of the 2004 Publication. The jury awarded Scott compensatory damages of $9,700,000 (the "Illinois Judgment"). A directed verdict was entered in Maria's favor on the claims arising from the 2002 Publication because it had not been offered into evidence, and for Maria on Scott's claim for tortious interference with prospective economic advantage. Scott had not requested, and the jury did not award, punitive damages.

[1] Both the 2002 Publication and the 2004 Publication are in the record in this proceeding. (Pl.'s Ex. 1, Ex. A, Ex. B.) The Court finds it unnecessary to republish the defamatory statements.

Maria relocated to Florida and filed the pending Chapter 7 case. Scott timely filed this adversary proceeding seeking an order determining that the Illinois Judgment is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6) as a debt for willful and malicious injury. The Court granted, in part, Scott's initial motion for summary judgment,[2] finding that the issue of "malicious injury" had been litigated in the Illinois Action, and thus the doctrine of collateral estoppel, as governed by Illinois law, precluded the re-litigation of that issue.[3] On reconsideration of its order denying Scott's second motion for summary judgment the Court clarified the standard it would apply in determining whether the injury was willful, stating that the standard was whether Maria subjectively knew that her actions were substantially certain to cause injury to Scott.[4] In its oral ruling on January 26, 2011, the Court also ruled that Maria's actions subsequent to the entry of the judgment against her could be considered evidence of her subjective knowledge at the time she initiated the 2004 Publication.[5]

At trial, Maria testified that Scott had threatened her, and that she had been in fear for her life since before they were married. She testified that unnamed law enforcement officials had advised her that, in order to save her life, she should tell the secrets she had kept during her marriage to as many people as possible. She admitted that the law enforcement officials had not suggested that she send the 2004 Publication. Maria testified that statements made in the 2004 Publication were "her truth."

Maria testified that she had mailed the 2004 Publication to approximately 3,000 individuals, including Oprah Winfrey, Steven Spielberg, Regis [Philbin] and Kelly [Ripka], Conan O'Brien, and David Letterman. Subsequently, Maria cooperated in the publication of an article in *Chicago* magazine (March 2007), and several online publications, including *The Clearwater Current* (July 17, 2009), *American Free Press* (November 9, 2009), and *Tampabay.com* (January 25, 2011).[6] In December 2008, Maria wrote a letter to Patrick Fitzgerald, the United States Attorney in Chicago, in which she repeated statements made in the 2004 Publication.[7] Maria testified that she has written a book covering the events described in the 2004 Publication. Maria's former boyfriend testified that Maria hoped to appear on the Oprah Winfrey Show.

Maria testified to having filed police reports with the Clearwater, Florida Police Department because of her concerns that her telephone was being tapped and her computer and emails were being accessed, and because she believed she was under surveillance in her Clearwater condominium from an adjacent condominium building. The police reports were closed as "unfounded."

Eleni Matos, who lived in Maria and Scott's Chicago home from December 1996 through March 1997, testified that Scott had made four threats against Maria in 1997: (1) that he would leave her penniless; (2) that he would leave her on the street; (3) that he would take her children away from her; and (4) that he would wipe her out. These "threats," made in 1997, and which do not include threats of violence, are too removed in time to be relevant to Maria's motivation in mailing the 2002 Publication and the 2004 Publication.[8]

Other than one deposition and an inadvertent telephone call in 2002 (while Scott was talking to his and Maria's daughter) Maria and Scott have had virtually no direct communication since 1999. After 1997, Scott has travelled to Clearwater, Florida (where Maria resides) on only three occasions, twice for depositions and once to meet with his attorney in this case.

The Court finds that Maria's testimony that she was, and is, in fear for her life is not credible. No evidence was presented at trial on the issue of Maria's mental health or any lack of ability on her part to form the intent necessary to establish willfulness.

Conclusions of Law

The Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

Scott must prove his case by a preponderance of the evidence.[9] Exceptions to discharge are narrowly construed in favor of the debtor.[10] In order to prevail

[2] Doc. No. 20.
[3] Doc. No. 41.
[4] Doc. Nos. 87, 89, 157.
[5] Tr., Doc. No. 93, at 13.
[6] Pl.'s Exs. 26-29.
[7] Pl.'s Ex. 40.

[8] Later in her testimony, Ms. Matos testified to having heard Scott use the words "in the morgue," "wipe out," and "you'll wish you never existed." (Tr. Doc. No. 152, p. 151.)
[9] *Grogan v. Garner*, 498 U.S. 297 (1991).
[10] *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986) (abrogated by *Grogan*, 498 U.S. at 291, on other grounds).

on his complaint, Scott must prove by a preponderance of the evidence that Maria (1) deliberately and intentionally, (2) injured Scott, by (3) a willful and malicious act.[11]

The Injury Was Malicious

As set forth above, the Court previously ruled on Scott's two summary judgment motions that collateral estoppel precludes litigation on the issue of "malicious injury."[12] Malice was not an element of Scott's defamation claim.[13] However, in connection with Scott's invasion of privacy – false light claim, which involved the same statements as the defamation claim, the jury was instructed that Scott had the burden of proving that Maria acted with "actual malice, that is, with knowledge that the statements were false or with reckless disregard for whether the statements were true or false."[14] In a section 523(a)(6) action, the requirement of malice is proven if a debtor acts with reckless disregard.[15] As the issue of actual malice or reckless disregard was actually litigated in the Illinois Action, collateral estoppel applies and this Court is bound by the jury's verdict in Scott's favor as to that issue.

The collateral estoppel effect of the Illinois Judgment also establishes that Scott was injured.

The Injury Was Willful

The Eleventh Circuit has recently restated the standard to be applied in determining whether an injury is willful. In *Maxfield v. Jennings (In re Jennings)*,[16] the court states as follows:

> We have held that proof of "willfulness" requires " 'a showing of an intentional or deliberate act, which is not done merely in reckless disregard of the rights of another.' " *In re Walker*, 48 F.3d 1161, 1163 (11th Cir.1995) (quoting *In re Ikner*, 883 F.2d 986, 991 (11th Cir.1989)). "[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; *see also Kawaauhau v. Geiger*, 523 U.S. 57, 61–62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (holding that § 523(a)(6) requires the actor to intend the injury, not just the act that leads to the injury). Recklessly or negligently inflicted injuries are not excepted from discharge under § 523(a)(6). *Kawaauhau*, 523 U.S. at 64, 118 S.Ct. 974.[17]

As *Jennings* explains, the issue in this case is whether Maria disseminated the 2004 Publication with the purpose of causing injury to Scott, or whether the dissemination was substantially certain to cause injury. But *Jennings* does not address whether "substantial certainty" is determined subjectively – from the debtor's subjective perspective – or by an objective standard.

In *Drewes v. Levin (In re Levin)*,[18] the court attempted to resolve this question in the context of a gunshot victim seeking to except from discharge the judgment he obtained against the shooter. In its analysis, the court distinguishes injuries resulting from financial harm from injuries resulting from physical harm.[19] The court found this distinction important because the financial harm cases involve a "somewhat attenuated relationship between the defendant's act and the resulting harm, [and] a purely objective substantial certainty analysis would bring the court dangerously close to the reckless standard. In such cases, using a subjective standard for substantial certainty avoids this

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[11] 28 U.S.C. § 523(a)(6); *Conseco v. Howard (In re Howard)*, 261 B.R. 513, 519 (Bankr. M.D. Fla. 2001) (citing *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1163-1165 (11th Cir. 1995)).

[12] Under Illinois law, the three elements of collateral estoppel are: (1) that the issues in the cases are identical; (2) that there is a final judgment on the merits; and (3) that the party against whom estoppel is asserted is a party or is in privity with a party to the prior adjudication. *Hayes v. State Teacher Cert. Board*, 835 N.E. 2d 146, 155 (Ill. 2005).

[13] The jury was instructed that the elements of defamation *per se* are: "(a) that Maria George made a false statement which falsely impute [sic] to Scott George: (a) the commission of a crime; (b) an inability to perform or want of integrity in the discharge of his duties in his employment; or (c) a lack of ability in his trade, profession and business; and (b) that there was a publication of the false statement to a third party by Maria George."

[14] Pl.'s Ex. 6.

[15] *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1263 (11th Cir. 1988) (abrogated by *Grogan*, 498 U.S. at 291, on other grounds); *see also Orix Credit Alliance v. Cole*, 199 B.R. 804, 805 (Bankr. M.D. Fla. 1996).

[16] 670 F.3d 1329 (11th Cir. 2012).

[17] *Id.* at 1334.

[18] 434 B.R. 910, 919 (Bankr. S.D. Fla. 2010).

[19] *See, e.g., Pettey v. Belanger*, 232 B.R. 543 (D. Mass. 1999); *Kleman v. Taylor (In re Taylor)*, 322 B.R. 306, 309 (Bankr. N.D. Ohio 2004); *cf. In re Englehart*, 2000 WL 1275614 (10th Cir. Sep. 8, 2000); *In re Howard*, 261 B.R. at 521.

risk."[20] In contrast, in cases involving physical harm, "the circumstantial evidence of a defendant's actual knowledge or belief tends to merge with the evidence supporting a finding of substantial certainty on an objective basis. To put it plainly, the willfulness of the act under subsection (a)(6) is often fairly obvious given the circumstances."[21]

This Court agrees with the analysis in *Levin.* In cases involving financial harm, such as this case, a more subjective intent standard is applied; in cases involving physical harm, a more objective standard is applied. In both types of cases, the debtor's knowledge or belief may be proven not only by the debtor's admissions, but also by circumstantial evidence tending to establish what the debtor knew when taking the injury producing actions.[22] Applying the subjective standard to the facts in this case, the question is whether Maria herself knew that the 2004 Publication was substantially certain to cause Scott injury.

Maria knew that Scott had sued her for damages in 2003 arising from the 2002 Publication; therefore, she knew that Scott claimed that she had injured him after she sent the 2002 Publication to ten or so of his business associates. Yet despite this knowledge, Maria went on to mail the 2004 Publication, at first, to over 100 of Scott's business and social acquaintances, and then to a total of approximately 3,000 individuals. In the *Jennings* case, the court found that the debtor's participation in a fraudulent transfer with actual knowledge of the creditor's claim demonstrated willfulness.[23] Similarly, Maria's dissemination of the 2004 Publication to over 3,000 individuals, with actual knowledge that Scott had already commenced the Illinois Action against her because of the statements contained in the 2002 Publication, demonstrates willfulness.

And even after the $9.7 million judgment was entered against her in the Illinois Action, Maria continued to take actions to publicize her dispute with Scott. She participated – if not instigated – the republication of the defamatory statements in *Chicago* magazine and various online publications. She did this knowing that her actions had caused injury to Scott. Maria's actions subsequent to the entry of judgment against her are relevant to and indicative of her intent at the time that she originally published the defamatory statements: Maria either intended to injure Scott, or she knew that her defamatory statements were substantially certain to cause injury to him. The Court finds that Maria's actions were willful.

In support of her position, Maria has cited two Illinois bankruptcy cases that address the dischargeability of defamatory statements. However, these cases may be distinguished on their facts and their legal analysis. In *Merritt v. Rizzo (In re Rizzo*),[24] the debtor went to the plaintiff's place of employment to serve him with a summons and complaint. When asked by a third party why he was serving the plaintiff, the debtor answered that the plaintiff was engaged in a money laundering scheme. The court found the debtor's testimony to be credible as to the reason for making the defamatory statement – in response to a direct question and which he would not have otherwise made – negating the element of intent. In *Jefferson v. Holland (In re Holland),*[25] the court found that the debtor's first defamatory statement was not actionable because it had been made to a police officer, and that a second defamatory statement was not malicious. The *Holland* court did not discuss the willfulness of the second statement. Unlike the present case, neither the *Rizzo* nor the *Holland* case involved an underlying state court action in which the issue of malice had actually been tried.

Conclusion

For the reasons set forth above, the Court concludes that the Illinois Judgment is a debt for a willful and malicious injury by Maria George to Scott George, and is therefore excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). Accordingly, the Court will enter a separate final judgment in favor of Scott George on his adversary complaint.

DONE and **ORDERED** in Chambers at Tampa, Florida, on April 11, 2012.

/s/
Caryl E. Delano
United States Bankruptcy Judge

[20] *In re Levin*, 434 B.R. at 920; *see also Via Christi Reg'l Med. Ctr. V. Englehart (In re Englehart)*, 229 F.3d 1163 (10th Cir. 2000).
[21] *In re Levin*, 434 B.R. at 920; *see also Hearon v. Kane (In re Kane)*, 2011 WL 165836, at *6-7 (Bankr. S.D. Fla. Jan. 18, 2011).
[22] *See Carrilo v. Su (In re Su)*, 290 F.3d 1140, 1147 n.6 (9th Cir. 2002).
[23] 670 F.3d at 1334.
[24] 337 B.R. 180 (Bankr. N.D. Ill. 2006).
[25] 428 B.R. 465 (Bankr. N.D. Ill. 2010).