

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN THE MATTER OF)	
)	
ROBERT A. PASTRICK,)	CASE NO. 10-25689 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
STATE OF INDIANA and CITY OF EAST)	
CHICAGO ex rel. GREGORY ZELLER,)	
ATTORNEY GENERAL OF INDIANA,)	
)	
PLAINTIFFS,)	
vs.)	PROC. NO. 11-2048
)	
ROBERT A. PASTRICK,)	
)	
DEFENDANT.)	

Appearances:

Christopher M. Trapp, Esq., and James E. Rossow, Esq., attorneys for plaintiff, 342 Massachusetts Avenue, Suite 500, Indianapolis, Indiana 46204;

Heather M. Crockett, Esq., attorney for plaintiff, Office of the Attorney General, 302 West Washington Street, IGCS, Fifth Floor, Indianapolis, Indiana 46204; and

Catherine Molnar-Boncela, Esq., Gordon E. Gouveia, Esq., and Shawn D. Cox, Esq., attorneys for defendant, Gordon E. Gouveia & Associates, 433 West 84th Drive, Merrillville, Indiana 46410.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 25, 2013.

Before the court is the Plaintiffs' Motion for Partial Summary Judgment, filed by the plaintiffs, State of Indiana ("the State") and City of East Chicago ("the City"), through their representative the Attorney General of Indiana (collectively, "plaintiffs"). The plaintiffs requested summary judgment on Counts I and III of the Complaint to Except Debt From Discharge ("Complaint") against the chapter 7 debtor Robert A. Pastrick ("defendant" or "debtor"). In response, the defendant filed an Amended Answer and "Motion for

Judgment on Pleadings, i.e. Answer to Count III.” For the reasons that follow, the court grants the plaintiffs’ Motion for Partial Summary Judgment on Counts I and III and grants the defendant’s Motion for Judgment on Pleadings.¹

BACKGROUND

On March 11, 2010, the United States District Court for the Northern District of Indiana, South Bend Division (“District Court”), entered final judgment against Robert Pastrick (and others) and in favor of the plaintiffs in the amount of \$108,007,584.33. The District Court found that Pastrick by default admitted that he violated numerous federal and state statutes and committed theft, in violation of Indiana Code 35-43-4-2, and was civilly liable under Indiana’s Civil Recovery for Crime Victims Act, Indiana Code 34-24-3-1.² *See State of Indiana et al. v. Pastrick et al.*, 696 F.Supp.2d 970 (N.D. Ind. 2010).

On December 17, 2010, the defendant filed a voluntary chapter 7 petition. The plaintiffs timely filed their Complaint requesting that Pastrick’s adjudged indebtedness to the plaintiffs be excepted from his discharge pursuant to 11 U.S.C. § 523(a)(6), § 523(a)(4), § 523(a)(7), § 523(a)(13), and § 523(a)(2)(A), in an amount not less than the amount of the District Court Judgment, \$108,007,584.33, and interest thereon. The defendant filed an Answer and a Motion to Dismiss. In its Memorandum of Decision of March 22, 2012, the court granted Pastrick’s Motion in part, dismissing Count IV of the Complaint, and denied the Motion with respect to Counts I, II, III, and V of the Complaint. *See* R. 26.

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

² The theft provision of the Indiana Code provides:

A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

Ind. Code § 35-43-4-2(a).

Now before the court is the plaintiffs' Motion for Partial Summary Judgment with respect to Counts I and III. Count I seeks judgment pursuant to 11 U.S.C. § 523(a)(6), and Count III seeks judgment pursuant to 11 U.S.C. § 523(a)(7). The defendant, granted leave to amend his Answer, admitted the plaintiffs' allegations pursuant to § 523(a)(7) and stated this prayer for relief:

WHEREFORE, Defendant respectfully requests that the Court enter judgment on Count III of Plaintiff's [*sic*] Complaint against the Defendant pursuant to Section 523(a)(7) in the total amount of \$108,007,584.33 plus interest and costs.

R. 39, p. 29. On the same day, Pastrick filed a "Motion for Judgment on Pleadings, i.e., Answer to Count III," admitting liability under § 523(a)(7) and consenting to the entry of judgment in that specific amount, \$108,007,584.33, plus interest and costs. *See* R. 40. The plaintiffs filed a Response concurring with the defendant's Motion:

Plaintiffs have no objection provided that the granting of the Motion for Judgment results in the entry of judgment against Pastrick for the entire amount of damages requested in all counts of the Complaint, including principal, interest and costs and determining that the judgment is excepted from discharge pursuant to 11 U.S.C. § 523(a)(7) with 'prejudgment' and 'postjudgment' interest calculated at .34% per annum, the applicable rate set forth in the [District Court's] Judgment.

R. 42, p. 1-2.

The undisputed material facts in this adversary proceeding were set forth in the court's Memorandum of Decision of March 22, 2012, which in turn were adapted from the background facts in the District Court's March 11, 2010 Opinion and Order. *See State of Indiana et al. v. Pastrick et al., supra*. The court notes that, before the District Court, the defendant had answered the Complaint but later advised the court that he would accept judgment by default rather than defend against the allegations. Those uncontested, thoroughly documented facts therefore are accepted as true by the parties and the courts. Because the issues before this court are legal rather than factual in nature, the court finds it unnecessary to repeat them herein.

DISCUSSION

The plaintiffs request summary judgment on two counts of their Complaint. This court renders summary judgment only if the record shows that “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); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

A. Count III: 11 U.S.C. § 523(a)(7)

The court considers first whether there is any genuine issue of material fact in Count III of the plaintiffs’ summary judgment motion. Section 523(a)(7) excepts from a debtor’s discharge any debt “to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss” To prove that a debt is excepted from a debtor’s discharge under § 523(a)(7), a plaintiff has the burden of showing that the debt is (1) a fine, penalty or forfeiture, (2) payable to and for the benefit of a governmental unit, and (3) not compensation for actual pecuniary loss. *See In re Towers*, 162 F.3d 952, 954-55 (7th Cir. 1998), *cert. den.*, 527 U.S. 1004 (1999).

As this court discussed in its earlier Memorandum of Decision, criminal restitution orders are the type of fine, penalty, or forfeiture generally held nondischargeable. *See Kelly v. Robinson*, 479 U.S. 36, 53, 107 S. Ct. 353, 93 L.Ed.2d 216 (1986); *Nelson v. La Crosse Cty. Dist. Atty.*, 301 F.3d 820, 825, n.3 (7th Cir. 2002). In *In re Towers*, the Seventh Circuit concluded that civil restitution orders in Illinois also could be found nondischargeable. *See Towers*, 162 F.3d at 956. The courts in our circuit have distinguished between

a dischargeable monetary sanction entered for contempt (when meant to compensate the injured party for damages), *see In re Butler*, 2011 WL 806078 at *16 (Bankr. C.D. Ill. Mar. 2, 2011), and a nondischargeable monetary sanction against an attorney (because it was a disciplinary fine), *see In re Logal*, 381 B.R. 706, 713 (Bankr. N.D. Ind. 2007).

By admitting liability under § 523(a)(7), Pastrick has consented to the sanctions created in this exception from discharge. Sanctions are deemed by the courts to be punitive damages, whether they were categorized or denominated as fines, penalties, or forfeitures. *See In re Tanner*, 1997 WL 578746 at *3-4 (Bankr. N.D. Ill. Sept. 16, 1997). The court found, in its earlier Memorandum of Decision, that the District Court’s Judgment of treble damages was punitive in nature. *See R. 26* at 18 (citing cases). It also determined that the Complaint’s allegations stated sufficient facts, accepted as true, to present a plausible claim that the treble damage award was a penalty which could be excepted from the debtor’s discharge under § 523(a)(7). *See id.* Pastrick now agrees that his conduct is deserving of sanctions under § 523(a)(7).

The defendant specifically consented to a judgment in the amount of \$108,007,584.33 plus interest and costs. He did not respond or object to the plaintiffs’ more specific request for judgment against Pastrick for the “entire amount of damages,” including principal, interest and costs, and establishing the prejudgment and postjudgment interest calculated at .34% per annum. Therefore the nondischargeable debt is adjudged to be in the amount of \$108,007,584.33, with interest and costs determined according to a prejudgment and postjudgment interest rate of .34% per annum.

Accordingly, based upon the court’s review of the facts and the record herein, the plaintiffs’ arguments in their summary judgment motion and brief in support, and the defendant’s motion consenting to judgment in favor of the plaintiffs and against himself pursuant to § 523(a)(7), the court grants the defendant’s Motion for Judgment on Pleadings. It finds that the plaintiffs are entitled to summary judgment on Count III of the Plaintiffs’ Complaint as a matter of law. It therefore grants the relief requested in Count

III of the plaintiffs' Complaint and grants judgment against the defendant Robert A. Pastrick in the amount of \$108,007,584.33 plus interest and costs pursuant to § 523(a)(7).

B. Count I: 11 U.S.C. § 523(a)(6)

The court now considers whether there is any genuine issue of material fact in Count I of the plaintiffs' summary judgment motion. Section 523(a)(6) excepts from a debtor's discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The Supreme Court held that § 523(a)(6) requires "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998); *see also In re Gulevsky*, 362 F.3d 961, 963-64 (7th Cir. 2004). Courts in our circuit traditionally begin with this analysis:

"[W]illful means deliberate or intentional . . . [and] [m]alicious means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm."

In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994) (quoting *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)). Our circuit has underscored that § 523(a)(6) was meant "to prevent the discharge of debts incurred as a result of intentional torts." *In re Pickens*, 234 F.3d 1273 at *1 (7th Cir. 2000) (unpub'd). However, the courts of this circuit also have recognized that the standard could be met by any conduct by the defendant that was substantially certain to result in injury or motivated by a desire to cause injury to the creditor or other party. *See, e.g., Kafantaris v. Signore*, 2011 WL 1743416 at *4 (N.D. Ill. May 5, 2011); *Larsen v. Jendusa-Nicolai*, 442 B.R. 905, 915 (E.D. Wis. 2010); *In re Roberts*, 431 B.R. 914, 920 (Bankr. S.D. Ind. 2010). Recently, in *Jendusa-Nicolai v. Larsen*, 677 F.3d 320 (7th Cir. 2012), Judge Posner discussed the distinctions and redundancies among the courts of appeals in their definitions of "willful" and "malicious" and in their formulas for establishing the § 523(a)(6) exception to discharge. He then provided a definition that might achieve consensus among the circuits:

[W]hatever the semantic confusion, we imagine that all courts would agree that a willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act. To allow him to shirk liability by discharging his judgment debt in those circumstances would undermine the deterrent efficacy of tort law without serving any policy that might be thought to inform bankruptcy law.

Id. at 324 (affirming that debt was not dischargeable under § 523(a)(6)).

The burden of proof under this exception to discharge, as under all the subsections to § 523(a), is on the party seeking the nondischargeability of the debt to prove each of the elements by a preponderance of the evidence. *See Grogan v. Gardner*, 498 U.S. 279, 287, 291, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991); *see also Ojeda v. Goldberg*, 599 F.3d 712, 716 (7th Cir. 2010). By that preponderance standard, therefore, the plaintiffs were required to establish these elements: “(1) that the debtor intended to and caused an injury to the [creditor or to the] creditor’s property interest; (2) that the debtor’s actions were willful; and (3) that the debtor’s actions were malicious.” *Colemichael Investments, L.L.C. v. Burke (In re Burke)*, 405 B.R. 626, 652 (Bankr. N.D. Ill. 2009).

The plaintiffs point out that before the District Court they established, and the court found, that Pastrick acted with both an intent to injure and an intent to deprive someone of the value of his or her property. The plaintiffs now argue, following the § 523(a)(6) test recently articulated in *Jendus-Nicolai*, that “it necessarily follows that [the District Court] found [that] Pastrick inflicted injury knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act.” R. 35 at 13.

The plaintiffs further posit that the defendant was collaterally estopped from relitigating the issues determined in the District Court underlying the dischargeability determination. They assert that the issue sought to be precluded in this proceeding was the same issue involved in the District Court action and was actually litigated. In addition, they insist, the determination of that issue was essential to the final judgment and the party to be estopped was fully represented in that prior action.

The defendant answered Count I with blanket denials, but did not respond at all to the plaintiffs' summary judgment motion. His Motion for Judgment on the Pleadings addressed only Count III of the plaintiffs' Complaint. He did not challenge the plaintiffs' summary judgment arguments on Count I.

The court considers whether the doctrine of collateral estoppel applies in this case to prevent the defendant from relitigating issues previously determined in another court. *See Jensen v. Foley*, 295 F.3d 745, 748 (7th Cir. 2002). The principles of collateral estoppel are applicable in adversary proceedings. *See Grogan v. Garner*, 498 U.S. 279, 285 n.11, 111 S. Ct. 654, 658 n.11, 112 L.Ed.2d 755 (1991). "The effect of a judgment in subsequent litigation is determined by the law of the jurisdiction that rendered the judgment . . . provided the judgment was rendered in a proceeding that comported with due process of law." *In re Catt*, 368 F.3d 789, 790-91 (7th Cir. 2004) (citing 28 U.S.C. § 1738 and supporting case law); *see also Kramer Consulting, Inc. v. McCarthy (In re McCarthy)*, 350 B.R. 820, 831-33 (Bankr. N.D. Ind. 2006). The decision whether to apply the doctrine of collateral estoppel is within the court's sound discretion. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331, 99 S. Ct. 645, 651-52, 58 L.Ed.2d 552 (1979).

In Indiana, "to bar relitigation of an issue, the doctrine of collateral estoppel requires: 1) a final judgment on the merits in a court of competent jurisdiction; 2) identity of the issues; and 3) the party to be estopped was a party or the privity of a party in the prior action." *Huber v. United Farm Family Mut. Ins. Co.*, 856 N.E.2d 713, 717 (Ind. App. 2006) (citation omitted). The Seventh Circuit noted that Indiana is among "a significant minority of states . . . [to] allow findings made in default proceedings to collaterally estop, provided that the defaulted party could have appeared and defended if he had wanted to." *In re Catt*, 368 F.3d at 791.

The court finds that the plaintiffs fully demonstrated that the requirements for collateral estoppel have been met. It first determines that the District Court judgment by default is no impediment to the application of collateral estoppel. The District Court granted recovery to the plaintiffs after the defendant had appeared, answered, and actively defended himself for five years. A default judgment was entered

against Pastrick only after he affirmatively requested it and chose instead to contest damages. It is clear to this court that the defendant could have appeared and defended if he had wanted to. *See In re Catt*, 368 F.3d at 791. He actively participated in the lawsuit and, well represented by counsel, could reasonably have foreseen that the uncontested facts would be binding in future proceedings. *See Herbstein v. Bruetman (In re Bruetman)*, 259 B.R. 649, 663 (Bankr. N.D. Ill. 2001) (citing *Klingman v. Levinson*, 831 F.2d 1292, 1296 (7th Cir. 1987)). The court concludes that the District Court judgment was a final judgment on the merits in which the defendant actively participated and even strategically guided the court to a default judgment on liability so that he could contest the charges of damages.

It is also clear that Robert Pastrick is the party defendant in the prior District Court case and the party to be estopped in this adversary proceeding. The only issue to be considered is whether the plaintiffs demonstrated “identity of the issues.” The District Court found that each of the statutory elements of theft was proven; in addition, Pastrick conceded that his conduct fulfilled those statutory criteria by requesting judgment by default on all counts against him, including the ruling of violation of the Indiana theft statute. In this court, the plaintiffs argued in their Complaint that Pastrick’s conduct, which satisfied the requirements of Indiana’s theft statute, also satisfies the § 523(a)(6) requirements for willful and malicious injury.

The plaintiffs’ Complaint presented the following allegations demonstrating that Pastrick’s actions were willful, deliberate, and/or intentional within the meaning of § 523(a)(6):

- (1) After the Board of Public Works failed to accept bids for the sidewalk improvement program, “Pastrick knowingly and/or intentionally and in violation of local and State law solicited, directed and authorized numerous contractors and sub-contractors (some of whom had no experience, permits, licenses, insurance or bonding) to pour concrete, trim and cut trees, and provide other services . . . for non-public, political purposes.”
- (2) By authorizing compensation for those contractors and sub-contractors in order to curry their political favor and to draw the votes of those whose neighborhoods were improved, Pastrick and others spent millions of dollars of East Chicago’s money and property.
- (3) After the primary election, the unauthorized concrete pouring and tree trimming stopped, and Pastrick and his associates created false and misleading documents, including backdated contracts, to conceal the illegal work.

(4) Pastrick's deliberate, calculated actions caused the City of East Chicago to pay \$23,993,005.53 to contractors under that "Sidewalks for Votes" scheme, payments which depleted the City's general fund and overdrew its general fund bank account.

See R. 26, p. 10 (citing R. 1, ¶¶ 13-20). This court found, in its March 22, 2012 Memorandum of Decision, that the plaintiffs' factual allegations concerning Pastrick's deliberate actions and conduct were sufficient to support an allegation that Pastrick's actions were willful and either malicious or done in conscious disregard of his duties. *See id.* at 10-11. Denying the defendant's Motion to Dismiss Count I, it concluded that the plaintiffs' allegations "sufficiently demonstrated that Pastrick intentionally inflicted an injury on the plaintiffs or on their property, or that he acted with substantial certainty that injury to the City would result." *Id.* at 11.

The court reiterates that the defendant has not objected to the plaintiffs' summary judgment arguments concerning § 523(a)(6).³ The court earlier found that the plaintiffs' claims under Count I were sufficient to withstand a motion to dismiss. It now finds that the plaintiffs clearly showed that the defendant's conduct in committing theft satisfied the requirements under § 523(a)(6). Since the underlying facts concerning that conduct were not disputed, the court determines that there are no genuine issues of material fact on this issue.

To prove "identity of the issues," the plaintiffs point out the District Court's conclusion: that Pastrick, by committing theft under Indiana law, intended to injure and to deprive the plaintiffs of the value of their property. They argue that it necessarily follows that Pastrick violated § 523(a)(6) with his "willful and malicious injury" to East Chicago, to the state Indiana, and to the property of those entities. Using the Seventh Circuit's language in *Jendus-Nicolai*, they describe Pastrick's conduct in this way: "Pastrick inflicted injury knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act." R. 35 at 13.

³ It is significant to the court, as well, that the defendant admitted that his conduct was deserving of sanctions under § 523(a)(7).

This court finds that the District Court concluded that Pastrick committed theft as defined by Indiana Code § 35-43-4-2. It adjudged that Pastrick committed theft by “knowingly and intentionally exerting unauthorized control over property and money belonging to the City, with the intent to deprive the City of any part of the value or use of that property and money.” R. 1, Ex. 2 at 9 (696 F.Supp.2d at 981). A theft conviction under the Indiana statutes “has been found to satisfy the requirements of § 523(a)(6) and to be entitled to preclusive effect in a proceeding to determine dischargeability brought under that subsection.” *In re Baker*, 2011 WL 4549156 at *4, n.8 (Bankr. S.D. Ind. Sept. 28, 2011) (citing *Babbs v. Hale*, 11-59004 (Bankr. S.D. Ind. 2011)). Bankruptcy courts in other states have found that a theft conviction has collateral estoppel effect in a § 523(a)(6) action. *See, e.g., In re Ragucci*, 433 B.R. 889 895 (Bankr. M.D. Fla. 2010) (concluding that Florida’s Civil Theft Act establishes willful and malicious injury and thus satisfies the first prong of collateral estoppel).

It is clear to this court that the District Court’s judgment that Pastrick committed theft under the Indiana statute establishes willful and malicious injury under § 523(a)(6) and fulfills the “identity of the issues” requirement of collateral estoppel. The court concludes that the plaintiffs have proven that the defendant committed theft and that Indiana’s statutory requirements for theft satisfy the Bankruptcy Code’s statutory requirements for “willful” and “malicious” injury under § 523(a)(6). There are no issues of material fact, and the plaintiffs are entitled to summary judgment on Count I of their Complaint as a matter of law.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court grants the Motion for Judgment on Pleadings of the defendant Robert A. Pastrick. Judgment on Count III of the plaintiffs’ Complaint is granted against the defendant in the amount of \$108,007,584.33 plus interest and costs at the interest rate of .34%.

The plaintiffs' Motion for Partial Summary Judgment is also granted as a matter of law. The court grants the relief requested in Counts I and III of the plaintiffs' Complaint to Except Debt from Discharge. The debt owed by the defendant Robert A. Pastrick to the plaintiffs State of Indiana and City of East Chicago is excepted from the debtor's discharge pursuant to 11 U.S.C. § 523(a)(6) and § 523(a)(7).

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT