



Entered on Docket
April 11, 2008

A handwritten signature in black ink, appearing to read "Mike K. Nakagawa".

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * *

In re:)
CHRISTINE MARIA GABELL,)
Debtor.)

BK-S-07-12817-MKN

Chapter 7

DAN B. WILSON, JR.,)
Plaintiff,)
v.)
CHRISTINE MARIE GABELL,)
Defendant.)

Adv. Proceeding No.: 07-01129-MKN

Date: April 3, 2008

Time: 9:30 a.m.

**MEMORANDUM DECISION ON PLAINTIFF DAN B. WILSON, JR.'S
MOTION FOR SUMMARY JUDGMENT¹**

This matter was heard on April 3, 2008. After oral arguments were presented, the Court took the matter under submission.

BACKGROUND

¹ In this Memorandum Decision, all references to "Section" shall be to the provisions of the Bankruptcy Code, 11 U.S.C. section 101, et seq., unless otherwise indicated. Additionally, all references to "Rule" shall be to the Federal Rules of Bankruptcy Procedure unless otherwise indicated.

1 On May 16, 2007, Christine Maria Gabell ("Defendant") filed a voluntary Chapter 7
2 petition. On August 14, 2007, the above-captioned adversary proceeding was commenced by Dan
3 B. Wilson, Jr. ("Plaintiff") seeking a determination that he is owed a debt based on judgment
4 previously rendered in the State of Tennessee that is excepted from discharge under Section
5 523(a)(6). On August 22, 2007, a discharge was entered as to all other obligations.

6 On September 12, 2007, Defendant filed a motion to dismiss the adversary complaint (Dkt#
7 8) which was heard on December 10, 2007. Defendant's motion to dismiss was denied and a
8 written order (Dkt#24) was entered on January 2, 2008. Defendant filed an Answer to the
9 adversary complaint on January 11, 2008. (Dkt# 26)

10 On January 28, 2008, Plaintiff filed a motion for summary judgment ("SJ Motion") (Dkt#27)
11 to which Defendant filed an Opposition to Plaintiff Dan B. Wilson, Jr.'s Motion for Summary
12 Judgment ("Opposition") (Dkt#30) along with the Affidavit of Christine Gabell in Support of
13 Opposition to Plaintiff's Motion for Summary Judgment ("Gabell Affidavit") (Dkt#31). Plaintiff's
14 reply brief ("Reply") (Dkt#33) was filed on March 19, 2008.

15 APPLICABLE LEGAL STANDARDS

16 Rule 56 of the Federal Rules of Civil Procedure is applicable in adversary proceedings
17 pursuant to Bankruptcy Rule 7056. See In re Silva, 190 B.R. 889, 891 (9th Cir. B.A.P. 1995).
18 Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and
19 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
20 material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.
21 56(c). A fact is "material" for summary judgment purposes if it might affect the outcome of suit
22 under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
23 (1985). The nonmoving party cannot rest upon mere denials or allegations in pleadings, but must
24 set forth specific facts, by affidavit or otherwise, sufficient to raise a genuine issue of fact for trial.
25 See Celotex Corporation v. Catrett, 477 U.S. 317, 324 (1986).

26 DISCUSSION

1 On February 7, 1997, Plaintiff filed a complaint in the Chancery Court for Davidson County,
2 Tennessee ("Tennessee Complaint") against Defendant, denominated Case Number 97-473-I.
3 Paragraph 8 of the Complaint alleged that Defendant, in retaliation against the Plaintiff, knowingly
4 lodged false complaints of sexual harassment against Plaintiff. Paragraph 9 alleged that Defendant
5 maliciously and falsely stated that Plaintiff had been sexually harassing her. Paragraph 11 alleged
6 that the statements made by Defendant were slanderous, false and malicious and/or made with a
7 total and reckless disregard for the truth, and with the intent to interfere without justification with
8 Plaintiff's business/employment relationship with his employer. Paragraph 12 alleged that
9 Defendant's statements injured and damaged the professional and personal reputation of Plaintiff
10 and directly interfered and caused the termination of Plaintiff's business/employment relationship
11 with his employer.

12 Paragraph 13 alleged that Defendant's statements were false and malicious and constituted
13 slander, that caused injury to the character and reputation of Plaintiff. Paragraph 14 alleged that
14 Defendant intentionally interfered with Plaintiff's business/employment relationship with his
15 employer without justification and caused Plaintiff harm for which he has suffered lost wages and
16 damage to his reputation. Paragraph 14 alleged that Defendant knew of the business/employment
17 relationship and intentionally interfered with it without justification.

18 Based on these and other allegations, the prayer of the Tennessee Complaint sought
19 compensatory damages of \$1.5 million and punitive damages of \$1.5 million for defamation, and
20 compensatory damages for lost income and punitive damages of \$1.5 million for tortious
21 interference with business relations.

22 A copy of the Tennessee Complaint is attached as Exhibit "1" to the SJ Motion and as
23 Exhibit "E" to the Opposition.

24 On November 17, 1997, the Davidson County Chancery Court ("Chancery Court") entered a
25 Final Order stating that judgment by default was previously entered in the case based on
26 Defendant's failure to answer or otherwise respond to the Complaint. The Final Order also set forth

1 the determinations made by the Chancery Court at a hearing that had been conducted on November
2 5, 1997. The Final Order states, inter alia, that “The Court found that Plaintiff had paid expenses to
3 or had been obligated by virtue of credit card charges in the sum of \$45,788.14 for and on behalf of
4 the Defendant. Further, the Plaintiff lost his employment of more than twenty (20) years by virtue
5 of the defamatory statements.” The court also found that “the conduct of the Defendant had been
6 shown by clear and convincing evidence to have been intentional, willful, and malicious and had
7 caused harm to the person or property of the Plaintiff.” The Final Order further states that “having
8 considered the nature and reprehensibility of the Defendant’s wrongdoing, including the impact of
9 the conduct on the Plaintiff, the relationship of the Defendant to the Plaintiff, and the Defendant’s
10 awareness and motivation of the form and the duration of the misconduct, the Court was of the
11 opinion that the Plaintiff should also have and recover from the Defendant punitive damages in the
12 amount of Five hundred thousand dollars (\$500,000.00).” The Final Order then directs that
13 “Plaintiff is awarded judgment from and against the Defendant in the amount of One million forty-
14 five thousand seven hundred eighty-eight and 14/100 (\$1,045,788.14) in compensatory damages
15 and Five hundred thousand dollars (\$500,000.00) in punitive damages.” The Final Order constitutes
16 the final judgment of the Chancery Court on the Tennessee Complaint (hereafter “the Tennessee
17 Judgment”).²

18 A copy of the Tennessee Judgment is attached as Exhibit “4” to the SJ Motion and as
19 Exhibit “F” to the Opposition.

20 There is no genuine issue of material fact that Defendant was personally served with the
21 Tennessee Complaint as indicated on page 117, lines 16-19, of Defendant’s 2003 deposition in
22 another case, excerpts of which are attached as Exhibit “3” to the SJ Motion³. There is no dispute
23

24 ² At oral argument on the SJ Motion, Plaintiff’s counsel clarified that the Final Order is the
25 judgment rendered by the Chancery Court in the Tennessee action.

26 ³ In her opposition, Defendant opines that only excerpts of the deposition testimony was
provided and that the deposition was taken in 2003 in connection with a separate case that Plaintiff

1 that Defendant never responded to the Tennessee Complaint as set forth in the Tennessee Judgment.
 2 There is no dispute that Defendant was served with the Tennessee Judgment as indicated on page
 3 118, lines 12-17 of Defendant's deposition, excerpts of which are attached as Exhibit "5" to the SJ
 4 Motion⁴. There is no dispute that the judgment entered on the Tennessee Complaint is final.

5 In this circuit, the collateral estoppel or "issue preclusion" effect given to a state court
 6 judgment is determined by the rules of the state in which the judgment was entered. See In re
 7 Bugna, 33 F.3d 1054, 1057 (9th Cir. 1994); Randolph v. City of East Palo Alto, 2008 WL 618908 at
 8 *3 (N.D.Cal. March 1, 2008); In re Ormsby, 2008 WL 544589 at *3 (E.D.Cal. February 26, 2008).
 9 Under Tennessee law, collateral estoppel bars relitigation of an issue if it was raised in an earlier
 10 case between the same parties, the issue was actually litigated, and determination of the issue was
 11 necessary to the judgment. See In re Bursack, 65 F.3d 51, 54 (6th Cir. 1995); In re Olson, 355 B.R.
 12 660, 667 (Bkrtcy.E.D.Tenn. 2006). In Tennessee, a default judgment will satisfy the requirement of
 13 actual litigation for collateral estoppel purposes. See In re Bursack, supra, 65 F.3d at 55, citing
 14 Lawhorn v. Wellford, 179 Tenn. 625, 168 S.W.2d 790, 792 (1943).

15 The Tennessee Complaint alleged causes of actual for defamation and tortious interference
 16
 17

18 pursued against his former employer. See Opposition at 2:22-24 & n.1. Oddly, however, Defendant
 19 attaches as Exhibit "B" to her Opposition excerpts from the same 2003 deposition as evidence that she
 20 did not want Plaintiff to be fired. At oral argument, Defendant's counsel did not dispute that
 21 Defendant had been served with the Tennessee Complaint but suggested that there is "a discrepancy"
 22 as to how the service occurred. When pressed for an explanation, counsel indicated that Defendant
 23 some how had been "enticed" to respond in a certain manner to the litigation. Counsel also stated that
 24 while he "believes that she received the complaint", Defendant may have simply followed someone's
 25 bad advice (presumably from a non-attorney) that she flee Tennessee rather than respond to the
 26 complaint. In her affidavit filed in opposition to the SJ Motion, however, Defendant acknowledges
 that she was served with "papers at some point" but makes no mention at all of any purported
 "discrepancy" regarding service of the Tennessee Complaint. See Gabell Affidavit at ¶ 29. The Court
 concludes that there is no genuine issue as to service.

⁴ Nowhere in Defendant's affidavit does she dispute having been served with the Tennessee
 Judgment.

1 with an at-will relationship⁵. Under Tennessee law,

2 “The elements for a defamation cause of action are: (1) a party's publication of
3 a statement; (2) with knowledge that the statement was false and defaming to
4 the other; or (3) with reckless disregard for the truth of the statement or with
5 negligence in failing to ascertain the truth of the statement. In *Davis*, the court
6 found that there must be actual damages; the defamation must have caused
7 damage to the plaintiff's reputation or standing in the community.....Generally,
8 punitive damages are not permitted in a libel action unless actual malice is
9 shown. However, punitive damages may be awarded without a showing of
10 actual malice when the defamatory statements are not of public concern....A
11 statement made with "actual malice" is a statement made with knowledge that
12 it is false or with reckless disregard of its truth or falsity.”

13 5 Tenn.Prac., Civil Procedure Forms § 8:201 (2007-2008)(Footnotes and citations omitted).

14 A prima facie case for tortious interference under Tennessee law requires proof of the
15 following elements:

16 “... a valid business relationship, the defendant's knowledge of the relationship,
17 the defendant's intention to interfere with the relationship, actual breach or
18 termination of the relationship proximately caused by the defendant's act, and
19 damages resulting....”

20 5 Tenn.Prac., Civil Procedure Forms § 8:181 (2007-2008)(Footnotes and citations omitted). The
21 business relationship may include an at-will employment relationship. See generally 17 Am.Jur.,
22 Proof of Facts 2d 517 (Database Update June 2007).

23 In granting the Tennessee Judgment, the Chancery Court necessarily found in Plaintiff's
24 favor on each of the elements of the claims for defamation and for tortious interference. Because
25 the defamatory statements were with respect to a private rather than a public concern, it was not
26 necessary for the court to find malice to award punitive damages on the defamation claim. To the
extent the award was made in relation to the tortious interference claim, however, the court was
required to find that Defendant acted either intentionally, fraudulently, maliciously, or recklessly.
See In re Cambio Health Solutions, LLC v. Reardon, 213 S.W.3d 785, 792 (Tenn. 2006).

In Tennessee, the pattern jury instruction for an award of punitive damages under Tennessee

⁵ At oral argument, Plaintiff's counsel clarified that the interference cause of action was on a theory of intentional interference with an at-will relationship under Tennessee law.

1 law requires a finding that the “defendant has acted either intentionally, recklessly, maliciously, or
 2 fraudulently.” For purposes of the award, the instruction provides that “a person acts intentionally
 3 when it is the person’s purpose or desire to do a wrongful act or cause the result.” It further
 4 provides that “A person acts maliciously when the person is motivated by ill will, hatred or personal
 5 spite.” 8 Tenn.Prac.Pattern Jury Instr. T.P.I. - Civil 14.55 (2007).

6 Plaintiff’s adversary complaint seeks a determination that Defendant’s obligation under the
 7 Tennessee Judgment is excepted from discharge under Section 523(a)(6). That provision provides
 8 that a discharge under Section 727 does not discharge an individual debtor from any debt “for
 9 willful and malicious injury by the debtor to another entity.” An award of punitive damages is
 10 included within this provision. See Muegler v. Bening, 413 F.3d 980, 984 (9th Cir. 2005); In re
 11 Beyers, 2008 WL 678682 at *5 (Bkrtcy.W.D.Wash. March 7, 2008).

12 In determining whether an act is willful within the meaning of Section 523(a)(6), “...a two-
 13 pronged test is used..... The test is subjective.... The court must determine that: (1) the act that
 14 resulted in the creditor's injury was intentional and (2) the debtor actually intended the injury to
 15 occur or, at least, was substantially certain that it would occur.” In re Qari, 357 B.R. 793, 798
 16 (Bkrtcy.N.D.Cal. 2006), citing In re Su, 290 F.3d 1140, 1143-44 (9th Cir.2002) and In re Sicroff,
 17 401 F.3d 1101, 1106 (9th Cir. 2005).

18 An act is considered to be malicious “when it is: (1) a wrongful act, (2) done intentionally,
 19 (3) which necessarily causes injury, and (4) is done without cause or excuse.” In re Sicroff, supra,
 20 401 F.3d at 1106, quoting In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001). An intent to injure
 21 need not be proven, only an intentional act which causes injury. Id.

22 **A. The Determination of Willfulness.**

23 In the Tennessee Judgment, the Chancery Court found that “the conduct of the
 24 Defendant had been shown by clear and convincing evidence to have been intentional, willful, and
 25 malicious and had caused harm to the person or property of the Plaintiff.” To find Defendant’s
 26 conduct to have been intentional, the Chancery Court was required to find that Defendant acted with

1 the “purpose or desire to do a wrongful act or cause the result.” To find Defendant’s conduct to
 2 have been malicious, the Chancery Court was required to find that Defendant was “motivated by ill
 3 will, hatred or personal spite.”

4 In this case, there is no dispute that the Defendant intended to make statements to
 5 Plaintiff’s former employer⁶, therefore satisfying the first prong for the determination of willfulness
 6 under Section 523(a)(6). In awarding punitive damages, the Chancery Court found that the
 7 Defendant acted with intent to injure the Plaintiff, therefore satisfying the second prong of the
 8 inquiry. Under these circumstances, the Court finds that the willfulness requirement was
 9 adjudicated by the Chancery Court for purposes of Section 523(a)(6)⁷.

10 **B. The Determination of Maliciousness.**

11 As previously noted, to find Defendant’s conduct to have been malicious, the
 12 Chancery Court was required to find that Defendant was “motivated by ill will, hatred or personal
 13 spite.” And as previously noted, an act is considered to be malicious if it is wrongful, done
 14 intentionally, necessarily causes injury, and is without just cause or excuse.

15 In Sicroff, supra, the debtor (“Sicroff”) sent a letter to various newspapers wherein he
 16 alleged that a university professor (“Jett”) had engaged in unprofessional conduct. Jett sued Sicroff

17
 18 ⁶ At oral argument, Defendant’s counsel indicated that there is no dispute that Defendant
 19 spoke to Plaintiff’s employer but that the statements were as represented in the Gabell Affidavit,
 presumably in Paragraphs 20, 21 and 22.

20 ⁷ Defendant indicates in her affidavit that she did not ask for Plaintiff to be fired by his
 21 employer and that she did not want to cause anyone harm. See Gabell Affidavit at ¶ 21. She also
 22 indicates in her affidavit that she denied to Plaintiff’s employer having an intimate relationship with
 23 the Plaintiff, id. at ¶ 22, that she did not fabricate any dealings with the Plaintiff, id. at ¶ 30, that she
 24 did not intend to have Plaintiff fired, id. at ¶ 31, and that she did not expect Plaintiff’s employer to fire
 25 him. Id. at ¶ 32. Based on the affidavit and a portion of her 2003 deposition transcript, she argues that
 26 there are issues of fact regarding her intentions. See Opposition at 14:4-9. At oral argument, her
 counsel was adamant that Defendant’s affidavit and deposition testimony raise issues of fact
 precluding summary judgment. Her argument might be appropriate, even compelling, if Plaintiff was
 seeking summary judgment on the Tennessee Complaint in the first instance. In this case, however,
 judgment already has been rendered on the Tennessee Complaint and the pertinent question is whether
 Defendant is prevented by collateral estoppel or issue preclusion from re-litigating such issues.

1 in state court for damages on theories of slander and libel. While the litigation was pending, Sicroff
2 filed for bankruptcy relief. In an adversary proceeding to determine whether Sicroff's statements in
3 the letter were willful and malicious under Section 523(a)(6), Sicroff conceded that his conduct was
4 willful and intentional, but denied that it was malicious. The bankruptcy court agreed with Sicroff,
5 concluding that his conduct was not without cause or excuse. The district court affirmed the
6 bankruptcy court's determination, but the Ninth Circuit reversed.

7 The Ninth Circuit panel in Sicroff addressed only the maliciousness requirement under
8 Section 523(a)(6) in view of Sicroff's concession that his conduct was willful and intentional. 401
9 F.3d at 1106 n.4. In discussing the four elements required for a finding of maliciousness, the panel
10 concluded that "a libelous act, by its nature, is self-evidently wrongful and is committed by an
11 intentional act of publication." Id. The court also found that the libelous act necessarily caused
12 injury because the statements made by the debtor were directed at the plaintiff's professional
13 reputation and therefore would necessarily harm him in his occupation. Id. As to the final element
14 of "cause or excuse", the circuit panel concluded that there was no just cause or excuse for the
15 libelous statements in view of the Sicroff's specific intent to injure Jett. Id. at 1107.⁸

16 The analysis applied by the Ninth Circuit in Sicroff also applies in the instant case. The
17 Chancery Court determined that Defendant made wrongful, defamatory statements to Plaintiff's
18 employer, that Defendant's acts were intentional, and that the acts necessarily and actually caused
19 harm to the Plaintiff. Because the Chancery Court also found that Defendant acted with intent to
20 injure the Plaintiff, the statements made by Defendant, as in Sicroff, were without just cause or
21 excuse.

22 Under these circumstances, the Court concludes that the Tennessee Judgment must be given
23 collateral estoppel or preclusive effect with respect to the identical issues relevant to Plaintiff's
24

25 ⁸ The panel in Sicroff also noted the fourth element of "just cause and excuse" is still
26 applicable, but that "it may be rare to find a just cause and excuse for defamation...." 401 F.3d at 1107
n.5.

1 claim under Section 523(a)(6). Because there are no genuine issues of material fact, summary
 2 judgment is appropriate determining that Defendant's liability under the Tennessee Judgment is
 3 nondischargeable.⁹

4 Defendant's assertion that summary judgment should be denied on a theory of "double
 5 recovery", based on Plaintiff's successful wrongful termination claim against his former employer,
 6 see Opposition at 14:13 to 16:6, is without merit. While a factual nexus may exist between
 7 Plaintiff's claim against the Defendant and his claim against his former employer, the bases of
 8 liability are legally distinct.¹⁰ No authorities are cited by Defendant that permits a bankruptcy court
 9 to use the general equitable powers under Section 105(a) to deny a creditor relief to which it is
 10 otherwise entitled under Section 523(a).

11 Plaintiff's request for entry of an additional monetary judgment will be denied because there
 12 are no "unusual circumstances" and no necessity to enter a monetary judgment in this adversary
 13 proceeding. See Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 874 (9th Cir. 2005), cert. denied,
 14 126 S.Ct. 2890 (2006). See, e.g., Smith v. Lachter (In re Smith), 242 B.R. 694, 703 (9th Cir. B.A.P.
 15 1999). Prior to Defendant's commencement of the bankruptcy proceeding, Plaintiff apparently took
 16 steps to register the Tennessee Judgment in the State of Nevada and to execute on the judgment.

17
 18 ⁹ Under Tennessee law, a judgment is effective for ten years from its date of entry, see
 19 Tenn.Code Ann. 1 28-3-110(2), and may be revived for an additional ten years upon an order to show
 cause. See Tenn.R. Civ. P. 69.04.

20 ¹⁰ At oral argument, Defendant's counsel asserted that the Tennessee Complaint had different
 21 allegations than those made in the complaint against the former employer, but that Plaintiff "can't
 22 recover twice against the same pot." If the "same pot" is referring the injury sustained, clearly the
 23 injuries were different since a defamation claim seeks compensation for damage to a person's
 24 reputation while a wrongful termination claim seeks compensation for damage to a person's interest
 25 in continued employment. If the "same pot" is referring to the source of payment, then obviously the
 26 two defendants are distinct and not the same. At best, Defendant's argument seeks an exception to the
 "collateral source rule" that prohibits a reduction of damages based on compensation received from
 another source. See Trial Handbook for Tenn. Law § 33:20 (2007-08 edition). See also Proctor v.
Castelletti, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996)(evidence of payment from a collateral source
 inadmissible). Defendant has cited no authority suggesting that Section 105(a) could provide such an
 exception.

1 See SJ Motion at 6:6-10; Opposition at 15:17-19; Reply at 5:17-24. There is no reason why
2 collection on the existing monetary judgment cannot proceed once a judgment is entered in this
3 adversary proceeding determining that the obligation under the Tennessee Judgment is excepted
4 from discharge.

5 Finally, Plaintiff's request for an award of attorney's fees and costs in connection with this
6 adversary proceeding also will be denied. Absent an agreement between the parties or statutory
7 authority specifically allowing it, shifting attorneys fees from one party to another is generally
8 disallowed. See DeRoche v. Arizona Industrial Commission (In re DeRoche), 434 F.3d 1188, 1190-
9 91 (9th Cir. 2006). Section 523(d) provides for fee shifting in limited circumstances not applicable
10 to this proceeding and no other provision of the Bankruptcy Code supports such a request.

11 CONCLUSION

12 For the reasons stated above, Plaintiff's Motion for Summary Judgment will be granted. A
13 separate order has been entered herewith.

14
15 Copies noticed through ECF to:

16 W. GARY BLACKBURN gblackburn@bmclawyers.com

17 PETER DUBOWSKY peter@dubowskylaw.com, brandy@dubowskylaw.com

18 ZACHARIAH LARSON ecf@lslawnv.com, susans@lslawnv.com

19 and sent to BNC to:

20 W. GARY BLACKBURN
21 BLACKBURN & MCCUNE, PLLC
22 101 LEA AVENUE
NASHVILLE, TENNESSEE 37210

23 ###
24
25
26