



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
June 21, 2021

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No. 20-12895-mkn
)	
GREGG WILLIAM CHAMBERS,)	Chapter 7
)	
Debtor.)	
)	
EUGENE TUMBARELLO, and)	Adv. Proc. No. 20-01119-mkn
SHAMROCK PAINTING INC.,)	
)	
Plaintiffs,)	
)	Date: June 2, 2021
vs.)	Time: 11:00 a.m.
)	
GREGG CHAMBERS,)	
)	
Defendant.)	

**ORDER ON ADVERSARY PLAINTIFFS EUGENE TUMBARELLO, AND SHAMROCK
PAINTING INC.' MOTION FOR SUMMARY JUDGMENT PURSUANT
FED.R.BANKR.P. 7056, FED.R.CIV.P. 56, AND L.R. 7056¹**

¹ In this Order, all references to "ECF No." are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the Clerk of Court. All references of "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" or "§§ 101-1532" are to the provisions of the Bankruptcy Code. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence.

On June 2, 2021, the court heard Adversary Plaintiffs Eugene Tumbarello, and Shamrock Painting Inc.’ Motion for Summary Judgment Pursuant Fed.R.Bankr.P. 7056, Fed.R.Civ.P. 56, and L.R. 7056 (“SJ Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND²

The instant matter requires consideration of a specific civil action that was pending prior to the commencement of these bankruptcy proceedings and which remains pending in the Eighth Judicial District Court, Clark County, Nevada (“State Court”).

A. The State Court Action.³

On October 23, 2017, Eugene Tumbarello and Shamrock Painting, Inc. (collectively “Tumbarello”) filed a civil action against defendants Elizabeth Ramsey (“Ramsey”) and Gregg Chambers (“Chambers”), denominated Case No. A-17-763560-C (“State Court Action”). Tumbarello’s complaint (“State Complaint”) primarily focused on two parcels of real property located at 1201 Westlund Drive and 1207 Westlund Drive, Las Vegas, Nevada 89102. The State Complaint alleged a variety of causes of action, theories or remedies, including deceit, unjust enrichment, declaratory relief, breach of contract, breach of covenant of good faith and fair dealing, civil conspiracy and concert of action, misrepresentation, negligent misrepresentation, violation of contractors licensing statutes, conversion, injunctive relief, quiet

² Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned adversary proceeding and the above-captioned Bankruptcy Case See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this case, the underlying bankruptcy case and public records.”).

³ Counsel for the parties in this matter have provided this court with copies of only some of the relevant materials filed in the State Court Action. The court therefore takes judicial notice under FRE 201 of the balance of the materials of public record in the State Court Litigation. See U. S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde v. Open Door Mktg., LLC, 223 F. Supp. 3d 949, 970 n.9 (N.D. Cal. 2017); Gree v. Williams, 2012 WL 3962458, at *1 n.1 (D. Nev. Sept. 7, 2012); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

1 title, and constructive trust. After defaults were taken against both defendants, both defendants
2 filed separate motions to set aside the defaults.

3 On March 16, 2018, an order was entered denying without prejudice a motion to set aside
4 default and granting other relief regarding certain real property. Both defendants appealed that
5 order to the Nevada Supreme Court.

6 On March 29, 2018, defendants filed a renewed motion to set aside defaults.

7 On May 17, 2018, the State Court entered an order denying Ramsey's request to set aside
8 the default but granting Chambers' request. Both defendants initiated appeals to the Nevada
9 Supreme Court.

10 On December 1, 2018, Tumbarello filed a motion to enforce a settlement reached during
11 the Nevada Supreme Court appeal. The settlement required, *inter alia*, that Chambers and
12 Ramsey execute a promissory note in favor of Tumbarello in the amount of \$200,000, secured by
13 the 1201 Westlund Drive and 1207 Westlund Drive properties. The settlement was encompassed
14 by a Memorandum of Understanding signed by the parties on August 15, 2018.

15 On February 10, 2019, both defendants filed an opposition to the settlement enforcement
16 motion.

17 On February 12, 2019, the settlement enforcement motion was heard by the State Court
18 and granted on the record.

19 On March 8, 2019, the State Court entered an order granting Tumbarello's settlement
20 enforcement motion ("Settlement Enforcement Order"). The Settlement Enforcement Order
21 entered a judgment against Chambers and Ramsey ("State Judgment"), in favor of Tumbarello,
22 in the amount of \$221,735.99, and ordered that the judgment amount constitute a deed of trust
23 lien against the 1201 Westlund Drive and 1207 Westlund Drive properties. The Settlement
24 Enforcement Order also directed that the order could be recorded in the county records as a
25 substitute for a prior *lis pendens* against the two real properties.

26 On April 9, 2019, Chambers and Ramsey filed a notice of appeal of, *inter alia*, the
27 Settlement Enforcement Order.

1 On May 27, 2019, Ramsey filed a claim of a homestead exemption with respect to the
2 1201 Westlund Drive property and Chambers filed a claim of a homestead exemption with
3 respect to the 1207 Westlund Drive property.

4 On May 29, 2019, Tumbarello filed objections to the homestead exemptions claimed by
5 both Ramsey and Chambers.

6 On May 30, 2019, Tumbarello filed a further objection to the homestead exemption
7 claimed by Ramsey that added a motion to set aside fraudulent transfer of Ramsey's interest in
8 the 1207 Westlund Drive property to Chambers.

9 On June 4, 2019, both Ramsey and Chambers filed a motion seeking to stay a sheriff's
10 sale of the 1201 Westlund property and the 1207 Westlund property, pending their request for
11 clarification of the Settlement Enforcement Order.

12 On June 4, 2019, both Ramsey and Chambers filed separate responses to Tumbarello's
13 objections to their respective homestead claims.

14 On June 17, 2019, Tumbarello filed an opposition to the motion for stay brought by
15 Ramsey and Chambers.

16 On July 9, 2019, Tumbarello's objections to the homestead exemptions claimed by
17 Ramsey and Chambers were heard and sustained on the record. The motion to stay the sheriff's
18 sale of the 1201 Westlund Drive property and the 1207 Westlund Drive property was granted on
19 the condition that a supersedeas bond be posted in the full amount of the State Judgment on or
20 before July 23, 2019.

21 On July 22, 2019, the State Court entered its written order ("July 22, 2019 Order")
22 denying the respective homestead exemptions claimed by both Ramsey and Chambers, but
23 granting a stay of the sheriff's sales only on the condition that a supersedeas bond in the full
24 State Judgment amount be posted on or before July 23, 2019.⁴ In the event a bond was not
25 timely posted, no stay would issue preventing a sheriff's sale of the properties.

26
27 ⁴ The State Court's order included the following: "THE COURT FURTHER FINDS that
28 the homestead asserted by Judgment Debtor GREGG CHAMBERS in and to the 1207 Westlund
property does not apply and that Judgment Debtor GREGG CHAMBERS has failed to meet his
burden to prove that Judgment Debtor is entitled to the claimed exemptions in the 1207

1 On July 24, 2019, Tumbarello filed a status memorandum indicating that supersedeas
2 bond required by the July 22, 2019 Order had not been posted by Ramsey or Chambers, resulting
3 in an expiration of any stay of the sheriff's sale.

4 On August 8, 2019, a sheriff's certificate of sale was filed indicating that on August 1,
5 2019, the 1201 Westlund Drive property was sold to Tumbarello by a credit bid \$50,000 of its
6 State Judgment. On the same date, a separate sheriff's certificate was filed indicating that the
7 1207 Westlund Drive property also was sold to Tumbarello on August 1, 2019, by a credit bid on
8 \$50,000 of its State Judgment.

9 On May 15, 2020, the Nevada Supreme Court entered an order dismissing the appeal of
10 the Settlement Enforcement Order that had been filed by Chambers and Ramsey.

11 On July 18, 2020, Ramsey apparently redeemed the 1201 Westlund Drive property
12 pursuant to Nevada law and regained title.

13 On August 7, 2020, Ramsey filed, in pro se, another claim of exemption with respect to
14 the 1201 Westlund Drive property as well as various items of personal property, including
15 amounts held in a bank account maintained at Bank of America ("BOA Account").

16 On August 11, 2020, Tumbarello filed an objection to Ramsey's re-assertion of the
17 homestead exemption in the 1201 Westlund Drive property as well as her attempt to exempt an
18 excessive amount in the BOA Account.

19 On September 21, 2020, Ramsey filed a response to Tumbarello's objection.

20 On September 22, 2020, Tumbarello's objection to the re-asserted homestead exemption
21 as well as the excessive amount in the BOA Account was heard by the State Court and sustained
22 on the record.

23 On September 30, 2020, the State Court entered an order denying Ramsey's reasserted
24 homestead exemption in the 1201 Westlund Drive property as well as her excessive exemption in
25 the BOA Account.

26
27
28 Westlund Property. Maki v. Chong, 119 Nev. 390, 394, 75 P.3d 376, 379 (2003)." July 22,
2019 Order at 3:22-27.

1 On October 8, 2020, the State Court entered another order denying Ramsey's re-asserted
 2 homestead exemption in the 1201 Westlund Drive property and excessive BOA Account
 3 exemption ("October 8, 2020 Order"), to which was attached a revised certificate of service
 4 reflecting that the order was served on additional parties.⁵

5 On October 18, 2020, the Ramsey filed a motion for reconsideration of the October 8,
 6 2020 Order with respect to the BOA Account.

7 On November 20, 2020, Tumbarello filed an opposition to the motion for reconsideration
 8 with respect to the BOA Account.

9 On December 15, 2020, the motion for reconsideration with respect to the BOA Account
 10 was heard by the State Court and denied on the record.

11 On December 24, 2020, the State Court entered an order denying Ramsey's motion for
 12 reconsideration with respect to the BOA Account ("December 24, 2020 Order").

13 **B. Chambers' Current Bankruptcy Case.⁶**

14 On June 17, 2020, Chambers filed a voluntary Chapter 7 petition, along with his
 15 schedules of assets and liabilities ("Schedules") and statement of financial affairs ("SOFA").
 16

17 ⁵ The October 8, 2020 Order entered against Ramsey included the following: "**THE**
 18 **COURT FURTHER FINDS** that this Court has ruled in 2019 that any homestead asserted by
 19 Judgment Debtor ELIZABETH RAMSEY in and to the 1201 Westlund property does not apply
 20 because an individual using fraudulently obtained funds to purchase real property should not be
 21 protected by the homestead exemption because the exemption's purpose is to provide protection
 22 to individuals who file the homestead exemption in good faith and that Judgment Debtor
 23 ELIZABETH RAMSEY had failed to meet her burden to prove that Judgment Debtor is entitled
 24 to the claimed exemptions in the 1201 Westlund Property. Maki v. Chong, 119 Nev. 390, 394,
 25 75 P.3d 376, 379 (2003)." October 8, 2020 Order at 2:12-20. Although Chambers was a party to
 26 the Settlement Enforcement Order and the July 22, 2019 Order, he was not a participant in the
 27 October 8, 2020 Order.

28 ⁶ Chambers previously filed a Chapter 13 petition on February 20, 2020, denominated
 Case No. 20-10946-MKN ("Prior Chapter 13 Case"). The Prior Chapter 13 Case was dismissed
 on May 12, 2020, because Chambers failed to file his schedules of assets and liabilities as well as
 other information required under Section 521(a). Under Section 362(c)(3)(A), the automatic stay
 arising in the current Chapter 7 proceeding was in effect for 30 days unless Chambers obtained
 an extension of the automatic stay by filing and having a motion under Section 362(c)(3)(B)
 heard within 30 days. There is no evidence in the record that such a motion was filed or granted.

(ECF No. 1). The face of the Chapter 7 petition indicates that Chambers' residence is at 3228 Robin Circle, Las Vegas, Nevada 89123 ("Robin Circle Property"), and that he has no other mailing address. In his Schedule "C," Chambers claimed a homestead exemption in the Robin Circle Property. The case was assigned for administration to Ryan A. Anderson as Chapter 7 bankruptcy trustee ("Chapter 7 Trustee").⁷ A Notice of Chapter 7 Bankruptcy Case ("Bankruptcy Notice") was issued scheduling a meeting of creditors for July 22, 2020. (ECF No. 8).⁸ The Bankruptcy Notice also set a deadline of September 21, 2020, for creditors to object to discharge and to dischargeability of debts.⁹

On September 21, 2020, Tumbarello commenced the instant adversary proceeding by filing an adversary complaint against Chambers, objecting to discharge of the State Judgment based on Sections 523(a)(2, 4, and 6) ("523 Complaint"). (AECF No. 1). According to the summons, an initial scheduling conference in the adversary proceeding was set for January 28, 2021. (AECF No. 5). On September 23, 2020, a Certificate of Service was filed certifying that the 523 Complaint, summons, standard discovery plan and scheduling order packet were served by first class mail to Chambers at the address for the Robin Circle Property. (AECF No. 6).

On October 20, 2020, Chambers, in pro se, filed an answer to the 523 Complaint. (AECF No. 7).

On November 18, 2020, a discovery plan was filed by Tumbarello. (AECF No. 8).

⁷ The Chapter 7 case initially was assigned to Chapter 7 panel trustee Troy S. Fox, but subsequently was reassigned to the current Chapter 7 Trustee.

⁸ The meeting of creditors was continued on various occasions and eventually concluded on March 1, 2021. (ECF Nos. 150 and 159)

⁹ Ramsey also filed for bankruptcy relief. On April 7, 2020, she commenced a Chapter 13 proceeding denominated Case No. 20-11877-MKN, which was dismissed on July 21, 2020, with a 180-day bar to refile another bankruptcy petition. On January 19, 2021, Ramsey commenced a voluntary Chapter 7 proceeding denominated Case No. 21-10230-MKN. Tumbarello timely commenced an adversary proceeding denominated Adversary No. 21-01039-MKN, objecting to discharge of debts under Section 523(a). As to all other debts, Ramsey received a discharge on April 13, 2021. Tumbarello also objected to Ramsey's claim of a Nevada homestead exemption in the 1201 Westlund Drive property. That objection was heard on April 14, 2021.

1 On January 28, 2021, the initial scheduling conference was held before the court in
2 accordance with the summons. Counsel for Tumbarello appeared but Chambers did not. The
3 scheduling conference was continued to March 25, 2021.

4 On March 23, 2021, the Chapter 7 Trustee filed an objection to certain exemptions
5 claimed by Chambers, including the homestead claimed in the Robin Circle Property
6 (“Exemption Objection”). (ECF No. 160).

7 On March 23, 2021, the Chapter 7 Trustee commenced Adversary Proceeding No. 21-
8 01040-MKN (“727 Action”)¹⁰ by filing a complaint against Chambers seeking to deny a Chapter
9 7 discharge based on Sections 727(a)(4)(A) [false oath], 727(a)(4)(D) [withholding books,
10 documents, records, and papers], 727(a)(2)(A) [transfer, removal, destruction, mutilation, or
11 concealment of property before filing bankruptcy], and 727(a)(2)(B) [transfer, removal,
12 destruction, mutilation, or concealment of property after filing bankruptcy]. (727 AECF No. 1).
13 An initial scheduling conference in the 727 Action was calendared for August 12, 2021. (727
14 AECF No. 4).

15 On March 25, 2021, the continued scheduling conference was held before the court.
16 Counsel for Tumbarello appeared but Chambers did not. A status hearing was scheduled for
17 May 27, 2021.

18 On March 25, 2021, Chambers, through counsel, filed an amended SOFA as well as an
19 amended Statement of Intention. (ECF Nos. 166 and 167).

20 On March 26, 2021, Tumbarello filed a joinder in the Exemption Objection. (ECF No.
21 168).

22 On March 29, 2021, Tumbarello filed a motion to compel discovery responses (“Compel
23 Motion”) and noticed the motion to be heard on May 5, 2021. (AECF Nos. 13 and 14).

24 On March 29, 2021, Tumbarello also filed the instant SJ Motion along with a statement
25 of undisputed facts (“Tumbarello SUF”). (AECF Nos. 11 and 12). Fifteen exhibits are attached
26
27

28 ¹⁰ All references to “727 AECF No.” are to the documents filed in that adversary proceeding.

1 in support of the Tumbarello SUF. The SJ Motion was noticed to be heard on May 18, 2021.
2 (AECF No. 16).

3 On April 21, 2021, Chambers, through counsel, filed a Motion to Set Aside, Withdraw, or
4 Amend FRBP 7036 Admissions (“Set Aside Motion”), which was noticed to be heard along with
5 the continued SJ Motion on June 2, 2021. (AECF No. 21).

6 On April 21, 2021, Chambers also filed an opposition to the Compel Motion. (AECF No.
7 24).

8 On April 26, 2021, Tumbarello filed a reply in support of the Compel Motion. (AECF
9 No. 28). On this same date, Chambers filed opposition to the SJ Motion as well as a statement of
10 undisputed facts (“Chambers SUF”). (AECF Nos. 29 and 30). Attached to the opposition and
11 referenced in the Chambers SUF is a declaration from Chambers and a copy of an email.

12 On May 5, 2021, the hearing on the Compel Motion was continued to June 9, 2021.

13 On May 6, 2021, Tumbarello filed a reply in support of the SJ Motion (“SJ Reply”).
14 (AECF No. 32). Attached to the SJ Reply is another exhibit.

15 On May 10, 2021, Chambers filed, *in pro se*, an answer to the Chapter 7 Trustee’s
16 complaint in the 727 Action. (727 AECF No. 14).

17 On May 13, 2021, an order was entered approving a stipulation that scheduled an
18 evidentiary hearing on the Objection Exemption to be conducted on September 20 and 21, 2021.
19 (ECF No. 177). The stipulation also included deadlines for discovery to be completed, as well as
20 for exhibits, witness lists, and additional briefing to be filed.

21 On May 17, 2021, Tumbarello filed opposition to the Set Aside Motion. (AECF No. 33).
22 No reply to that opposition was filed by Chambers.

23 On May 18, 2021, the hearing on the SJ Motion was continued to June 2, 2021, to be
24 heard along with the Set Aside Motion.

25 On May 27, 2021, the status hearing in this adversary proceeding was continued to July
26 14, 2021.

27 On June 2, 2021, a hearing was conducted on both the SJ Motion and the Set Aside
28 Motion. Counsel for the parties also agreed to submit the Compel Motion for decision on the

1 written materials and to vacate the hearing that was set for June 9, 2021. The Set Aside Motion
2 and the Compel Motion are the subjects of separate orders entered concurrently herewith.

3 DISCUSSION

4 Tumbarello seeks summary judgment on the entire 523 Complaint. It alleges claims
5 under Sections 523(a)(2), 523(a)(4), and 523(a)(6). Based on the sixteen exhibits accompanying
6 the Tumbarello SUF, it argues that it is entitled to judgment as a matter of law.

7 **A. Elements of Tumbarello's Claims.**

8 Under Section 523(a)(2)(A), a Chapter 7 discharge does not include a debt “for money,
9 property, services or an extension ... of credit to the extent obtained by false pretenses, false
10 representations, or actual fraud...” 11 U.S.C. § 523(a)(2)(A) (emphasis added). To establish a
11 nondischargeable debt under Section 523(a)(2)(A), a creditor must demonstrate, by a
12 preponderance of the evidence, five elements: (1) the debtor made representations; (2) that at the
13 time she knew were false; (3) that she made them with the intention and purpose of deceiving the
14 creditor; (4) that the creditor justifiably relied on such representations; and (5) that the creditor
15 sustained the alleged loss and damages as the proximate result of the misrepresentations having
16 been made. See Wickam v. Ivar (In re Werner), 817 Fed. Appx. 432, 435 (9th Cir. 2020); see
17 also Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010). Additionally, a
18 claim based on actual fraud under Section 523(a)(2)(A) can include fraudulent schemes that are
19 not effectuate through false representations. See, e.g., Husky International Electronics, Inc. v.
20 Ritz, 136 S.Ct. 1581 (2016) (debtor who participates in a fraudulent transfer scheme is subject to
21 a claim for actual fraud). “Intent to defraud is a question of fact.” Cowen v. Kennedy (In re
22 Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997), as amended (Mar. 21, 1997). “Intent to deceive
23 can be inferred from surrounding circumstances.” Thomas v. Kenmark Ventures, LLC (In re
24 Thomas), 716 Fed. Appx. 647, 649 (9th Cir. 2018).

25 Under Section 523(a)(4), a Chapter 7 discharge does not include a debt “for fraud or
26 defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. §
27 523(a)(4) (emphasis added). Fraud or defalcation while acting in a fiduciary capacity is one
28 basis for nondischargeability of a debt under this provision, while embezzlement or larceny are

two separate bases. See generally 4 Collier on Bankruptcy, ¶523.10[2] (Richard Levin and Henry J. Sommers, eds., 16th ed. 2021) (“In section 523(a)(4), the term ‘while acting in a fiduciary capacity’ does not qualify the words ‘embezzlement’ or ‘larceny.’ Therefore, any debt resulting from embezzlement or larceny falls within the exception of clause (4).”). See, e.g., Bullock v. Bankchampaign, N.A., 569 U.S. 267, 274-277 (2013) (fraud or defalcation in a fiduciary capacity); Ziebarth v. Adams (In re Adams), 833 Fed.Appx. 679, 682 (9th Cir. 2020) (elements of embezzlement); Ormsby v. First American Title Co. (In re Ormsby), 591 F.3d 1199, 1205 & n.4 (9th Cir. 2010) (elements of larceny).

Under Section 523(a)(6), a Chapter 7 discharge does not include a debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6) (emphasis added). Both a willful injury and a malicious injury must be established. See Transamerica Commercial Finance Corp. v. Littleton (In re Littleton), 942 F.2d 551, 554 (9th Cir. 1991). Establishment of a willful injury under Section 523(a)(6) requires proof that the debtor had a subjective motive to inflict injury on the creditor, or, that the debtor believed that injury was substantially certain to result from the conduct. See Garcia v. Fawzy (In re Garcia), 2020 WL 5203201, at *5 (B.A.P. 9th Cir. Sep. 1, 2020), citing Ormsby v. First Am. Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010). Demonstration of the additional requirement of malicious injury necessitates proof of four separate elements: (1) a wrongful act, (2) done intentionally, (3) that necessarily caused injury, and (4) without just cause or excuse. See Hamm v. Burcar (In re Hamm), 2020 WL 5814362, at *6 (B.A.P. 9th Cir. Sep. 29, 2020), citing Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001).

B. Exhibits Offered in Support.

Tumbarello offers copies of sixteen documents marked as exhibits in support of the SJ Motion: (1) Declaration of Eugene Tumbarello signed on February 26, 2018 (“Tumbarello Declaration”); (2) Declaration of Todd Geib signed on February 20, 2018 (“Geib Declaration”); (3) Agreement dated October 20, 2016, between Tumbarello, Chambers and Ramsey regarding 1207 Westlund Drive property; (4) Agreement dated March 3, 2017, between Tumbarello, Chambers and Ramsey regarding 1201 Westlund Drive property; (5) Memorandum of

Understanding dated August 15, 2018, regarding the parties' settlement of the State Court Action and appeals; (6) Settlement Enforcement Order; (7) Quitclaim Deed from Ramsey to Chambers dated May 21, 2019 regarding the 1207 Westlund Drive property; (8) July 22, 2019 Order; (9) Sheriff's Certificate of Sale of Real Property dated August 8, 2019 regarding 1207 Westlund Drive property; (10) Sheriff's Certificate of Sale of Real Property dated August 8, 2019 regarding 1201 Westlund Drive property; (11) Order for Judgment Debtor Examination of Elizabeth Ramsey filed October 14, 2019; (12) Ex-Parte Order Dismissing Chapter 13 Case Pursuant to 11 U.S.C. Section 521 entered May 12, 2020 in Prior Chapter 13 Case; (13) Sheriff's Deed dated August 31, 2020 regarding 1207 Westlund Drive property; (14) October 8, 2020 Order; (15) Adversary Plaintiffs' Requests for Admission to Defendant Gregg Chambers dated January 4, 2021; and (16) Declaration of Debra Reade signed May 6, 2021.

Chambers offers copies of two documents: (1) a Declaration of Gregg William Chambers in Support of Opposition to Motion for Summary Judgment signed April 26, 2021 ("Chambers Declaration"); and (2) an email from attorney Chris Reade to Gregg Chambers dated October 30, 2020, which enclosed a proposed Standard Discovery Plan.

C. Summary Judgment Standards.

A motion for summary judgment is governed by Civil Rule 56 which is applicable in this adversary proceeding under Bankruptcy Rule 7056. See Silva v. Smith's Pac. Shrimp, Inc. (In re Silva), 190 B.R. 889, 891 (B.A.P. 9th Cir. 1995). Under Civil Rule 56(a), summary judgment may be granted only if "the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

For summary judgment purposes "[m]aterial facts are those that may affect the outcome of the case." Farmer v. Las Vegas Metro. Police Dep't, 423 F. Supp.3d 1008, 1013 (D. Nev. 2019), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985). Findings of fact may not be entered because summary judgment may only be granted where there are no disputed issues of fact. See Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987, 989-90 (9th Cir. 2016). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The moving party's

evidence is judged by the same standard of proof applicable at trial. See Celotex Corp. v. Catrett, 477 U.S. 316, 323 (1986); see also Southern Calif. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003). The burden of proof is on the party seeking the summary judgment, but the inferences are viewed in favor of the opposing party. See Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992); see also Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987 (9th Cir. 2006). A preponderance of the evidence standard applies to proceedings to determine dischargeability of debt under Section 523. See Grogan v. Garner, 498 U.S. 279, 286 (1991).

Once the moving party demonstrates the absence of disputed material facts, the responding party must provide admissible evidence raising a genuine dispute. The responding party cannot rely solely on conclusory allegations unsupported by factual data. See Farmer v. Las Vegas Metro. Police Dep't, 423 F. Supp.3d at 1014 (“the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data [. . .] Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial.”) (external citations omitted).

D. Summary Judgement Must be Denied.

Genuine disputes of material fact exist that preclude entry of judgment as a matter of law on any of the claims alleged by Tumbarello. Even a cursory review of the written testimony contained in the Tumbarello Declaration and Geib Declaration, compared to that in the Chambers Declaration, reflect fundamental differences in the versions of the essential facts. Although both sides strenuously advocate their versions and interpretations of the events, a factual determination will depend on the credibility of the witness testimony. As previously observed, determinations of credibility as well as intent are seldom appropriate to make through summary judgment.

The documentary materials are relevant but also do not establish the absence of genuine disputes of material fact. The copies of the Settlement Enforcement Order, July 22, 2019 Order, and October 8, 2020 Order, no doubt reflect conclusions reached by the State Court as to both

Chambers and Ramsey. There is no dispute that this bankruptcy court must apply to those orders the same claim and issue preclusion rules that would be applied by Nevada courts. See Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). In Nevada, “issue preclusion requires that (1) an issue be identical; (2) the initial ruling was on the merits and final; (3) ‘the party against whom the judgment is asserted’ was a party in the prior case, or in privity with a party in the prior case; and (4) the issue was actually and necessarily litigated.” Bayuk v. Leonard (In re Morabito), 2020 WL 5814364, at *4 (B.A.P. 9th Cir. Sep. 29, 2020), citing Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713 (Nev. 2008).

Even a cursory review of those orders, however, reveal no specific factual findings addressing the elements required to establish Tumbarello’s theories of nondischargeability. The Settlement Enforcement Order found that Chambers and Ramsey breached the settlement described in the Memorandum of Understanding, but made no findings addressing the factual allegations or the merits of the claims alleged in the State Complaint. With respect to Chambers’ claim of a homestead in the 1207 Westlund Drive property, the July 22, 2019 Order made specific findings as to Chambers and cited the Nevada Supreme Court’s decision in Maki v. Chong, 119 Nev. 390, 75 P.3d 376 (2003). See note 4, supra. In the July 22, 2019 Order, the State Court made no express findings, *inter alia*, as to Chambers’ knowledge or intent under Section 523(a)(2)(A), as to Chambers’ intent to convert or deprive Tumbarello of specific property for purposes of larceny under Section 523(a)(4), or, as to Chambers’ intent to inflict injury or to intentionally commit a wrongful act under Section 523(a)(6). The October 8, 2020 Order further explains the July 22, 2019 Order, see note 5, supra, but the October 8, 2020 Order was entered in response to Ramsey’s re-assertion of a homestead claim in the 1201 Westlund Drive property, and not as a result of any request made by Chambers.¹¹

More important, Tumbarello fails to distinguish between the elements for denial of a Nevada homestead under Maki v. Chong, and the elements for determination of dischargeability

¹¹ The October 8, 2020 Order was entered after Chambers commenced the pending Chapter 7 proceeding. Unless relief from stay was obtained prior to entry of the order, or, the automatic stay had already terminated, the order arguably would not be valid as to Chambers even if he has participated in that matter.

1 required by its own complaint. In Maki, the plaintiff was an inmate in a Nevada state prison. 75
2 P.3d at 378. He gave his sister a power of attorney allowing her to cash a disability settlement
3 check received from the State of Nevada. Instead of using the funds to hire an attorney to appeal
4 her brother's criminal sentence, the sister purchased a Nevada residence for herself. She told her
5 brother that she had cashed his monthly disability checks. She also told her brother that she
6 would not be returning any of the funds. While still incarcerated, the brother sued his sister in
7 State court for breach of contract, fraud, and conversion. The sister then recorded a homestead
8 declaration against the residence. The brother obtained a default judgment. When he attempted
9 to enforce the judgment through a sheriff's sale of the residence, the district court denied the sale
10 by allowing the sister's homestead exemption. The Nevada Supreme Court reversed, however,
11 concluding that "the homestead exemption is inapplicable when the proceeds used to purchase
12 real property can be traced directly to funds obtained through fraud or similar tortious conduct."
13 Id. at 379. It therefore remanded "for the district court to enter an order consistent with this
14 opinion that [the sister's] homestead exemption is invalid against [her brother's] default
15 judgment." Id. at 380.

16 In the July 22, 2019 Order, there were no findings by the State Court addressing the
17 specific elements of a claim for actual fraud. No such findings were necessary, however,
18 because the Nevada Supreme Court's decision in Maki did not require the existence of fraud
19 based on misrepresentations by the plaintiff's sister. Instead, the plaintiff's sister in Maki had
20 misused the power of attorney obtained from her brother to misappropriate his disability
21 settlement payment as well as his monthly disability payments. She actually informed him that
22 she had done so. There were no elements of misrepresentation or reliance, but only intentional
23 misconduct and damage. Thus, the State Court's citation of the Maki decision does not establish
24 that it necessarily made the factual findings required to support any of Tumbarello's present
25 claims under Section 523.

26 Under these circumstances, the court concludes that Tumbarello has failed its burden of
27 demonstrating that there are no genuine disputes of material fact.
28

