



Dated: 6/28/2018

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE**

IN RE:)
) **CASE NO. 313-07626**
DAVID PETER BERGE,)
) **JUDGE MARIAN F. HARRISON**
) **Debtor.**) **Chapter 7**
)
MARKETGRAPHICS RESEARCH) **ADV. NO. 313-90400**
GROUP, INC.,)
)
) **Plaintiff,**)
)
v.)
)
DAVID PETER BERGE,)
)
) **Defendant.**)

MEMORANDUM OPINION

This matter is before the Court upon MarketGraphics Research Group, Inc.'s ("MarketGraphics") renewed motion for summary judgment based on collateral estoppel. For the following reasons, the Court finds that MarketGraphics' motion for summary judgment should be denied.

I. PROCEDURAL BACKGROUND

Prior to bankruptcy, the District Court entered judgment in favor of MarketGraphics against the debtor in the amount of \$332,314.94, jointly and severally with three other defendants. The District Court found in a memorandum and order prepared by MarketGraphics' counsel on the default summary judgment that the debtor "willfully or knowingly violated the Tennessee Consumer Protection Act" ("TCPA") and that the debtor's copyright infringement was willful.

After the debtor filed his bankruptcy petition, MarketGraphics filed this adversary complaint to determine the dischargeability of its claim pursuant to 11 U.S.C. § 523(a)(6). MarketGraphics sought summary judgment relief based on collateral estoppel resulting from the District Court's action. This Court denied the motion, and MarketGraphics filed an interlocutory appeal. After MarketGraphics' appeal was dismissed by the District Court and the Sixth Circuit Court of Appeals, this Court conducted a trial and determined that the debt owed to MarketGraphics was dischargeable and dismissed MarketGraphics' complaint. MarketGraphics again appealed. The District Court affirmed the findings of this Court following trial but reversed this Court's decision on the initial summary judgment decision and remanded the case "to determine the matter of issue preclusion on first impression." To decide whether issue preclusion should apply, the District Court remanded the case to determine whether the District Court in the underlying judgment held that the debtor willed or desired harm or believed that injury was substantially certain to occur as a result of his

behavior. In MarketGraphics' renewed motion for summary judgment, it asserts that issue preclusion applies to the District Court's findings regarding the TCPA, copyright infringement, and common law claims.

II. DISCUSSION

A. Summary Judgment Standards

Pursuant to Federal Rule of Civil Procedure 56(a), as incorporated by Federal Rule of Bankruptcy Procedure 7056, an entry of summary judgment is mandated "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." When considering a motion for summary judgment, the Court "must view the evidence and draw all reasonable inferences in favor of the nonmoving party." *Browning v. Levy*, 283 F.3d 761, 769 (6th Cir. 2002) (citation omitted). The Court does not "weigh the evidence and determine the truth of the matter but . . . determine[s] whether there is a genuine issue for trial." *Id.* (citation omitted).

B. Issue Preclusion

Issue preclusion prevents a party from relitigating issues that were actually litigated in a prior proceeding. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6th Cir. 1999) (citations omitted). "Principles of collateral estoppel apply in non-dischargeability actions." *Livingston v. Transnation Title Ins. Co. (In re Livingston)*, 372 Fed. App'x 613, 617 (6th Cir. 2010) (unpublished) (citations omitted).

Whether federal or state law applies when seeking collateral estoppel from a federal court judgment appears to be in a state of confusion. Some courts hold that collateral estoppel application from any federal court judgment rests on federal preclusion law. *Trost v. Trost (In re Trost)*, 545 B.R. 193, 203 (Bankr. W.D. Mich. 2016) (citations omitted); *J.Z.G. Res., Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 213-14 (6th Cir. 1996) (citations omitted). The Supreme Court has stated that federal court judgments based on state law claims in diversity actions rely on state issue preclusion standards, although the opinion noted that the state and federal standards for issue preclusion were similar. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). In this case, federal and state law are almost identical. The federal law of issue preclusion requires:

- (i) the issue in the subsequent litigation is identical to that resolved in the earlier litigation;
- (ii) the issue was actually litigated and decided in the prior action;
- (iii) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation;
- (iv) the party to be estopped was a party to the prior litigation (or in privity with such a party); and
- (v) the party to be estopped had a full and fair opportunity to litigate the issue.

In re Trost, 545 B.R. at 204 (citing *Verizon North Inc. v. Strand*, 367 F.3d 577, 583 (6th Cir. 2004)).

Tennessee law applies essentially the same standards for collateral estoppel as federal law. *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009). Accordingly, it makes no difference which law is applied. This opinion relies on the federal standards recited above.

C. 11 U.S.C. § 523(a)(6)

Exceptions to discharge are to be strictly construed. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915). Pursuant to 11 U.S.C. § 523(a)(6), a debt is nondischargeable when the debt is “for willful and malicious injury by the debtor to another entity or to the property of another entity.” Therefore, “nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). “[U]nless ‘the actor desires to cause the consequences of his act, or . . . believes that the consequences are substantially certain to result from it,’ he has not committed a ‘willful and malicious injury’ as defined under § 523(a)(6).” *In re Markowitz*, 190 F.3d 455, 464 (internal citation omitted).

D. Tennessee Consumer Protection Act

In the present case, the District Court ruled that “pursuant to Tennessee Code Ann. § 47-18-109(a)(3), that the Defendants . . . willfully or knowingly violated the Tennessee Consumer Protection Act,” and awarded treble damages to MarketGraphics. The issue is whether that judgment included a finding that the debtor intended harm to MarketGraphics or was substantially certain that harm would occur as required under 11 U.S.C. § 523(a)(6).

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