



IT IS SO ORDERED.
Signed January 3, 2014

A handwritten signature in cursive script, reading "Arthur S. Weissbrodt". The signature is written in black ink and is positioned above a horizontal line.

Arthur S. Weissbrodt
U.S. Bankruptcy

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 08-53573-ASW
ALI FARSIO,]	Chapter 7
]	
Debtor.]	
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FARIBA GRAHAM,]	Adv. Pro. No. 08-05288-ASW
]	
Plaintiff,]	
]	Date: Oct. 18, 2013
v.]	Time: 3:00 p.m.
ALI FARSIO,]	
]	
Defendant.]	
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**DECISION AND ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on a Motion for Summary Judgment (the "Motion") filed by Plaintiff Fariba Graham ("Graham"), who is represented by attorney Carl Lindstrom. The Motion is opposed by Defendant and Debtor Ali Farsio ("Farsio"), who is represented by attorney Daniel HERNs.

Graham seeks a determination by this Court that a debt owed by Farsio in the amount of \$27,516 pursuant to a state court judgment

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1 is not dischargeable under 11 U.S.C. § 523(a)(6), based upon
2 findings made and a judgment entered by a state trial judge on
3 April 8, 2008 ("Judgment"), along with the order entered by the
4 state court on June 25, 2013 clarifying those findings (the "June
5 25, 2013 Order"). For the reasons set forth below, Plaintiff's
6 Motion is granted.

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8 **I. FACTS**

9 The material facts are not in dispute. Between January 7 and
10 24, 2008, a trial was held before the Honorable William J. Elfving,
11 Judge, Santa Clara Superior Court, on contract and tort claims
12 asserted by Farsio against Graham and others, and on cross-claims
13 by Graham and Mirage Imaging Center, LLC, against Farsio. Judge
14 Elfving ruled against Farsio on Farsio's claims, but ruled in favor
15 of Graham on Graham's tort claims.

16 The pertinent underlying facts found by Judge Elfving are as
17 follows.¹ Farsio, who was divorced, and Graham, who was married,
18 were engaged in a nine-year affair. During their affair, Farsio
19 took nude photographs of Graham. Farsio and Graham also had a
20 business relationship. By the end of May 2006, the relationship
21 between Farsio and Graham deteriorated. In June 2006, Farsio
22 published the photographs to Graham's family and friends when
23 Graham "wouldn't do his bidding." In addition, Farsio harassed
24 Graham with threatening phone messages and written communications,
25 sent the nude photographs along with a scandalous letter to two
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27 ¹ Judge Elfving made extensive findings of fact with regard to
28 Farsio's background and the relationship between Farsio and Graham.
Most of these findings are not material to the issue presented to
this Court and are not recited here.

1 women in Iran -- wives of two men who Farsio believed were having
2 an affair with Graham -- and hired a private investigator to spy on
3 Graham, among other things.

4 Judge Elfving found in favor of Graham on Graham's claim for
5 intentional infliction of emotional distress, which Judge Elfving
6 identified as having the following elements: "(1) extreme and
7 outrageous conduct by the defendant with the intention of causing,
8 or reckless disregard of the probability of causing, emotional
9 distress; (2) the plaintiff's suffering severe or extreme emotional
10 distress; and (3) actual and proximate causation of the emotional
11 distress by the defendant's outrageous conduct." Judge Elfving
12 specifically found:

13 [Farsio]'s conduct was extreme and outrageous. He
14 intended to cause [Graham] emotional distress. [Graham]
15 suffered severe emotional distress and [Farsio]'s conduct
16 was a substantial factor in causing [Graham]'s severe
emotional distress. [Farsio]'s voicemail messages in
June 2006 make it clear that he wanted to hurt her. He
admitted as much during cross-examination at trial.

17 Judge Elfving also found in favor of Graham on Graham's claim
18 for public disclosure of private facts, which required proof of:
19 (1) public disclosure (2) of a private fact (3) which would be
20 offensive and objectionable to a reasonable person and (4) which is
21 not of legitimate public concern. On this claim, Judge Elfving
22 found that Graham was harmed by Farsio and that when Farsio
23 disseminated nude photos of Graham, Farsio did so "with the intent
24 to ruin [Graham]'s reputation and to hurt her."

25 Judge Elfving also found in favor of Graham on Graham's claim
26 of defamation per se, based upon Farsio's failure to use reasonable
27 care to determine the truth or falsity of Farsio's statements.

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1 However, Judge Elfving found in favor of Farsio on Graham's claim
2 that Farsio committed the tort of intrusion into private affairs.

3 On the issue of damages, Judge Elfving found:

4 [Farsio] intentionally went out of his way to wound
5 [Graham]. His outrageous behavior caused [Graham] to
6 suffer anguish, fright, horror, nervousness, anxiety,
7 worry, shock, humiliation and shame. For this suffering
8 the Court awards [Graham] compensatory damages against
9 [Farsio] in the amount of \$20,000.00.

10 This award of damages was general and not broken down by
11 claim. However, Judge Elfving then declined to award punitive
12 damages because Farsio "was a rejected lover consumed by jealousy,
13 rage, and hurt . . . on an emotional roller-coaster. He couldn't
14 get [Graham] to talk to him. He felt betrayed. He lashed out in
15 inappropriate ways, but it cannot be said that malice, oppression
16 or fraud has been proved by clear and convincing evidence."

17 Farsio appealed. On July 27, 2011, the Court of Appeal for
18 the State of California, Sixth Appellate District, affirmed Judge
19 Elfving's decision on the grounds that Farsio failed to provide an
20 adequate record for appellate review. The parties do not dispute
21 that the Judgment is final.

22 Graham filed this adversary proceeding on September 30, 2008,
23 seeking a determination that Farsio's debt to her is
24 nondischargeable under § 523(a)(6). Graham filed a Motion for
25 Summary Judgment on August 24, 2012 (the "August 24, 2012 Motion")
26 seeking judgment in her favor based on the preclusive effect of the
27 Judgment. The Court denied the Motion on the grounds that the
28 state court's findings fell short of demonstrating that Farsio's
debt is nondischargeable under 11 U.S.C. § 523(a)(6) as a matter of
law. The Court entered an order on October 15, 2012 denying the

1 August 24, 2012 Motion without prejudice, and abstaining in favor
2 of the state court's determination of issues.

3 The parties then returned to state court seeking clarification
4 of the issues. Judge Elfving issued a clarifying order on June 25,
5 2013 (the "June 25, 2013 Order"), which contains the following
6 supplemental findings:

7 The Court finds true that Ali Farsio had a belief
8 that injury was substantially certain to result from his
conduct. That was his intention.

9 . . . Ali Farsio did engage in intentional, wrongful
10 acts which the Amended Statement of Decision goes into
great detail about his publication of photographs and his
11 phone calls to Cross-Complainant Fariba Graham's friends
and relatives and other things that he did to try and
12 hurt her. And so Ali Farsio's acts were done in an
intentional, wrongful way which was malicious by a
13 preponderance of the evidence.

14 IT IS FURTHER ORDERED in response to Judge
Weissbrodt's query as to what is "the portion of the
15 \$20,000 damages award, if any, which is attributable to
any wilful and malicious conduct of Ali Farsio," the
16 Court responds that the entire \$20,000 damages award was
proveable under the intentional infliction of emotional
17 distress cause of action of Cross-Complainant Fariba
Graham and that the entire \$20,000 damages award is
18 attributed to intentional infliction of emotional
distress even though the other theories were also proven.
19 It is not right or just or appropriate to take anything
off that amount of damages proved under the intentional
20 infliction of emotional distress and try and segregate it
out.

21 **II. STANDARD OF REVIEW**

22 Summary judgment shall be rendered by the Court if the
23 pleadings, depositions, answers to interrogatories, and admissions
24 on file, together with the affidavits, if any, show that there is
25 no genuine issue as to any material fact and that the moving party
26 is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56,
27 incorporated in bankruptcy via Fed. R. Bank. P. Rule 7056;
28 Matsushita Electric Industrial Co., Ltd. v. Zenith Radio

1 Corporation, 475 U.S. 574, 584-85 (1985). All inferences must be
2 drawn against the moving party. Adickes v. S.H. Kress & Co., 398
3 U.S. 144, 158-59 (1970); United States v. Diebold, Inc., 369 U.S.
4 654, 655 (1962). Where a rational trier of fact could not find for
5 the non-moving party based on the record as a whole, there is no
6 "genuine issue for trial." Matsushita Elec. Indus. Co., 475 U.S.
7 at 587.

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9 **III. ANALYSIS**

10 Graham seeks a determination that Farsio's debt to Graham is
11 not dischargeable under 11 U.S.C. § 523(a)(6). Graham carries the
12 burden of proving, by a preponderance of the evidence, that
13 Graham's claim against Farsio is excepted from discharge. Suarez
14 v. Barrett (In re Suarez), 400 B.R. 732, 736 (9th Cir. BAP 2009).
15 Under § 523(a)(6), a debtor may not discharge a debt "for willful
16 and malicious injury by the debtor to another entity or to the
17 property of another entity." These are two separate requirements -
18 - the injury must be both willful and malicious. Barboza v. New
19 Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008).

20 To be willful, an injury must be deliberate or intentional.
21 Id. at 707-08. The debtor must have intended the consequences of
22 the debtor's actions -- specifically, the debtor must have had a
23 subjective motive to inflict injury or have a belief that injury is
24 substantially certain to result from the conduct. In re Suarez,
25 400 B.R. at 736-37; see also Carrillo v. Su (In re Su), 290 F.3d
26 1140, 1142 (9th Cir. 2002). In addition, a deliberate or
27 intentional act that merely leads to injury is not a willful
28 injury. In re Barboza, 545 F.3d at 706.

1 To be malicious, the injury must involve: (1) a wrongful act
2 (2) which is done intentionally, (3) which necessarily causes
3 injury, and (4) which is done without just cause or excuse. Id.

4 Graham argues that the findings of the state court in its
5 judgment, along with the June 25, 2013 Order should have preclusive
6 effect in this adversary proceeding. Collateral estoppel
7 principles apply to non-dischargeability actions brought under
8 523(a). Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991). The
9 preclusive effect of a state court judgment in a subsequent
10 bankruptcy proceeding is determined by the preclusion law of the
11 state where the judgment was issued. Gayden v. Nourbakhsh (In re
12 Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995).

13 Under California law, collateral estoppel precludes
14 relitigation of issues argued and decided in prior proceedings.
15 For collateral estoppel to apply, each of five factors must be
16 satisfied: (1) the issues sought to be precluded from relitigation
17 must be identical to those decided in a former proceeding; (2) the
18 issues must have been actually litigated in the former proceeding;
19 (3) the issues must have been necessarily decided in the former
20 proceeding; (4) the decision in the former proceeding must be final
21 and on the merits; and (5) the party against whom preclusion is
22 sought must be the same as, or in privity with, the party to the
23 former proceeding. Roussos v. Michaelides (In re Roussos), 251
24 B.R. 86, 92 (B.A.P. 9th Cir. 2000). To be "necessarily decided,"
25 the issue simply must not be "entirely unnecessary to the
26 judgment." Apple, Inc. v. Franchise Tax Bd., 199 Cal. App. 4th 1,
27 15, 132 Cal. Rptr. 3d 401, 412 (Cal. App. 1 Dist. 2011), rev.
28 denied, (2012) (citations and quotations omitted).

1 Even if the threshold requirements for collateral estoppel are
2 satisfied, California courts will not necessarily give preclusive
3 effect to a previously litigated issue. Baldwin v. Kilpatrick (In
4 re Baldwin), 249 F.3d 912, 919-20 (9th Cir. 2001).² California
5 courts will only give preclusive effect to prior litigation when
6 three policies are satisfied: (1) preservation of the integrity of
7 the judicial system; (2) promotion of judicial economy; and
8 (3) protection of litigants from harassment by vexatious litigants.
9 Id. at 919-20. As to the first policy, if the state court was
10 fully capable of adjudicating the issue subsequently presented to
11 the bankruptcy court, the public's confidence in the state judicial
12 system would be undermined should the bankruptcy court relitigate
13 the same question. Id. at 920. Also, relitigation of the issue
14 would conflict with principles of federalism underlying the Full
15 Faith and Credit Act.³ Id. The second policy is aimed at
16 conservation of judicial resources and avoiding the cost of
17 duplicative proceedings. Id. As for the third policy, a
18 bankruptcy court should consider whether the parties had a full and
19 fair opportunity to litigate the issues in state court and whether
20 the parties were afforded due process. Id.

21 As noted, this Court previously declined to apply issue
22 preclusion with respect to the willful and malicious elements
23 because the state court had not made an express finding of willful
24 and malicious conduct, and such a finding was not necessary to the

26 ² In Baldwin, the bankruptcy court gave collateral estoppel
27 effect to a finding that the debtor committed the intentional tort
28 of "battery" for purposes of a claim under 11 U.S.C. § 523(a)(6).

³ This is a reference to the full faith and credit statute
found at 28 U.S.C. § 1738.

1 intentional infliction of emotional distress claim because reckless
2 conduct can support such a claim. Further, Judge Elfving had
3 awarded general damages in the amount of \$20,000, with regard to
4 all three of Graham's claims. Two of those claims -- for public
5 disclosure of private facts and for defamation per se -- did not
6 require Graham to prove an intent to cause harm. This Court found
7 that although some portion of the general damages award likely
8 should be attributed to the claim for intentional infliction of
9 emotional distress, it was not clear how much. Finally, Judge
10 Elfving declined to award punitive damages because malice had not
11 been established by clear and convincing evidence, so there was no
12 finding that Farsio acted willfully or with malice to which this
13 Court could give preclusive effect.⁴

14 Now, however, this Court has the benefit of Judge Elfving's
15 supplemental findings contained in the June 25, 2013 Order. Those
16 findings establish (1) that Defendant acted with a belief that
17 injury was substantially certain to result from his conduct, and
18 that was Defendant's intention; (2) that Defendant engaged in
19 intentional, wrongful acts to try and injure Plaintiff "in an
20 intentional, wrongful way which was malicious by a preponderance of
21 the evidence." Finally, Judge Elfving clarified that the entire
22 amount of the \$20,000 damages awards was attributable to the
23 intentional infliction of emotional distress claim.

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26 ⁴ Under Cal. Civ. Code § 3294(c)(1), the term "malice" is
27 defined as "conduct which is intended by the defendant to cause
28 injury to the plaintiff or despicable conduct which is carried on
by the defendant with a willful and conscious disregard of the
rights or safety of others." Interestingly, this definition of
malice bears more similarity to the definition of willfulness for
purposes of § 523(a)(6).

Court Service List

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All recipients are ECF participants