UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

MICHELLE RENEE MLADEK, Case No.: 17−10948−tr7

Debtor.

THE ESTATE OF WAYNE MARSHALL COLEMAN,

Plaintiff,

v. Adversary No. 17−01047−t

MICHELLE RENEE MLADEK,

Defendant.

OPINION

Plaintiff brought this adversary proceeding under 11 U.S.C. § 523(a)(2) and (a)(6), asking the Court to declare defendant's debt nondischargeable. Defendant filed a motion for summary judgment on both counts. Plaintiff agrees that summary judgment against it is appropriate on the § 523(a)(2) claim, but maintains that its § 523(a)(6) claim should be tried. The Court, having reviewed the motion, response, reply, and the applicable law, concludes that there are genuine issues of material fact on Plaintiff's § 523(a)(6) claim. Defendant's motion on that claim therefore will be denied.

I. FACTS[1]

The Court finds that the following facts are not in genuine dispute:[2]

1. From about March 1989 until his death, Wayne Coleman owned a parcel of real property in Otero County, New Mexico, with a street address of 1203 Puerto Rico, Alamogordo, NM 88310 (the "Property").

2. According to representations made by Plaintiff's counsel in state court, Mr. Coleman died in 2013. Defendant, other the other hand, represents to this Court that Mr. Coleman died on or about September 20, 2011.

3. Property taxes accruing on the Property were not paid for the 2010-2013 tax years.

4. On August 7, 2014, a probate proceeding for Mr. Coleman's estate was commenced in the Twelfth Judicial District Court. Ms. Velma Morgan was appointed as the personal representative of the estate.

5. On September 17, 2014, The Hand of God LLC, a New Mexico limited liability company ("THOG") owned by Defendant, filed a document entitled "Lien" in the Otero County real estate records. The Lien recites in part:

> On September 12, 2014, Lienholder purchased the Otero County Tax Lien on [the Property] for the years 2013, 2012, 2011, 2010 in the following amounts:

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[1] The Court took judicial notice of the docket in the main bankruptcy case and this adversary proceeding. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (holding that a court may *sua sponte* take judicial notice of its docket); *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 8 (1st Cir. 1999) (citing Fed. R. Evid. 201 and concluding that "[t]he bankruptcy court appropriately took judicial notice of its own docket").

[2] The parties did not do not do a very good job of presenting admissible evidence in support of their positions. For example, a number of Defendant's alleged undisputed facts were submitted without affidavit or other support. *See, e.g.*, alleged undisputed facts 1, 2, 4, 5, 7, 11, 12, 13, 14, 15, and 22. Similarly, Plaintiff's response purports to dispute many of Defendant's alleged undisputed facts, but does not refer to any portion of the record. The Court could summarily deny Defendant's motion, but thought it better to attempt to glean facts from the record and give the parties some idea about the issues that should be tried.

2010	$157.00
2011	$423.51
2012	$280.84
2013	$251.53
Total	$1,112.88

6. The Lien purported to encumber the Property.

7. Attached to the Lien is a sworn affidavit signed by Defendant on September 17, 2014 (the "Sworn Affidavit"), in which Defendant avers, inter alia:

> My name is Michelle Mladek. I am the President of The Hand of God, LLC, a legally incorporated entity in the State of New Mexico. Being aware that the deed to the property described more fully below was available for purchase, on September 12, 2013 I did purchase the Otero County Tax Lien for the years and amounts described below.
> . . .
>
> Lienholder claims a financial interest in this real property in the amount of $3486.88, excluding the interest to incur at 18% annual interest from the date of filing this lien. In doing so, the Hand of God, LLC now has a financial interest in the above referenced property and is seeking clean and clear title.

8. On September 27, 2014, THOG filed a complaint in New Mexico's Twelfth Judicial District Court, styled *The Hand of God LLC v. The Estate of Marshall Wayne Coleman,* cause no. D-1215-CV-2014-00582, seeking a quiet title judgment (the "Quiet Title Action").

9. On December 17, 2014, Plaintiff filed a petition to void the Lien in the Quiet Title Action. The petition was brought under New Mexico's Lien Protection Efficiency Act, N.M.S.A. § 48-1A-1 et seq. (the "LPEA") The LPEA provides in part:

> A. If . . .the district court determines that the claim of lien is invalid, the district court shall issue an order declaring the lien void ab initio . . . .
> . . .
>
> C. A person who . . . filed and recorded . . . a document purporting to create a nonconsensual common law lien against real or personal property, knowing or having reason to know that the document is forged or groundless, contains a material misstatement or false claim or is otherwise invalid, shall be liable to the

> owner of the property affected for actual damages or five thousand dollars ($5,000), whichever is greater, plus costs and reasonable attorney fees as provided in this section.

N.M.S.A. § 48-1A-9.

10. The next day, Plaintiff filed a counterclaim against THOG, and a third party claim against Defendant, asserting claims for slander of title, malicious abuse of process, fraud, and unfair trade practices.

11. The state court held a hearing on the petition to avoid the Lien on January 20, 2015. On April 22, 2015, the state court entered an order avoiding the Lien (the "Lien Avoidance Order"). In the Lien Avoidance Order, the state court awarded Plaintiff $5,000 in damages and $4,133.83 in attorney fees.[3] The award apparently was against THOG, not Defendant.

12. On July 25, 2016, Plaintiff filed a motion for summary judgment in the Quiet Title Action, asking the state court to dismiss THOG's quiet title claim and for a money judgment, including punitive damages, against Defendant on the slander of title claim.

13. The state court held a hearing on Plaintiff's summary judgment motion on January 17, 2017. At the conclusion of legal argument, the following ruling and discussion took place:

> THE COURT: Okay. I'm going to grant the motion for summary judgment. I'm going to order that the quiet title is dismissed, and that the misrepresentations caused you slander of title.
>
> And I will order the attorney's fees. I don't have any attorney's affidavit. If one was submitted, my assistant is out on a family emergency, so I don't have it. But I'll need an affidavit of attorney's fees for the motions that you filed since the - for the - the series of motions.
>
> And I will award punitive damages, but I going to wait until I have – did you submit an affidavit?
>
> MR ORTIZ: I have not.
>
> THE COURT: Okay. I'm going to – I'll make an award of punitive damages, excuse me, but I want to see what those attorney's fees are before I do that.
>
> MR ORTIZ: Right.

[3] § 48-1A-2 of the LPEA Act includes a legislative finding that invalid liens have "serious disruptive effects on property interests and title" and "are costly and time-consuming to expunge."

> THE COURT: And if you should want a hearing based on that, I can – I'll grant that, okay? If you feel that, you know, I abused my discretion in that regard, I certainly want you to be able to make an argument. Okay?
> MR. ORTIZ: So the – I'll submit an affidavit of attorney's fees. So I'll have an opportunity to object and then we'll -
> THE COURT: Exactly.
> MR. ORTIZ: And –
> THE COURT: Excuse me.
> MR ORTIZ: And then the order on the petition to cancel the lien, which awards the damages in that, can we include that as all part of the same transcript of judgment?
> THE COURT: Any objection?
> MR. BEZPALKO: I guess that it still exists and it is there, but it's not – if there's going to be a separate award of damages, I wouldn't ask that it be added in, it would just be a separate paragraph.
> MR. ORTIZ: Right, right.
> THE COURT: Right.
> MR. ORTIZ: That would be fine.
> THE COURT: Okay. I'll look for a form of order from you.[4] Anything further?
> MR. ORTIZ: Nothing from me.
> THE COURT: Anything further?
> MR. BEZPALKO: No.
> THE COURT: All right. We'll be in recess.

14. Defendant filed this voluntary chapter 7 bankruptcy case on April 18, 2017, before any written order or judgment was entered.

15. Plaintiff filed this adversary proceeding on June 21, 2017, seeking to declare Defendant's debt to Plaintiff nondischargeable under § 523(a)(2). On September 11, 2017, Defendant moved to dismiss the proceeding, arguing that the Court lacked subject matter jurisdiction over the dispute, and that Plaintiff's complaint failed to state a claim upon which relief may be granted.

[4] This request is somewhat confusing. It is clear Mr. Ortiz was expected to submit an affidavit of his attorney fees and that, after the state court had reviewed the affidavit, she intended to enter a money judgment against Defendant for reasonable attorney fees and punitive damages. It also is clear that the money judgment in the Order Canceling Lien was to be added to these amounts, so a single transcript of judgment could be issued. Unclear, however, is what the order Mr. Ortiz was ordered to prepare should include, given that the state court had not yet quantified the attorney fee or punitive damages awards.

16. On November 9, 2017, the Court denied the motion to dismiss and determined that it had jurisdiction over all issues.

17. Plaintiff amended its complaint on April 9, 2018, to add a count under § 523(a)(6).

18. Defendant now asks for summary judgment on both counts. Plaintiff has conceded the § 523(a)(2) claim. The only remaining claim is under § 523(a)(6).

II. DISCUSSION

A. Summary Judgment Standards.

Summary judgment is appropriate if the pleadings, discovery papers, admissions, and any affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Rule 56 applies in adversary proceedings. *See* Fed. R. Bankr. P. 7056. "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and ... [must] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant carries this burden, Rule 56 requires the non-moving party to designate specific facts showing that there is a genuine issue for trial. *F.D.I.C. v. Lockhaven Estates, LLC*, 918 F. Supp. 2d 1209, 1231 (D.N.M. 2012) (*citing Celotex*). Further, the party opposing summary judgment must "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990) (*citing Celotex*, 477 U.S. at 324). To deny a motion for summary judgment, genuine fact issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A mere "scintilla" of evidence will not avoid summary judgment. *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993). Rather, there must be sufficient

evidence on which the fact finder could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 251; *Vitkus*, 11 F.3d at 1539.

B. § 523(a)(2)(A) (Fraud).

Plaintiff stipulated to the entry of summary judgment in Defendant's favor under 11 U.S.C. § 523(a)(2)(A). The Court will enter such a judgment.

C. § 523(a)(6) (Willful and Malicious Injury to Property)

Plaintiff alleges that Defendant's debt is nondischargeable under 11 U.S.C. § 523(a)(6) because it arose from "willful and malicious injury" to Plaintiff. To carry its burden of proof under § 523(a)(6), a plaintiff must prove: (1) either he or his property sustained an injury; (2) the injury was caused by the debtor; (3) the debtor's actions were "willful;" and (4) the debtor's actions were "malicious." *In re Deerman*, 482 B.R. 344, 369 (Bankr. D.N.M. 2012). Nondischargeability under § 523(a)(6) requires that the debtor's actions be *both* willful and malicious. *Panalis v. Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir. 2004).

1. Injury to Person or Property. Defendant argues that Plaintiff has not made a sufficient showing of its damages:

> It is even unclear what sort of harm resulted from the lien. *Den-Gar* specifies that the Plaintiff must show special damages with particularity and the amount thereof must be proven and not merely estimated . . . . Nowhere in Plaintiff's Exhibit C does she offer proof as to the damages sustained by the filing of a lien nor does Plaintiff identify the exact sum lost owing to the lien.

Motion, p. 12. This argument lacks merit. As stated by this Court in *In re Spencer*, 2016 WL 1556033 (Bankr. D.N.M.):

> The Supreme Court has held that where compensatory damages awarded in a state court judgment are nondischargeable under § 523(a)(2)(A), all ancillary damages arising from the fraud are also nondischargeable. *Cohen v. de la Cruz*, 523 U.S. 213 (1998). This includes punitive damages, fees, and interest. *See In re Barber*, 326 B.R. 463, 467 (10th Cir. BAP 2005) (punitive damages are nondischargeable under § 523(a)(2)(A), to the extent they are traceable to the fraud); *In re Cupit*, 514 B.R.

42, 57–58 (Bankr. D. Colo. 2014) (interest constitutes part of the nondischargeable debt under *Cohen*); *In re Goguen*, 691 F.3d 62, 67 (1st Cir.2012) (costs are nondischargeable under *Cohen*).

"The holding and reasoning of *Cohen* applies to actions under § 523(a)(6)." *In re Pixley*, 504 B.R. 852, 870 (Bankr.E.D.Mich.2014). *See also Suarez v. Barrett (In re Suarez)*, 400 B.R. 732, 738–739 (9th Cir. BAP 2009), *aff'd*, 529 Fed. App'x. 832 (9th Cir. 2013); *In re Musgrave*, 2011 WL 312883 (10th Cir. BAP 2011); *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 309 (6th Cir. BAP 2004); *DirecTV, Inc. v. Karpinsky (In re Karpinsky)*, 328 B.R. 516, 527–528 (Bankr. E.D. Mich. 2005); *Nolan v. Smith (In re Smith)*, 321 B.R. 542, 548 (Bankr. D. Colo. 2005); *Lopez Roofing Service v. Baker (In re Baker)*, 2014 WL 948656, *3 (Bankr. D.N.M. 2014).

Here, the state court ruled orally that Plaintiff was entitled to a judgment against Defendant on its slander of title claim. The judgment amount apparently was going to include attorney fees, punitive damages, and the amounts awarded in the Lien Avoidance Order. That is sufficient, for summary judgment purposes, to show injury. Additional findings and conclusions about the nature, dischargeability, and extent of the injuries will be decided at trial.

2. Cause of Injury. Defendant filed the Lien, the Sworn Statement, and Quiet Title Action. She does not contend that she is entitled to summary judgment because she was not the cause of any injury.

3. Willfullness. To be willful, a debtor must have intended both the act and the resulting harm. In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), the Supreme Court held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." 523 U.S. at 61. *See also Deerman*, 482 B.R. at 369, n. 18 (quoting *Geiger*). Intent may be inferred from surrounding circumstances. *See In re Trujillo*, 2014 WL 2336645, at *2, n. 2 (Bankr. D.N.M.); *Nat'l Labor Relations Board v. Gordon (In re Gordon)*, 303 B.R. 645, 656, n. 2 (Bankr. D. Colo. 2003 ("absolutely permissible to infer . . . actual intent to cause injury from . . . evidentiary facts");

Allison v. Dean (In re Dean), 2013 WL 1498305 (Bankr. M.D. Ala.) (to the same effect); *Smith v. Davenport (In re Davenport)*, 491 B.R. 911, 922 (Bankr. W.D. Mo. 2013).

Defendant argues that there is no evidence she intended to injure Plaintiff. The argument fails; the undisputed facts are sufficient to support an inference of intent to injure Plaintiff. After all, Defendant knew Plaintiff owned the Property (Plaintiff was the named defendant in the Quiet Title Action). Despite that knowledge, Defendant attempted to wrest ownership from Plaintiff. Whether Defendant had the requisite intent is to be determined at trial; the Court reaches no conclusions on that issue. It is sufficient at this point to hold that, based on the undisputed facts, Defendant's willfulness and intent are in genuine dispute.

4. Malice. For a debtor's actions to be malicious, they must be intentional, wrongful, and done without justification or excuse. *Deerman*, 482 B.R. at 369 (citing *Bombardier Capital, Inc. v. Tinkler*, 311 B.R. 869, 880 (Bankr. D. Colo. 2004)). The Tenth Circuit follows a subjective standard in determining whether a defendant desired to cause injury or believed the injury was substantially certain to occur. *Via Christi Reg'l Med. Ctr. v. Englehart (In re Englehart)*, 2000 WL 1275614, at *3 (10th Cir. 2000) ("[T]he 'willful and malicious injury' exception to dischargeability in § 523(a)(6) turns on the state of mind of the debtor, who must have wished to cause injury or at least believed it was substantially certain to occur."); *See also C.I.T. Financial Services, Inc. v. Posta (In re Posta)*, 866 F.2d 364, 367 (10th Cir. 1989), abrogated on other grounds by *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) ("malicious intent [may] be demonstrated by evidence that the debtor had knowledge of the creditor's rights and that, with that knowledge, proceeded to take action in violation of those rights."); *In re Pasek*, 983 F.2d 1524, 1527 (10th Cir. 1993) (quoting *Posta*); *In re Grey*, 902 F.2d 1479, 1481 (10th Cir. 1990) (same).

The state court awarded damages under the LPEA, which means it found that Defendant knew or had reason to know that the Lien was forged or groundless, contained a material misstatement or false claim, or was otherwise invalid. N.M.S.A. § 48-1A-9. This finding is support for Plaintiff's allegation that Defendant acted with malice.

In addition, the state court orally granted Plaintiff's motion for summary judgment on its slander of title claim. In New Mexico, slander of title includes the element of malice:

> The tort of slander of title occurs when one who, without the privilege to do so, wilfully [sic] records or publishes matter which is untrue and disparaging to another's property rights in land, as would lead a reasonable man to foresee that the conduct of a third purchaser might be determined thereby. See *Dowse v. Doris Trust Co.*, 116 Utah 106, 208 P.2d 956 (1949). Malice is an essential ingredient in a claim of slander of title. *City of Hobbs v. Chesport, Limited*, 76 N.M. 609, 417 P.2d 210 (1966).

Den-Gar Enterprises v. Romero, 94 N.M. 425, 430 (Ct. App. 1980). The state court's rulings do not end the inquiry into Defendant's motivation and state of mind, but they are sufficient to show, at the summary judgment stage, that there is a genuine dispute about those important facts.

III. CONCLUSION

There are genuine factual disputes concerning several elements of Plaintiff's § 523(a)(6) claim. Defendant's motion for summary judgment on that claim therefore will be denied. Defendant's motion on the § 523(a)(2)(A) claim will be granted. The Court will enter a separate order.

Hon. David T. Thuma
United States Bankruptcy Judge

Entered: August 13, 2018

Copies to: counsel of record