

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND**

IN RE:)	
)	
JOHN MICHAEL SCHAEFER)	Case No. 09-24500 NVA
)	Chapter 7
Debtor)	
)	
_____)	
)	
ROBERT LAUER)	
)	
Plaintiff)	
)	
v.)	Adv. No. 09-00792
)	
JOHN MICHAEL SCHAEFER)	
)	
Defendant)	
_____)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

This Memorandum of Law is submitted by Defendant J. Michael Schaefer in support of his Motion for Summary Judgment, pursuant to Bankruptcy Rule 7056 and F.R.Civ.P. 56.

Undisputed Facts

On 2/14/01, Lauer filed a Complaint against Schaefer in the Superior Court of California for San Diego County, Case No. GIC 762340 [the “State Court Action”]. In the State Court Action, Lauer alleged the following causes of action:

1. Breach of Contract
2. Breach of Implied Covenant
3. Impairment of Interest in Collateral [Commercial Code sec. 3605]
4. Fraud
5. Negligent Misrepresentation
6. Interference with Prospective Economic Advantage
7. Interference with Contractual Relations

8. Slander of Title
9. Trade Libel
10. Abuse of Process
11. Constructive Trust

The complaint filed in the State Court Action alleges, among other things, that Schaefer sold a certain hotel property in San Diego, CA [the “Property”] to Lauer, who financed the purchase in part by giving Schaefer a promissory note secured by a deed of trust on the Property. Lauer alleged that in June 2000 Schaefer published an advertisement in the San Diego Tribune which offered the property for sale at \$4.5 million. Lauer alleged that he was actively attempting to sell the property for \$6.6 million when the advertisement appeared. Lauer further alleged that the advertisement caused him to lose various opportunities to sell the Property at his asking price. Lauer asserted in the State Court Action that Schaefer’s actions constituted a “wrongful, intentional interference with Plaintiffs’ prospective economic advantage”. A true and correct copy of the complaint filed in the State Court Action is attached hereto as **Exhibit A**.

On 12/13/01, a jury in the State Court Action returned a verdict which awarded Lauer compensatory damages in the amount of \$1.45 million. The money judgment was based on the jury’s determination that Schaefer had (1) violated the covenant of good faith and fair dealing implied in the note and trust deed; and (2) intentionally interfered with Lauer’s prospective economic advantage in connection with Lauer’s efforts to market and sell the property. The jury further determined that Schaefer’s interference was motivated by “malice, oppression or fraud”. It is noted, though, that the jury declined to award any punitive damages. A true and correct copy of the jury’s Verdict Sheet is attached hereto as **Exhibit B**. Also on 12/13/01, the court in the State Court Action

entered judgment in Lauer's favor in the amount of \$1,450,000 [the "Judgment"]. A true and correct copy of the Judgment is attached hereto as **Exhibit C**.

Schaefer appealed the Judgment to the Court of Appeals of California, Fourth Appellate District, Division One, D039675. The Court of Appeals affirmed the Judgment only as to the breach of implied covenant of good faith. The appellate court declined to address Schaefer's arguments concerning the sufficiency of the evidence in support of the verdict on the intentional interference claim. The Court of Appeals explained its decision as follows:

On appeal, Schaefer contends that the evidence is insufficient to support the verdict on the intentional interference claim.... We affirm the Judgment on the ground that Schaefer has failed to demonstrate any reversible error as to the implied covenant claim. Because the covenant claim independently supports the Judgment, we need not address Schaefer's arguments regarding the intentional interference claim.

Similarly, the appeals court declined to address Schaefer's argument concerning the sufficiency of evidence in support of the jury's determination that Schaefer had acted with malice, oppression, or fraud. The court reasoned that because the jury had declined to award punitive damages, its finding of malice, oppression, or fraud was not necessary to the judgment on appeal:

Schaefer also challenges the sufficiency of evidence to support the jury's finding that he acted with malice, oppression or fraud. In so finding, the jury necessarily concluded that Schaefer intended to cause injury to Lauer, that he engaged in despicable conduct that "would be looked down upon and despised by ordinary decent people," or that he committed intentional misrepresentation, deceit, or concealment. However, the jury did not award any punitive damages, and the final judgment for \$1.45 million is not predicated in any way on the finding of malice, oppression, or fraud. Thus, Schaefer has failed to demonstrate that he is in any way aggrieved by the jury's finding on this issue. Our function is to decide the correctness of the judgment, not to assess the validity of factual findings that had no impact on the judgment. Only the judgment is appealable under Code of Civil Procedure section 904.1; the jury verdict is not appealable. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 307, fn. 10, citing *Robins v. Weis* (1950) 97

Cal.App.2d 144, 145.) Because the jury's finding of malice, oppression, or fraud is not necessary to the judgment currently on appeal, and it is not separately appealable, we decline to address Schaefer's challenge to this finding.

A true and correct copy of the unpublished decision of the California Court of Appeals in the State Court Action is attached hereto as **Exhibit D**.

On 10/26/09, the trial court in the State Court Action entered a judgment [the "Post Petition Judgment"] in the amount of \$126,344.50 in Lauer's favor against Schaefer-Nevada, Inc. A true and correct copy of the Post Petition Judgment is attached hereto as **Exhibit E**. A portion of the Post Petition Judgment in the amount of \$83,425.00 is for money which the court determined is due and owing by Schaefer-Nevada, Inc. to the Debtor for personal services rendered. Prior to the entry of the Post Petition Judgment, the court had assigned this money to Lauer pursuant to three (3) separate Assignment Orders, as enumerated in the Post Petition Judgment. Because Schaefer-Nevada, Inc. had failed to comply with the Assignment Orders, the court entered the Post Petition Judgment at Lauer's request as a means to enforce the Assignment Orders.

On 12/18/09, the Debtor filed an amended claim of exemptions (Schedule C) in this case. The amended Schedule C exempted 75% of the amount determined in the State Court Action to be due and owing by Schaefer-Nevada, Inc. to the Debtor for personal services rendered by Schaefer on behalf of Schaefer-Nevada, Inc.¹ The amount claimed as exempt is \$62,568.75. A true and correct copy of the Debtor's Amended Schedule C is attached hereto as **Exhibit F**.

¹ Section 15-601 *et seq.* of the Maryland Commercial Law Code allows a debtor to exempt 75% of the debtor's earnings and wages from garnishment or attachment. To the extent that Nevada law may be applicable, based on the Debtor's prior domicile in Nevada and Schaefer-Nevada, Inc.'s incorporation in that state, it is noted that 75% of a debtor's earnings and wages are exempt from garnishment or attachment under Nevada law, *see* §31.295 of the Nevada Revised Statutes.

The chapter 7 trustee in the case *sub judice*, having been given notice of the filing of the Debtor's amended claim of exemptions, has filed no objections thereto. The time for objecting to the Debtor's amended claim of exemptions has now passed.

Argument

Lauer's Complaint to Determine Dischargeability of Debt

A. The Judgment entered in the State Court Action is not entitled to collateral estoppel effect.

Lauer has asked this Court to determine that the Judgment is excepted from discharge pursuant to 11 U.S.C. §523(a)(6), which is the exception to discharge for debts for willful and malicious injury by the debtor to another entity or to the property of another entity. Lauer asserts in his Complaint that the jury in the State Court Action awarded damages against Schaefer in the amount of \$1,450,000, based on its determination that the Debtor had intentionally interfered with Lauer's prospective economic advantage respecting the marketing and sale of the Property. Lauer further alleges that the jury found by clear and convincing evidence that Schaefer acted with "malice, oppression and fraud". Accordingly, Lauer concludes that the Judgment is a debt for willful and malicious injury within the meaning of §523(a)(6). *See, e.g., In re McCown*, 129 B.R. 432 (Bankr. D. Md. 1991)(wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute willful and malicious injury).

However, Lauer assumes, incorrectly, that the jury's verdict in the State Court Action is entitled to collateral estoppel effect in the case *sub judice*. Collateral estoppel precludes re-litigation of an issue decided previously in judicial or administrative

proceedings, provided the party against whom the prior decision is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. *See Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980). The Fourth Circuit Court of Appeals has held that in connection with dischargeability adversary proceedings, the bankruptcy court must, as a matter of full faith and credit, apply the collateral estoppel rules of the forum state which entered the judgment, not federal collateral estoppel law, *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995). The *McNallen* court reasoned as follows:

As the *Allen* Court explained, "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so," *Allen*, 449 U.S. at 96, 101 S.Ct. at 415. It is well recognized, therefore, that the forum state's law of collateral estoppel applies in determining the dischargeability of debt. *See Bugna v. McArthur (In re Bugna)*, 33 F.3d 1054, 1057 (9th Cir.1994) (applying California law of collateral estoppel to determine the dischargeability of debt under 11 U.S.C.A. Sec. 523(a)(4)); *In re Bulic*, 997 F.2d 299, 304 n. 6 (7th Cir.1993) (applying Indiana law of collateral estoppel to conclude that the debtor was precluded from relitigating the issues of fraud, deceit, and perjury in discharge proceedings because these were determined in state court); *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 675-76 (11th Cir.1993) (applying Florida law of collateral estoppel to deny discharge under 11 U.S.C.A. Sec. 523(a)(2)(A)); *Lehman's Inc. of Anderson v. Hittle (In re Hittle)*, 163 B.R. 814, 816-18 (S.D.Ind.1994) (applying Indiana law of collateral estoppel to deny discharge pursuant to Sec. 523(a)(6)).

In Zevnik et al v. Superior Court of Los Angeles County, 70 Cal.Rptr.3d 817 (2008), the California Court of Appeal considered the preclusive effect of a trial court decision based on alternative grounds, each of which was sufficient to support the decision, after an appellate court had affirmed the decision on only one of the alternative grounds without deciding the other grounds. The court held that the governing rule of law in California is that if a trial court relies on alternative grounds to support its decision and an appellate court affirms the decision based on fewer than all of those grounds, only the

grounds relied on by the appellate court can establish collateral estoppel. *Id.* at 819. The court reasoned that when an appellate court declines to review a particular basis for a trial court's decision, it is as if the appellant had been afforded no opportunity for review of that basis for the trial court's decision. Under these circumstances, there is no assurance that the trial court's decision is reliable, and therefore the trial court's decision should not be given collateral estoppel effect:

The opportunity for review of a decision is an important procedural protection against a potentially erroneous determination and is a factor to consider in determining whether collateral estoppel applies. [citations omitted] Appellate review provides a degree of assurance that the issue was correctly decided and enhances the reliability of the determination. When an appellate court declines to review a particular ground for a trial court decision, the reliability of that ground is not enhanced and is left in the same condition as if there had been no opportunity for review. The principal reason for an appellate court to decline to review alternative grounds for a trial court decision is judicial economy, which is a justification that we would not impugn. With regard to ensuring the reliability of a determination, however, an appellate court's failure to review an alternative ground on appeal has the same effect as the absence of an opportunity for review and, we believe, should result in no collateral estoppel as to that alternative ground.

Id. at 823.

In the case *sub judice*, the California Court of Appeal affirmed the Judgment insofar as it was based on the jury's determination that Schaefer had breached an implied contractual covenant of good faith in the deed of trust between the parties.² The California court declined to review the question whether there was sufficient evidence to support the jury's determination that Schaefer had intentionally interfered with Lauer's prospective economic advantage or that he had acted with malice, oppression, or fraud. Because Schaefer was not afforded appellate review as to these issues, the jury's

² Lauer has not asserted any basis for excepting his contractual breach of implied covenant of good faith claim from the bankruptcy discharge.

determinations that Schaefer intentionally interfered with Lauer's prospective economic advantage and acted with malice, oppression or fraud is not entitled to collateral estoppel effect under applicable California law. Accordingly, this Court may not give preclusive effect to the jury's determinations when determining whether Lauer's claim against the Debtor is excepted from discharge, *In re McNallen, supra*.

B. Schaefer is entitled to judgment as a matter of law on Lauer's §523(a)(6) complaint

Section 523(a) states that a discharge under §727 does not discharge an individual debtor from any *debt* that falls within any of the enumerated exceptions to discharge, including debts for willful and malicious injury. The term "debt" means "liability on a claim", 11 U.S.C. §101(12). In the case *sub judice*, Lauer asserts that Schaefer is liable under California law for tortious interference with Lauer's prospective economic advantage. For the following reasons, Lauer can not, as a matter of law, establish Schaefer's liability for tortious interference with prospective economic advantage under applicable California law. Accordingly, Schaefer is entitled to judgment as a matter of law in the adversary proceeding before this Court, because the debt which Lauer seeks to except from discharge is based on his tortious interference claim.

In *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937 (Cal., 2003), the California Supreme Court, California's highest court, articulated the elements of the cause of action for intentional interference with prospective economic advantage:

These elements are usually stated as follows: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt

the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

As to the third element, the court held that intentional interference with a plaintiff's prospective economic advantage is not wrongful in and of itself. In order to establish defendant's liability, a plaintiff must plead and prove that the defendant engaged in an *independently wrongful or actionable act*:

Thus, while intentionally interfering with an existing contract is "a wrong in and of itself" (*Quelimane, supra*, 19 Cal.4th at p. 56, 77 Cal.Rptr.2d 709, 960 P.2d 513), intentionally interfering with a plaintiff's prospective economic advantage is not. To establish a claim for interference with prospective economic advantage, therefore, a plaintiff must plead that the defendant engaged in an independently wrongful act. (*See Delia Penna, supra*, 11 Cal.4th at p. 393, 45 Cal.Rptr.2d 436, 902 P.2d 740.) An act is not independently wrongful merely because defendant acted with an improper motive. As we said in *Delia Penna*, "the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties." (*Delia Penna, supra*, 11 Cal.4th at p. 392, 45 Cal.Rptr.2d 436, 902 P.2d 740.) The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. (*Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.* (2001) 271 F.3d 825.) We conclude, therefore, that an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. (*See Marin Tug & Barge, supra*, at p. 835; *see also Delia Penna, supra*, 11 Cal.4th at p. 408, 45 Cal.Rptr.2d 436, 902 P.2d 740 (cone, opn. of Mosk, J.) ["It follows that the tort may be satisfied by intentional interference with prospective economic advantage by independently tortious means"].)

In the State Court Action, the intentional interference alleged in Lauer's complaint related to Schaefer's advertisement of the Property for sale at \$4.5 million at a time when Lauer was attempting to market and sell the Property for \$6.6 million:

16. In or around June 11 of 2000 Schaefer published an advertisement (the "Advertisement") in the San Diego Union Tribune Newspaper which states that the property is on the market for sale by Schaefer at a price of 4.5 million dollars. Schaefer took this action notwithstanding the fact that the Trust Deed vests title for sale in Wilshire, and the fact that no notice of default regarding the property had been recorded prior to the running of the Advertisement. ...

* * * * *

18. At or about time that Schaefer was advertising the Property at 4.5 million dollars, Lauer's real estate broker and agent Sperry Van Ness ("Sperry") was offering and promoting the Property for sale at a price of \$6,600,000.00....

Similarly, in the Complaint filed in the adversary proceeding presently before this Court, the intentional interference alleged relates to Schaefer's sale advertisement respecting the Property:

7. Although the Debtor had previously conveyed his interest in the Hotel to Robert Lauer, the Debtor began his own marketing efforts with respect to the Hotel concurrently with Robert Lauer's marketing of the Hotel.

8. The Debtor purchased advertising in a local newspaper listing the Hotel for sale at a purchase price that was substantially lower than the purchase price at which Robert Lauer was marketing the Hotel.

9. As a result of the Debtor's interference with Robert Lauer's marketing of the Hotel, Robert Lauer was forced to sell the Hotel on December 8, 2000 to Sandor Shapery (the "Purchaser") for a purchase price substantially lower than Robert Lauer would have received absent the Debtor's interference.

Defendant has served interrogatories on Lauer in this adversary proceeding.

Schaefer's interrogatories asked Lauer to articulate any acts or conduct of the Debtor constituting intentional interference with Lauer's prospective economic advantage which Lauer contends were independently actionable or unlawful. Lauer was unable to cite any such acts or conduct:

Interrogatory No. 2(g): If you so contend, please identify and describe with particularity any acts or conduct of the Debtor constituting interference with your prospective economic advantage which you contend were independently actionable or unlawful (*i.e.*, proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard).

Answer to Interrogatory No. 2(g): Lauer objects to subsection (g) of Interrogatory No. 2 on the basis that subsection (g) is vague and ambiguous. Without waiving the foregoing objection, Lauer incorporates herein his answer to Interrogatory No.

1(d) above. The jury in the State Court Action determined that Schaefer's conduct was actionable and unlawful.

Lauer answered Interrogatory No. 1 as follows:

* * * * *

(b) Concurrently with Lauer's and ECOM's marketing efforts, Schaefer, without any legal basis, commenced his own marketing effort by purchasing classified advertising the San Diego Union-Tribune (the "Tribune") offering the Hotel for sale at a substantially lower purchase price (\$4.5 million) than ECOM's listing price (\$6.6 million). Schaefer delivered to interested purchasers responding to the Tribune advertisement an invitation to make offers on the Hotel. The pool of buyers who read Schaefer's advertisement and/or received a copy of Schaefer's invitation to make offers were discouraged from purchasing the Hotel for its fair market value....

* * * * *

(d) The Note required Lauer to make monthly payments to Schaefer on the fifth day of each month until the maturity of the Note. When Lauer failed to make the June 5, 2000 payment due under the Note, Schaefer immediately advertised the Hotel for sale in the Tribune, notwithstanding that the Deed of Trust conveyed an interest in the Hotel to the Trustee rather than to Schaefer. Schaefer refused to cooperate with Lauer's efforts to refinance the debt secured by the Hotel and was "mad" at Lauer for Lauer's mention of the possibility of seeking protection under the Bankruptcy Code....

A true and correct copy of Lauer's answers to Plaintiff's interrogatories are attached hereto and made part hereof as **Exhibit G**.

Placing a sale advertisement in a newspaper was not in and of itself unlawful or independently actionable, whether or not it constituted interference with Lauer's efforts to market and sell the Property. Moreover, Lauer failed to plead or allege, either in the State Court Action or in this Court, that Schaefer engaged in any additional or other conduct constituting interference that is independently wrongful or actionable.

Accordingly, Lauer's complaint for intentional interference with prospective economic relations fails to state a claim upon which relief can be granted under applicable

California law. Moreover, as noted above, Lauer has failed to cite any additional facts in his responses to Schaefer's written discovery requests which might create a genuine dispute whether the Debtor engaged in independently wrongful or actionable conduct when he allegedly interfered with Lauer's prospective economic advantage. For all of these reasons, the Debtor is entitled to judgment as a matter of law in this adversary proceeding, and Lauer's complaint filed pursuant to §523(a)(6) of the Bankruptcy Code must be dismissed.

Schaefer's Counterclaim: Motion to Avoid Liens Impairing Exemptions

The Debtor has filed a counterclaim in this adversary proceeding pursuant to §522(f) of the Bankruptcy Code. The Debtor's counterclaim asks this Court to avoid the Post Petition Judgment, to the extent that it impairs exemptions to which the Debtor is entitled.

Section 522(f) of the Bankruptcy Code permits the Debtor to avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled, if such lien is a judicial lien.

Section 101(37) of the Code defines a lien to be a charge against or interest in property to secure payment of a debt. A judicial lien is a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding, 11 U.S.C. §101(36). The Post Petition Judgment constitutes a charge against amounts determined in the State Court Action to be due and owing to the Debtor by Schaefer-Nevada, Inc. Consequently, the Post Petition Judgment is a judicial lien within the meaning of 11 U.S.C. §522(f).

The Post Petition Judgment is a lien on the interest of the debtor in property, because the lien has attached to amounts determined in the State Court Action to be due and owing by Schaefer-Nevada, Inc. to the Debtor.

Finally, the Debtor has claimed an exemption in the amount of \$62,568.75 in his Amended Schedule C filed herein for amounts determined in the State Court Action to be owed by Schaefer-Nevada, Inc. to the Debtor. No timely objection to the Debtor's exemption claims was filed. Thus, the Post Petition Judgment impairs an exemption to which the Debtor is entitled.

For all of these reasons, the Debtor respectfully requests that this Court enter an order avoiding the Post-Petition Judgment, to the extent that it impairs an exemption to which the Debtor is entitled. The amount of the Post Petition Judgment is \$126,344.50, and the portion thereof which is for amounts due and owing by Schaefer-Nevada, Inc. to the Debtor, and which has been claimed as exempt, is \$62,568.75. Accordingly, the Debtor requests that this Court enter an order reducing the enforceable amount of the Post-Petition Judgment to \$63,775.75.

Date: 6/21/10

_____/s/
James P. Koch
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Baltimore, MD 21202
410 539 7816
Attorney for J. Michael Schaefer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of June 2010 a copy of the foregoing Motion for Summary Judgment and supporting Memorandum of Law was sent by regular first class mail, postage pre-paid, to

Robert Lauer
2654 West Horizon Ridge B5 #266
Henderson, NV 89052

_____/s/_____
James P. Koch