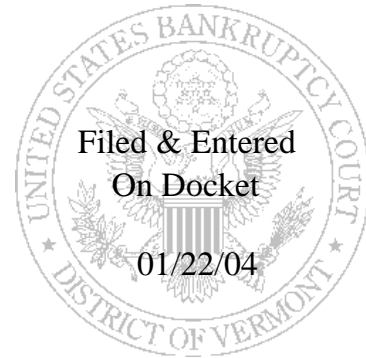


UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

Samuel Joseph Gorruso
Debtor.

Chapter 7 Case
02-11717

Robert W. Maguire and
Robert W. Maguire, Ltd.,
Plaintiffs,

v.

Samuel Joseph Gorruso,
Defendant.

Adversary Proceeding
03-1012

Appearances: *Robert S. DiPalma, Esq.*
 Paul, Frank & Collins
 Burlington, VT
 Attorney for Plaintiffs

Paul S. Kulig, Esq.
Keyser Crowley, P.C.
Rutland, VT
Attorney for Defendant

MEMORANDUM OF DECISION
GRANTING JUDGEMENT TO PLAINTIFFS

Plaintiffs Robert W. Maguire and Robert W. Maguire, Ltd. (“the Plaintiffs”) seek an order of this Court determining that the debt the Defendant owes to them is non-dischargeable under 11 U.S.C. § 523(a)(6)¹ because it arises from a “willful and malicious injury” the Debtor-Defendant² perpetrated on the Plaintiffs and their property. The debt in question arises from a judgment on a jury verdict issued by the Rutland Superior Court as modified by an affirming decision of the Vermont Supreme Court. See Maguire v. Gorruso, ___ Vt. ___, 800 A.2d 1085 (2002). After considering the pleadings, the state court rulings, and the evidence presented at a trial conducted by this Court in December 2003, this Court finds that the Plaintiffs have sustained their burden of proof. Therefore, the Court grants judgment in favor of the Plaintiffs for the reasons set forth below.

This Court has jurisdiction to enter a final order in this adversary proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(I).

¹ All references to statutes herein refer to Title 11 of the United States Code (the “Bankruptcy Code”), unless otherwise indicated.

² Hereinafter, Samuel Joseph Gorruso, the Debtor in this case and the Defendant in this adversary proceeding, shall be referred to interchangeably as “Debtor” or “Defendant”.

I. BACKGROUND

A. From the State Court

The Plaintiffs' state court legal action against the Defendant³ commenced in July 1999 and was brought to trial in February 2001; it resulted in a jury verdict favorable to the Plaintiffs. Subsequently, the verdict was reduced to a judgment, and the Defendant appealed that judgment. In its decision on appeal, the Vermont Supreme Court succinctly summarized the initial facts leading up to this case. For clarity, this Court recites those findings:

[Plaintiffs] owned and operated a weekly advertisement-based paper known as The Rutland Shopper and, later, as The Rutland Tribune. In March 1998, plaintiffs entered into a combined lease and purchase-and-sale agreement with defendants Samuel J. Gorruso and Sammy G. Media Corp. . . . The agreement provided for defendants to assume full operational control of the business, including its equipment, inventory, trade names and receivables, and to pay plaintiffs a monthly consulting fee until November 1999, when defendants would purchase the business for the sum of \$628,000

Defendants operated the business under the name The Rutland Shopper until the end of June 1999, at which time plaintiffs resumed possession and operation of the business pursuant to a subsequent agreement between the parties. Under that agreement, dated June 24, 1999, all prior contractual obligations between the parties were canceled, plaintiffs agreed to pay defendants a total of \$25,000, and defendants agreed to have no further involvement with the business and to refrain from any use of the names The Rutland Shopper or The Rutland Tribune. Although the original purchase/lease agreement contained a specific noncompete clause, the June 1999 memorandum canceling the agreement lacked such a clause.

Almost immediately after the parties' June agreement, defendants moved to a separate location in Rutland and commenced publication of an advertisement-based paper under the title Sam's Good News Shopper. Plaintiffs, in response, filed [a state court] action against defendants, alleging—among other claims—conversion of various items of property, including a customer list, computer and photographic equipment, and other hardware; unfair competition through misappropriation of business assets as well as trademark and trade dress infringement; and fraud. . . .

At the end of a five-day trial in January and February 2001, the jury returned a verdict in favor of plaintiffs, awarding damages of \$143,000 for conversion of property, \$272,000 for unfair competition, and \$1.00 for punitive damages. The jury found in favor of plaintiffs on defendants' counterclaim for defamation. In response to defendants' subsequent motion to alter or amend, the [state] court struck the \$1.00 award for punitive damages, but otherwise denied the motion. The [state] court subsequently entered an amended judgment in favor of plaintiffs, awarding damages totaling \$415,535.18 (the conversion and unfair competition awards plus costs). [An] appeal followed.

Maguire, ___ Vt. at ___, 800 A.2d at 1087-88.

³ In the state court action there was a co-defendant, Sammy G. Media Corp. That corporate entity is not a co-defendant in this proceeding.

B. From the Vermont Supreme Court

On appeal, the Vermont Supreme Court affirmed the jury verdict in favor of the Plaintiffs, but reduced the damages award. See id. at 1092. It ruled the jury's \$143,000 conversion award was duplicative of its unfair competition award. See id. Thus, the judgment was modified to have the damages award total \$273,535.18. See id.

Of importance to this proceeding, the Supreme Court upheld the unfair competition by misappropriation of business assets claim – an alternative theory to the Plaintiffs' unfair competition claims based on trademark and trade dress infringement – because it concluded:

[T]he record evidence was more than adequate to support [this alternative claim of unfair competition by misappropriation of business assets]. . . . [T]he record reveals that plaintiffs' principal theory, and the bulk of their evidence at trial, related to their assertion that defendants had engaged in unfair competition through the misappropriation and exploitation of their principal business assets.

Id. at 1089. The Supreme Court further noted that the jury was instructed on the Plaintiffs' misappropriation theory without any objection from the Defendant. See id. at 1090. The jury was instructed, *inter alia*:

Common law unfair competition must be grounded in either deception or misappropriation of the exclusive property of the Plaintiffs. The Plaintiffs assert that the Defendants engaged in unfair competition in two ways, principally. First, they argue that the Defendants misappropriated various items of property belonging to [T]he Rutland Shopper and used that property in establishing Sam's Good News Shopper. . . .

Id. at 1090. Finally, the Supreme Court observed that "the evidence, argument, and instructions [of the Plaintiffs'] focused extensively – if not exclusively – on the alleged misappropriation of certain proprietary information and tangible business assets, not simply plaintiffs' trade name or trade dress." Id. at 1091. Thus, it found the Defendant's argument on appeal regarding the Plaintiffs' unfair competition claims to be unpersuasive because "[c]ourts have long noted that common law unfair competition is a flexible and evolving concept, not confined to any particular form of unethical behavior." Id.

C. After the State Court Action

On December 4, 2002, after the Vermont Supreme Court affirmed the state court's judgment that the Defendant was liable to the Plaintiffs for unfair competition and conversion, and modified the award of that judgment, the Defendant filed a petition for bankruptcy relief under chapter 7 of the Bankruptcy Code. See Main Case #02-11717, doc. #1. The Defendant listed the state court judgment on Schedule F of his bankruptcy filing. See id. On March 10, 2003, the Plaintiffs filed a complaint commencing the instant

adversary proceeding. See Compl. (doc. #1). The Complaint seeks an order excepting the state court judgment from discharge, pursuant to § 523(a)(6), and alleges that the Defendant intentionally misappropriated significant business assets of the Plaintiffs. See id. at ¶5. The Defendant denied his actions were intentional and sought an order discharging the debt. See Answer (Doc. #5).

II. THE BANKRUPTCY COURT IS BOUND BY THE DECISIONS OF THE RUTLAND SUPERIOR COURT AND THE VERMONT SUPREME COURT

The Debtor's liability for conversion of assets and unfair competition based upon misappropriation of business assets, and the resulting damages, were determined by a state court jury. See Special Verdict, Plaintiffs' Trial Exhibit No. 29. Based upon the verdict, the Rutland Superior Court entered a judgment in the Plaintiffs' favor. See Judgment on Jury Verdict, Plaintiffs' Trial Exhibit No. 21. Thereafter, the Vermont Supreme Court affirmed the Debtor's liability to the Plaintiffs, modifying only the award of damages and only to the extent the award of damages for conversion was duplicative of the damages awarded under the claim of unfair competition. The parties in the underlying state court action were the same as those before this Court. The Plaintiffs' cause of action in this adversary proceeding is premised upon the same allegations as in the state court action except that the Complaint before this Court requires a determination of whether the Debtor's actions were willful and malicious. There is no dispute that the state court order was final as of the date of the filing of the instant chapter 7 case.

Under 28 U.S.C. § 1738 a federal court must, in according full faith and credit, give a state court judgment the same preclusive effect as would be given to the judgment under the law of the state in which the judgment is rendered. See, e.g., Johnson v. Watkins, 101 F.3d 792, 794 (2d Cir. 1996). Thus, pursuant to 28 U.S.C. § 1738 and the principles of collateral estoppel, this Court is bound by the determinations of the jury in the Rutland Superior Court and the decision of the Vermont Supreme Court regarding the Debtor's liability to the Plaintiffs and the amount of damages caused thereby. "Under Vermont law, collateral estoppel applies if the issue at stake is identical to an issue decided in prior litigation, if the issue was actually litigated, if the prior determination of the issue was a critical and necessary part of the judgment entered in the prior decision, and if the application of issue preclusion in the subsequent action would be fair." Shannon v. Kantorski (In re Kantorski), 2001 WL 34050697 (Bankr. D. Vt. 2001); see also In re Tariff Filing of Central Vermont Public Service Corporation, 172 Vt. 14, 20 (2001) (instructing that collateral estoppel "bars the relitigation of an issue, rather than a claim, that was actually litigated by the parties and decided in a prior case").

This Court finds that under Vermont law it is proper to give the state court judgment (and the Supreme Court decision affirming and modifying the state court judgment) preclusive effect. While the Defendant denies that the Vermont Supreme Court’s decision affirmed the liability of the Defendant, see Answer at ¶6 (doc. #6), throughout the trial he failed to object to the application of collateral estoppel regarding the State court’s determination of liability for conversion of assets and for unfair competition based upon misappropriation.⁴ Hence, giving the state court judgment (as modified by the Vermont Supreme Court’s decision, see Maguire, ___ Vt. at ___, 800 A.2d at 1092) full faith and credit in the matter before this Court is proper. Thus, the Plaintiffs are entitled to an allowed claim in the amount of \$273,535.18 for damages from the Debtor based on the Debtor’s liability for conversion of the Plaintiff’s assets and for conduct constituting unfair competition based on misappropriation of business assets. (Hereinafter, the \$273,535.18 damages award shall be referred to as “the Debt”.)

However, what is not clear is whether the Plaintiffs’ claim may be discharged in bankruptcy. The state court judgment did not anticipate the question of whether the Debt would be dischargeable in a bankruptcy case. Nor did the state court action determine whether the Debtor’s actions were willful and malicious.⁵ Yet, this standard must be met in order for a debt to be excepted from discharge under § 523(a)(6), the basis for the Plaintiffs’ cause of action in this Court. Since the Debtor seeks to discharge the Debt through his bankruptcy case, this Court must determine whether the Debtor’s conversion of the Plaintiffs’ assets and the Debtor’s conduct constituting unfair competition through misappropriation of business assets were willful and malicious in order to determine whether the Debt may be discharged. The Plaintiffs have the burden of proving that the Defendant’s conduct was willful and malicious by a preponderance of the evidence. Grogan v. Garner,

⁴ This Court notes, however, that throughout the trial, the Defendant took the position that only the conversion award is subject to the Plaintiffs’ § 523(a)(6) non-dischargeability Complaint. Therefore, the Defendant argued that only the corresponding, reduced \$1,000 award is subject to exception to discharge. This Court disagrees and will more fully discuss its reasons in Part V of this Decision.

⁵ Under Vermont state law:

To establish a claim for conversion, the owner of property must show only that another has appropriated the property to that party’s own use and beneficial enjoyment, has exercised dominion over it in exclusion and defiance of the owner’s right, or has withheld possession from the owner under a claim of title inconsistent with the owner’s title. . . . [L]iability requires that a defendant commit an overt act with respect to the subject property. The key element of conversion, therefore, is the wrongful exercise of dominion over property of another.

P.F. Jurgs & Co. v. O’Brien, 160 Vt. 294, 299 (1993) (internal citations omitted). For a discussion of a claim of unfair competition by misappropriation of business assets, see, supra, Part I.B.; see also Maguire v. Gorruso, ___ Vt. ___, 800 A.2d 1085 (2002).

III. FACTUAL FINDINGS

Upon consideration of the record, which includes the testimony and exhibits entered into evidence, this Court makes the following findings, see FED. R. BANKR. P. 7052(a):

- (1) Having had the opportunity to observe the demeanor of Plaintiff McGuire and Defendant Gorruso, the Court finds Plaintiff McGuire's testimony to be more credible than that of Defendant Gorruso.
- (2) In light of the state court jury verdict, the Court gives no weight to Defendant Gorruso's protestations of innocence regarding the Plaintiffs' claims of conversion of business assets and unfair competition by misappropriation of business assets.
- (3) The Court gives significant weight to Defendant Gorruso's testimony on cross-examination that, in order to run an advertisement-based newspaper, it is important for the newspaper to have photographic equipment, distribution racks, account information regarding its customers, as well as other information, such as customer lists, that would be contained on computers.
- (4) In the last issue of *The Rutland Shopper* that he published, Defendant Gorruso placed a full-page notice on the back page of the newspaper announcing, "*Sam's Good News Coming.*"
- (5) Based upon his cross-examination testimony, Defendant Gorruso's purpose in printing the notice was to invite "anyone" to become a customer or reader of *Sam's Good News*, an advertisement-based newspaper that would be published by the Defendant and that would compete with *The Rutland Shopper*. Defendant Gorruso purposely intended to compare *Sam's Good News* with *The Rutland Shopper*, and cast a more favorable light on *Sam's Good News*.
- (6) The state court judgment on the Plaintiffs' Complaint, which raised several causes of action, including, *inter alia*, conversion and unfair competition by misappropriation of business assets, is based on the same set of facts as is before this Court, namely, the Defendant improperly taking the property of the Plaintiffs.
- (7) The state court jury found the Defendant liable to the Plaintiffs for the injury caused by the Defendant's improper taking of the Plaintiffs' property. The Vermont Supreme Court affirmed the Defendant's liability to the Plaintiffs and reduced the award of damages for that liability only to the extent that it found the award was duplicative.

IV. WHAT CONSTITUTES WILLFUL AND MALICIOUS INJURY UNDER § 523(A)(6) WARRANTING EXCEPTION FROM DISCHARGE

The salient provision of the Bankruptcy Code provides:

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual from any debt—

• • •

(6) 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). It is essential that § 523(a) exceptions to discharge be strictly construed in favor of debtors to meet one of the Bankruptcy Code’s goals, namely, providing the debtor with a “fresh start.” See, e.g., Gleason v. Thaw, 236 U.S. 558 (1915); Household Fin. Corp. v. Danns (In re Danns), 558 F.2d 114, 116 (2d Cir. 1977); Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Bonnanzio (In re Bonnanzio), 91 F.3d 296, 300 (2d Cir. 1996). The countervailing consideration is that “[t]he purpose of § 523(a)(6) is to avoid rewarding blameworthy debtors through discharge.” In re Krautheimer, 241 B.R. 330, 340 (Bankr. S.D.N.Y. 1999). Evaluating these two factors is complicated by the fact that the Bankruptcy Code does not define the terms “willful” or “malicious”.

We are given some definitional guidance in the legislative history to § 523(a)(6) where Congress states that the term “willful” means deliberate or intentional. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 365 (1977); S. Rep. No. 989, 95th Cong. 2d Sess. 79 (1978). Further, the United States Supreme Court has explained that “willful” means a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. See Kawauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 977 (1998). Since “willful” modifies “injury,” the Supreme Court instructs that the debtor must have intended to cause the injury, not merely intended to perform the act that caused the injury. See id. at 62. Thus, in order to be willful for this purpose, there must be an intention that the consequences of an act, i.e., an injury, will result. See id. at 61-62 (quoting RESTATEMENT (SECOND) OF TORTS § 8A, Comment a, p.15 (1964)). Conversely, “[t]he Supreme Court did not address the word ‘malicious,’ but the Second Circuit interpreted malicious to mean ‘wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will.’” Neshewat v. Salem (In re Salem), 290 B.R. 479, 485 (S.D.N.Y. 2003) (quoting Navistar Financial Corp. v. Stelluti (In re Stelluti), 94 F.3d 84, 87 (2d Cir. 1996)). Malice may be constructive or implied. See Stelluti, 94 F.3d at 87. “Implied malice may be demonstrated ‘by the acts and conduct of the debtor in the context of [the] surrounding circumstances.’” Id. (quoting In re Stanley, 66 F.3d 664, 668 (4th Cir. 1995)). With these guideposts in place, this Court begins its determination of whether the Defendant’s conversion and unfair competition by misappropriation of business assets was committed willfully and maliciously.

This case presented an awkward evidentiary challenge for the Plaintiffs in that liability for both

conversion and unfair competition through misappropriation had already been determined by the state court, but this Court needed to, in essence, re-examine the Defendant's liability to assess the motivation of the Defendant in converting and misappropriating the assets. The Defendant testified as to the circumstances surrounding the subject transaction and, not surprisingly, denied having converted or misappropriated any assets whatsoever. Notwithstanding the vehement objections of the Plaintiffs, this Court needed to listen to testimony from the Defendant about whether he believed his conduct to be culpable and then had to sift out his fervent protestations of innocence to find evidence of his state of mind at the time of transaction.

Likewise, while this Court is bound by the state court determination that the mutual releases exchanged by the parties were effective as to all conduct prior to the date of execution,⁶ the conduct which occurred prior to the effective date was acutely relevant for my determination of intent. Hence, this Court considered that evidence over the emphatic objections of the Defendant.

As the trier of fact in this instance, it is the Court's role to assess credibility of the witnesses. As noted above, in this proceeding, this Court found Plaintiff Maguire more credible than the Defendant. Given the facts and circumstances surrounding the Plaintiffs' reacquisition of *The Rutland Shopper*, this Court finds the Defendant was eager to injure the Plaintiffs, both individually and as a business. This determination is based upon the evidence presented in this Court in the form of exhibits,⁷ live testimony of the parties, and the live testimony of a former employee.

This Court finds that by wrongfully taking the property of the Plaintiffs, the Defendant intended to cause the Plaintiffs injury. The combination of: (1) the Defendant knowing the possession of photographic equipment, distribution racks, account information regarding customers, as well as other information, such as customer lists, that would be contained on computers, was critical to the successful operation of an advertisement-based weekly newspaper; and (2) the Defendant having taken those assets from the newspaper premises before the Plaintiffs reacquired *The Rutland Shopper*, demonstrate deliberateness on the part of the Defendant to cause injury to the Plaintiffs. Moreover, this Court fails to find any just cause or excuse for the Defendant's wrongful taking of the Plaintiffs' property. In the same vein, the Court finds that when the Defendant placed a full-page notice in his last publication of *The Rutland Shopper* announcing that he would be publishing a new and, impliedly, better advertisement-based weekly newspaper that would be in direct

⁶ The date the mutual releases were executed was June 22, 1999. See Special Verdict, Plaintiffs' Trial Exhibit No. 29.

⁷ This Court notes that one of the exhibits admitted into evidence in this proceeding, over the objections of the Defendant, was the state court trial testimony of the Plaintiffs' expert, Lawrence Grimes. However, having found sufficient evidence from the other admitted exhibits, as well as the testamentary evidence taken, the Court has not considered any of Mr. Grimes' trial testimony. In fact, the Court has not read the transcript.

competition with the Plaintiffs' newspaper (i.e., *Sam's Good News*), this implies malice, especially in light of the contentious circumstances in which the Plaintiffs reacquired *The Rutland Shopper*. This Court finds the full-page notice was a thinly-veiled attempt to discredit *The Rutland Shopper* as a good source of advertising for its customers compared to the Defendant's new newspaper, *Sam's Good News*. In fact, it was the Defendant's actions of wrongfully taking the Plaintiffs' property – necessary, as the Defendant admitted on cross-examination, for the publication of an advertisement-based weekly newspaper – that clearly put the Plaintiffs at an initial disadvantage in competing with the Defendant's *Sam's Good News*. Thus, given the facts and surrounding circumstances underlying this proceeding, this Court finds the Defendant's wrongful taking of the Plaintiffs' property was a willful and malicious injury by the Defendant to the Plaintiffs.

V. WHAT IS THE AMOUNT OF THE DEBT EXCEPTED FROM DISCHARGE?

The jury in the Rutland Superior Court action awarded damages to the Plaintiff in the amount of \$143,000 on the conversion claim; the Vermont Supreme Court affirmed the findings of liability, but reduced the award of damages on the conversion claim to \$1,000, finding:

Defendants also contend the trial court erred in denying their post-judgment motion to reduce the conversion award from \$143,000 to \$1000. Defendants assert that the evidence did not support a finding that the converted assets were worth more than \$1000, and that the jury's award represented a duplication of the unfair competition award. We agree with the defendants in this regard. Although plaintiffs defend the award by noting that a list of assets attached to the original purchase and sale agreement valued the customer list at \$150,000, the record demonstrates that the list's only real value was based on its use in facilitating the sale of advertisements, and that this loss to plaintiffs was subsumed in the unfair competition award. Thus, as plaintiffs do not otherwise dispute defendants' claim that the value of the converted property did not exceed \$1000, we will order that the conversion award be remitted to \$1000.

Maguire, ___ Vt. at ___, 800 A.2d at 1092. The Defendant deduces from this holding that the amount of any non-dischargeable debt should be limited to \$1000. This Court does not agree. This Court has already found that the state court judgment was based upon the finding of liability on *two* causes of action, *both of which* stemmed from the same set of facts: conversion and unfair competition by misappropriation of business assets based upon the Defendant's improper taking of the Plaintiffs' property. This finding is consistent with the Vermont Supreme Court's finding of duplicativeness regarding the conversion award. Finding the Plaintiffs' unfair competition claim was established with a showing of misappropriation of business assets, the Supreme Court was saying, in essence, that the Plaintiffs were already being compensated for the Defendant's unlawful taking of those assets in the unfair competition award; thus, there was no need to award the Plaintiffs further

monetary compensation for their loss.

This Court finds that the Plaintiffs have established, by a preponderance of the evidence, that the Defendant's conduct, which gave rise to state court jury determination of conversion and unfair competition by misappropriation, was willful and malicious. Accordingly, this Court finds that the entire judgment awarded by the Vermont Supreme Court (\$273,535.18), minus any payments made to date, meets the criteria set forth in § 523(a)(6).

CONCLUSION

The Plaintiffs have established by a preponderance of the evidence that the Debtor's conduct, which resulted in a state court jury verdict finding the Debtor liable for conversion of assets and unfair competition through misappropriation of business assets, was willful and malicious as those terms are used in § 523(a)(6). Accordingly, the entire judgment Debt (as defined herein) is hereby declared excepted from discharge.

January 22, 2004
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge