IT IS SO ORDERED.

Dated: August 13, 2024

Mina Nami Khorrami
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	
	:	Case No. 23-50786
Sean D. Savinell	:	Chapter 7
Gina A. Savinell,	:	Judge Nami Khorrami
	:	
Debtors	:	
	:	
Edward Michael,	:	
	:	
Plaintiff	:	
	:	
v.	:	Adv. Pro No. 23-02036
	:	
Sean D. Savinell,	:	
	:	
Defendant	:	

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT SEAN D. SAVINELL'S AMENDED MOTION FOR SUMMARY JUDGMENT (DOC. 34)

I. Introduction

Before the Court is *Defendant Sean D. Savinell's Amended Motion for Summary Judgment* (Doc. 34) (the "Motion"), *Plaintiff's Response In Opposition To Defendant's Motion For Summary Judgment* (Doc. 35) (the "Response"), *Plaintiff's Amended Response in Opposition to Defendant's Motion for Summary Judgment* (Doc. 38) (the "Amended Response"), and *Defendant Sean D. Savinell's Reply To Plaintiff's Amended Response In Opposition To Defendant's Motion For Summary Judgment* (Doc. 39) (the "Reply"). The Court held a hearing on June 14, 2024, (the "Hearing") where counsel presented oral arguments and responded to the Court's questions. Nathaniel Sinn appeared on behalf of the Defendant, Sean D. Savinell ("Defendant"), and Laura Nesbitt appeared on behalf of the Plaintiff, Edward Michael ("Plaintiff"). At the conclusion of the Hearing, the Court took the Motion under advisement pending the receipt of certain additional submissions from the parties to be filed by June 21, 2024, some, but not all, of which were filed.[1]

For the reasons that follow, the Court grants the Motion with respect to Count I of the Complaint, and otherwise denies the Motion.

II. Jurisdiction and Venue

The Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 and Amended General Order 05-02 entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Venue properly lies in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

[1] Plaintiff filed the Amended Response on June 13, 2024, the day before oral argument. At the Hearing, the Court granted Defendant's request for leave to file the Reply by June 21, 2024, and invited Plaintiff and Defendant (jointly referred to as the "Parties") to supplement the summary judgment record by stipulation.

III. Factual and Procedural Background

The record before the Court consists of the pleadings of the Parties, the transcript of Defendant's deposition together with its 10 exhibits, which was Exhibit A to the Motion,[2] and the Affidavit of Edward Michael.[3]

This adversary proceeding arises out of the events that occurred in New Jersey over 17 years ago when the Parties lived in New Jersey. Defendant, who was originally from Ohio, was familiar with a small pizza restaurant in Steubenville, Ohio, known as DiCarlo's, and he believed that a restaurant of that nature would succeed in New Jersey. Defendant contemplated opening a similar restaurant in New Jersey (the "Pizza Shop").[4] After identifying a potential location for the Pizza Shop, Defendant contacted Plaintiff and then met him in December 2007 at the location where the Pizza Shop would be built. Plaintiff owned two limited liability companies, known as Precision Mechanical and Precision Home Builders.

At the December 2007 meeting, Defendant wrote a $5,000 check payable to Precision Home Builders (the "Check"), which was subsequently presented to and honored by Defendant's bank.[5] The Check bears the notation "deposit – construction" in the memo line. Also at this meeting, the Parties signed a document titled "Invoice," issued by Precision Home Builders, (the "Invoice"). The Invoice sets forth certain terms of agreement. It reflects Precision Home Builders would perform the following scope of work for the Pizza Shop: "Prepare construction drawings, including building specifications and reflective ceiling plans for new restaurant located at the above-mentioned address." [6] The Invoice further reflects that the price for these services would

[2] Savinell Dep., ECF 34-1 (the "Savinell Dep.").
[3] Michael Aff., ECF 35-1 (the "Michael Aff.").
[4] Savinell Dep. 11:9-20 and 19:1-24:1.
[5] Savinell Dep. 21:3-4; 60:9-20; and Exhibit 10.
[6] Savinell Dep. 58:14-60:2 and Exhibit 9.

be $5,000, and that Defendant had made the payment for these services. Notwithstanding that the Invoice and the Check reflect an agreement relating to the $5,000 payment, the Parties dispute the terms of their agreement and the purpose of the Check.

When Defendant received the cost estimates from Plaintiff, he decided that the project was more involved and expensive than he had anticipated, so he called Plaintiff on the telephone and advised that he had decided not to go forward with the Pizza Shop. Both Parties agree that the subject of a refund of the $5,000 was discussed during this call, but they dispute the specific details.

On or about April 4, 2008, Defendant went to the local police department in New Jersey and filed a police report[7] (the "Police Report"). The Police Report provides as follows:

> On Friday 4/4/08, Mr. Sean Savinell came to headquarters to report a theft of $5,000.00. I spoke to Mr. Savinell.
>
> Mr. Savinell stated he wrote a check to Precision Home Builders for work in the amount of $5,000 00 for a deposit for construction located at 2511 Fire Road. He gave the check to Mr. Edward B Michael, the owner of company on 12/21/07 (see photocopy of canceled check). Mr. Savinell stated he spoke to Mr. Michael on several occasions and Mr. Michael had told him he would return the money to him but was having some financial problems.
>
> Mr. Savinell gave him until 4/2/08 to return the money but Mr. Michael did not.
>
> Complaints were signed by Mr. Savinell against Mr. Michael.
>
> Nothing further at this time.

(Police Report., p. 2). At his deposition, Defendant acknowledged that the Police Report accurately reflected what he said to the police.[8] From this point, the details in the record are quite spotty.

At some point after the Police Report was filed, Plaintiff was indicted in Atlantic County, New Jersey (Indictment 08-05-1121 D) (the "Indictment"). The Indictment itself is not in the record. In fact, there is no evidence in the record regarding anything that led to the Indictment,

[7] Savinell Dep. 29:16-23. The Police Report was Savinell Dep. Exhibit 8.
[8] Savinell Dep. 45:10-48:19.

other than the Police Report. There is nothing in the record before this Court about any investigations that were conducted either by the police or the prosecutor or what role the Defendant played in those investigations. There is also nothing in the record about any specifics of the Indictment, such as when and how it was issued, or the specific charges alleged. Likewise, there is no evidence about the course of criminal proceedings that resulted from the Indictment. The Parties agree that the Indictment was subsequently dismissed, but there is nothing in the record which indicates how that dismissal came about.

On July 31, 2013, Plaintiff filed a civil complaint (the "New Jersey Complaint"), seeking a jury trial against Defendant in the Superior Court of New Jersey, Atlantic County, case no. ATL-L5140-13 (the "New Jersey Suit"). The New Jersey Suit was resolved by entry of a default judgment (the "New Jersey Default Judgment").[9] The New Jersey Default Judgment granted judgment in favor of Plaintiff and against Defendant for a total of $164,302.26, which includes: compensatory damages of $100,000.00, punitive damages of $50,000.00, attorney's fees (criminal) of $10,000.00, and attorney's fees (civil) of $4,302.26. The New Jersey Default Judgment states that it is a "Default Judgment" that was entered following a "Proof Hearing." Other than the damages amount, it contains no findings, either on the merits of the dispute or regarding the reasons that Defendant was in default. There is no other evidence relating to the New Jersey Suit in the record.

IV. Positions of the Parties

A. Overview Of the Allegations of the Complaint

Plaintiff in Count I of the Complaint alleges that the New Jersey Default Judgment is nondischargeable under 11 U.S.C. § 523(a)(2)(A), because it arose out of a "fraudulent" Police

[9] The New Jersey Default Judgment is attached to the Complaint as Exhibit B.

Report to the local police. Because some of the false statements were allegedly made in writing, the Complaint also alleges that the New Jersey Default Judgment is also nondischargeable under 11 U.S.C. § 523(a)(2)(B). Plaintiff in Count II of the Complaint asserts that the New Jersey Default Judgment is nondischargeable under 11 U.S.C. § 523(a)(6), since it resulted from Defendant's willful and malicious actions of making false statements to the police for the purpose of harming Plaintiff and his reputation in the community.

B. Arguments of the Parties Regarding the Motion

Defendant asserts four arguments in the Motion. First, he argues that the New Jersey Default Judgment is not entitled to collateral estoppel effect here because it does not have that effect under New Jersey law. Second, he argues that 11 U.S.C. § 523(a)(2) is not applicable because there is no evidence that Defendant obtained any "money, property, services, …. or…credit" from Plaintiff as a result of fraud or misrepresentation as required by the statute. He also argues that the attorney fees that Plaintiff paid to defend against the criminal charges are not something that the Defendant obtained. Based on these arguments, he asserts that Count I of the Complaint must be dismissed. Third, regarding Count II, Defendant argues that Plaintiff cannot prove that Defendant is liable for any harm Plaintiff suffered because of the Indictment since the power to prosecute in New Jersey is vested in the prosecutor and the grand jury. Consequently, Defendant could not have been the legal cause of any harm to Plaintiff. Finally, Defendant argues that he was acting with just cause or excuse, in that he was seeking the repayment of money owed to him by Plaintiff, and therefore was not acting willfully or with malice, as required under 11 U.S.C. § 523(a)(6).

Plaintiff in his Response and Amended Response only address Defendant's fourth argument, contending that Defendant's intent in making the Police Report is a disputed issue of

fact that requires a trial to resolve. At the Hearing, with regard to Defendant's argument that Count I must be dismissed because Defendant did not obtain anything from Plaintiff by means of his alleged fraud, Plaintiff asserted that Defendant had "obtained" the attorney fees Plaintiff had to pay to defend against the criminal charges but did not suggest that Defendant had personally received any of that money, and acknowledged that this argument was "tenuous." Finally, Plaintiff responded at the Hearing to Defendant's third argument, asserting that there was a genuine issue of material fact regarding whether the Defendant was a substantial cause of the Plaintiff's Indictment and subsequent arrest.

With specific regard to Defendant's fourth argument, the parties also have several factual disputes relating to the nature of their agreement regarding the $5,000 payment, and their discussions surrounding Defendant's request for a refund. Plaintiff's position regarding the Check is that the Invoice accurately sets forth the terms of the Parties' agreement: that Precision Home Builders would perform the specific services listed in the Scope of Work section of the Invoice, that the cost for those services would be $5,000, and that Defendant had paid the $5,000. Defendant, on the other hand, asserts that he never entered into any agreement with Plaintiff or Precision Home Builders. He testified that the $5,000 payment was merely a deposit in the event he later decided to hire Precision Home Builders as the general contractor.

While the parties do not dispute that Defendant contacted Plaintiff to advise that he had decided not to go forward with the Pizza Shop and requested a refund, the details of that discussion are sharply contested. Defendant claims that during this telephone conversation, he asked for his money back, less the time Plaintiff had done work and that Plaintiff agreed to return the money, but never did.[10] On the other hand, Plaintiff claims that Defendant asked for the return of the

[10] Savinell Dep. 26:2-8.

entire $5,000, with no credit for any work performed by Plaintiff.[11] Plaintiff further asserts that he reviewed the Invoice, determined that the $5,000 was already fully earned, and that he advised Defendant of the same.[12] Plaintiff also claims that he invited the Defendant to make a proposal for a partial refund, but that the Defendant never contacted him again.[13]

V. Analysis

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure, made applicable here by Rule 7056 of the Federal Rules of Bankruptcy Procedure, governs a motion for summary judgment and provides that "[t]he court shall grant summary judgment 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." Fed. R. Civ. P. 56(a). The party requesting summary judgment bears the burden of establishing the absence of a genuine issue of material fact. *See* Celotex *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The opposing party must then "come forward with specific facts showing that there is a genuine issue for trial." *Mounts v. Grand Trunk W. R.R.*, 198 F.3d 578, 580 (6th Cir. 2000) (citation omitted).

When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Amini v. Oberlin Coll.*, 440 F.3d 350, 357 (6th Cir. 2006). The Court must also draw all inferences reasonably supported by the evidence in favor of the non-moving party. *Ashford v. University of Michigan*, 89 F.4th 960, 969 (6th Cir. 2024). That said, "a mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon

[11] Michael Aff., ¶¶7 and 10.
[12] Michael Aff., ¶8.
[13] Michael Aff., ¶¶8-10.

which a reasonable jury could find in her favor." *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 529 (6th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

B. The Chapter 7 Discharge and Exceptions Thereto

"The principal purpose of the Bankruptcy Code is 'to grant a fresh start to the honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (citing *Grogan v. Garner,* 498 U.S. 279, 286, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (internal quotation marks omitted). To that end, Chapter 7 provides a broad discharge of the debtor's prepetition debts in exchange for having his or her nonexempt assets liquidated by a trustee and distributed to creditors. *Marrama*, 549 U.S. at 367. However, the Supreme Court has recognized that although the fresh start is the principal purpose of the Bankruptcy Code, "no statute pursues a single policy at all costs." *Bartenwerfer v. Buckley*, 598 U.S. 69, 81, 143 S.Ct. 655, 214 L.Ed.2d 434 (2023). Rather, the Bankruptcy Code balances multiple interests which often compete with each other. *Id*.

This balancing of interests is reflected in the scope of the debtor's discharge. Although the discharge is broad, it is subject to exceptions for particular types of debts. "The Bankruptcy Code strikes a balance between the interests of insolvent debtors and their creditors. It generally allows debtors to discharge all prebankruptcy liabilities, but it makes exceptions when, in Congress's judgment, the creditor's interest in recovering a particular debt outweighs the debtor's interest in a fresh start." *Bartenwerfer*, 598 U.S. at 72. These exceptions are set forth in 11 U.S.C. § 523(a), and two of them are relevant here. 11 U.S.C. § 523(a)(2) provides that debts arising out of certain types of fraudulent conduct are not discharged, and 11 U.S.C. § 523(a)(6) provides that debts for willful or malicious injury are not discharged.

These exceptions to discharge limit the fresh start and are therefore strictly construed against the creditor and in favor of the debtor. *See, e.g. In re Padzierz*, 718 F.3d 582, 586 (6th Cir. 2013) (citing *AT&T Universal Card Svcs., Inc. v. Rembert (In re Rembert))*, 141 F.3d 277, 280 (6th Cir. 1998)). In nondischargeability litigation, the creditor bears the burden of proving that an exception to discharge applies by a preponderance of the evidence. *Garner*, 498 U.S. at 291.

C. The State of the Record Precludes Summary Judgment on The Collateral Estoppel Issue

Defendant argues that the New Jersey Default Judgment is not entitled to collateral estoppel effect. However, the summary judgment record is insufficiently developed to permit the Court to resolve this issue.

The first issue addressed by the Motion relates to the preclusive effect of the New Jersey Default Judgment. This Court must give a state court judgment the same preclusive effect that the courts of the rendering state would give it. *Long v. Piercy (In re Piercy)*, 21 F.4th 909, 918 (6th Cir. 2021); *CMCO Mortgage v. Hill (In re Hill)*, 957 F.3d 704, 711 (6th Cir. 2020). In this District, a recent decision of the Sixth Circuit is instructive. *Long*, 21 F.4th at 918. The court in *Long* provided a broad overview of how the law of preclusion applies in bankruptcy court proceedings where a creditor seeks to have a debt excepted from the discharge under 11 U.S.C. § 523(a).

> Res judicata, also known as claim preclusion, "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979). This differs from the narrower doctrine of collateral estoppel, also known as issue preclusion, which "precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action." *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6th Cir. 1999) (citation omitted). The difference in these two doctrines is critical as applied to dischargeability proceedings in bankruptcy.

21 F.4th at 918. The Court will address each in turn.

Concerning res judicata, *Long* noted that a dischargeability action presents two distinct claims – (1) whether a debt is owed, and (2) whether it is dischargeable. 21 F.4th at 918 (citing *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 195-96 (B.A.P. 6th Cir. 2002)). Where there is a state court judgment between the parties, it will be res judicata as to whether a debt exists. *Long*, 21 F.4th at 918. It will not be res judicata governing dischargeability, because issues of dischargeability are within the exclusive jurisdiction of the bankruptcy court. *Long*, 21 F.4th at 918 ((citing *Brown*, 442 U.S. at 136-39)).

Under New Jersey law, a default judgment will be given res judicata effect. *Mattson v. Hawkins (In re Hawkins)*, 231 B.R. 222, 229-30 (D.N.J. 1999). S*ee also Howard v. Wells Fargo Bank, N.A.*, 2024 U.S. Dist. LEXIS 84049, at *5-6 (D.N.J. May 8, 2024) (collecting cases). Accordingly, applying the principles set forth in *Long*, 21 F.4th at 918-921, the New Jersey Default Judgment does not have res judicata effect regarding dischargeability, but it does determine the existence of the debt owed to Plaintiff.

In *Long*, the Sixth Circuit also addressed collateral estoppel in dischargeability cases. It noted that unlike res judicata, "when the debt at issue is based on a state-court judgment, the bankruptcy court's ultimate dischargeability determination may be governed by factual issues decided by the state court, provided that the requirements of collateral estoppel are met." 21 F.4th at 918 (citation omitted). The Sixth Circuit also set forth the process that bankruptcy courts should follow when determining whether collateral estoppel applies:

> The bankruptcy court, when asked to determine the potential application of collateral estoppel, must review the record of the state-court proceeding to determine if any factual issues relevant to dischargeability have been actually and necessarily determined by the state court. If not so determined, the bankruptcy court must independently make the necessary factual findings.

Long, 21 F.4th at 919 (citation omitted).

In this case, the parties have provided certain portions of the state-court record, but not all that is necessary for this Court's determination. The Parties provided the Court with the New Jersey Default Judgment, which itself does not provide any information regarding *why* it was issued. There is no evidence before the Court to tell it what, if anything, the state court *actually and necessarily determined* when it entered Judgment against Defendant. As a result, the record is inadequate to permit the Court to resolve the collateral estoppel issue on summary judgment. In addition to these general requirements imposed by the Sixth Circuit in *Long*, the record is also inadequate to permit the Court to address the Defendant's argument that New Jersey does not give collateral estoppel effect to default judgments. This Court must apply the collateral estoppel law of New Jersey, the state where the judgment was rendered. *Long*, 21 F.4th at 920. Defendant asserts that New Jersey does not give collateral estoppel effect to default judgments because the "actually litigated" requirement is not satisfied. In general, this is correct for default judgments entered where the defendant has failed to answer or otherwise defend. *See Hawkins*, 231 B.R. at 231 (collecting cases).

But New Jersey does not treat all default judgments the same. Where a default judgment is entered as a sanction for litigation misconduct, New Jersey applies collateral estoppel. *Walters v. Tehrani*, 2015 U.S. Dist. LEXIS 51910 (D.N.J. Apr. 21, 2015) (holding that where a default judgment was imposed as a sanction, the "actually litigated" element was satisfied). This Court has no evidence before it that would clarify whether the New Jersey Default Judgment was entered because the Defendant failed to answer or for other reasons. The New Jersey Default Judgment itself is completely devoid of any recitation of facts or the procedural background of the case that would clarify the basis upon which the Defendant's default was entered. The sparse record simply does not permit the careful review of the state-court record required by the Sixth Circuit before

this Court rules upon collateral estoppel. *See Long*, 21 F.4th at 919. Therefore, the Court must deny the Motion on this issue.

D. Count I of the Complaint, Asserting Claims Under 11 U.S.C. § 523(a)(2), Must Be Dismissed

1. 11 U.S.C. § 523(a)(2) Requires A Showing That Something Was Obtained by Fraud

Defendant asserts that Count I, asserting nondischargeabilty under 11 U.S.C. § 523(a)(2), fails because Plaintiff has no evidence that Defendant obtained anything by Defendant's alleged fraud.

In relevant part, 11 U.S.C. § 523(a)(2) provides that a chapter 7 discharge does not discharge an individual debtor from any debt:

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive;

The statutory language indicates that, under both 11 U.S.C. § 523(a)(2)(A) and (B), the creditor must prove that there is a debt for "money, property, services, or …credit, to the extent obtained by" one of the types of fraudulent conduct set forth in 11 U.S.C. §§ 523(a)(2)(A) or (B). *Cohen v. De La Cruz*, 523 U.S 213, 218-19, 118 S. Ct. 1212, 140 L.Ed.2d 341 (1998).[14]

[14] Although *Cohen* involved a claim under 11 U.S.C. § 523(a)(2)(A), the statutory text indicates that the "obtained by" requirement applies to both subsections. *See Ken Builders Supply, Inc. v. Mullen (In re Mullen)*, 2012 Bankr. LEXIS 615, at *8 (Bankr. S.D. Ohio Feb. 3, 2012).

In *Cohen*, the Supreme Court made clear that "once it is established *that specific money or property has been obtained by fraud*, however, 'any debt' arising therefrom is excepted from discharge." 523 U.S. at 218-219 (emphasis added). In other words, 11 U.S.C. § 523(a)(2) "encompasses any liability arising *from money, property, etc., that is fraudulently obtained*" (emphasis added). The law of the Sixth Circuit is consistent with *Cohen*, also imposing the requirement that the "debtor obtained money or services through a material misrepresentation…" *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280–81 (6th Cir.1998); *see also Helber v. Cline (In re Cline)*, 639 B.R. 452, 461 (Bankr. S.D. Ohio 2022) (denying claim under 11 U.S.C. § 523(a)(2) where the money that was paid to the debtor was paid before any of his allegedly false representations, so that the money was not "obtained by" those representations).

Here, Plaintiff has not identified any money, goods, services, or credit that he alleges Defendant obtained from Plaintiff by fraud. When the Court inquired of Plaintiff's counsel at the Hearing on this issue, the response was the attorney's fees that Plaintiff had to pay his criminal lawyer to defend against the Indictment and urged that those had been "obtained by" Defendant's fraud. Counsel however acknowledged at the Hearing that none of those funds went to the Defendant, either directly or indirectly, and conceded that the argument was "tenuous." The Court agrees that this argument is tenuous.

Courts have rejected similar arguments for stretching the "obtained by" requirement too far. In *Oasis, Inc. v. Fiorillo*, 246 F. Supp. 3d 489, 493 (D. Mass. 2017), for example, the debtor had been a plaintiff in state court litigation where a forged document was used as an exhibit, leading to a judgment in the debtor's favor. When the forgery was discovered, however, the state court vacated the judgment and imposed sanctions against the debtor for fees and costs related to

the forged exhibit. When the debtor filed bankruptcy, the opposing party brought an action under 11 U.S.C. § 523(a)(2)(A). The court rejected the plaintiff's argument that the debtor had "obtained" the fees the plaintiff had incurred to attack the original judgment because the debtor had not received those fees. 246 F.Supp.3d at 493. The court further dismissed the creditor's argument as "linguistic gymnastics," because even if the creditor had incurred costs related to the debtor's fraud, the debtor had not obtained those costs as required by 11 U.S.C. § 523(a)(2). 246 F.Supp.3d at 493, at n.4. *See also Golant v. Care Comm, Inc.*, 216 B.R. 248, 254 (N.D. Ill. 1997) ("inducing Care Comm to expend money to defend against fraudulent claims and arguments is not enough…") (citation omitted).

In this case, because there is no evidence in the record that Defendant obtained any money, property, services, or credit because of his allegedly fraudulent conduct, Plaintiff cannot establish an essential element of Count I. Accordingly, the Court grants partial summary judgment in favor of Defendant on Count I of the Complaint.

E. The Court Cannot Grant Summary Judgment on Count II

Defendant's last two arguments seek dismissal of Count II, which allege that Defendant's debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(6) because it is a debt for a willful and malicious injury to the person or property of the Plaintiff. To prevail under 11 U.S.C. § 523(a)(6), Plaintiff must prove that the injury from which the alleged debt arises was both willful and malicious. The Sixth Circuit has held that the two terms have distinct meanings so that the Court must undertake a "two-pronged inquiry." *MarketGraphics Rsch. Grp., Inc. v. Berge (In re Berge)*, 953 F.3d 907, 914-16 (6th Cir. 2020). While the same evidence that would support a finding of willful conduct will often also support a finding that the debtor acted with malice, that will not

always be the case, as the two concepts are distinct and each must be proven. *Berge*, 953 F.3d at 916.

A willful injury under 11 U.S.C. § 523(a)(6) requires "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998). A willful injury occurs when the debtor either desired to cause harm or believed that harm was a substantially certain consequence of his or her conduct. *Berge*, 953 F.3d at 915. The test is subjective, meaning that the Court must determine whether the debtor subjectively desired to cause harm or subjectively was aware that his conduct was substantially certain to cause harm. *Berge*, 953 F.3d at 915. A debtor need not actually admit intent and it may be proven circumstantially. *Id*.

As used in 11 U.S.C. § 523(a)(6), "malicious" means "in conscious disregard of one's duties or without just cause or excuse…" *Berge*, 953 F.3d at 915 (quoting *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)). "It is this knowledge of wrongdoing, not the wrongfulness of the debtor's actions, that is the key to malicious under § 523(a)(6)." *Kraus Anderson Cap., Inc. v. Bradley (In re Bradley)*, 507 B.R. 192, 204 (B.A.P. 6th Cir. 2014) (quoting *ABF, Inc. v. Russell (In re Russell)*, 262 B.R. 449, 445 (Bankr. N.D. Ind. 2001)).

1. The Court Cannot Grant Summary Judgment on The Causation Issue

In a claim under 11 U.S.C. § 523(a)(6), it must be proved that the creditor's loss was caused by the willful and malicious conduct of the debtor. *Steier v. Best (In re Best)*, 109 Fed. Appx. 1, 5-6 (6th Cir. 2004). Attempting to defeat causation, Defendant argues that, under New Jersey law, the decision to pursue an indictment is made by the prosecutor and the grand jury, so that he could not have been the legal cause of harm to the Plaintiff. Defendant does not rely upon any specific evidence, but rather simply cites to New Jersey caselaw stating that criminal cases in New Jersey

are initiated by presentation to a grand jury by a prosecutor, and not by private citizens. *See, e.g., In re Grand Jury Appearance Request by Lonigman*, 183 N.J. 133, 139, 870 A.2d 249, 253 (2005). However, Defendant has not tied this general principle of law to any cases rejecting claims under 11 U.S.C. § 523(a)(6), nor to any evidence about what happened here.

There is nothing in the record before this Court concerning any investigation undertaken in response to the Police Report and Plaintiff's ultimate Indictment. Although the Parties agree that Plaintiff was indicted at some point and that the Indictment was later dismissed, the only evidence of what happened in the criminal case comes from a few pages of Plaintiff's deposition testimony about his first meeting with the police and the Police Report. There is no evidence about what happened from the time of the Police Report to the time the Indictment was dismissed. Defendant, in support of his request for summary judgment, simply speculates that law enforcement conducted an extensive independent investigation so that he at most merely provided aid to the investigation. But "[s]peculation is no substitute for evidence at the summary judgment stage." *Bass v. Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 841 (7th Cir. 2014). As such, the Court finds that Plaintiff has not satisfied his initial burden under Rule 56(a) on this issue.

Defendant did not cite to any cases dismissing claims under 11 U.S.C. § 523(a)(6) based upon an independent investigation by law enforcement. This Court however finds the case of *Hass v. Trammell (In re Trammell)*, 388 B.R. 182 (Bankr. E.D. Va. 2008) instructive. The court in *Trammell* dismissed an action under 11 U.S.C. § 523(a)(6), which arose out of a state-law claim of malicious prosecution, because it found that the independent actions of law enforcement demonstrated that there was no causation. *Id.* at 189. *Trammel* is instructive because there were several factors present there which are lacking here. First, *Trammell* was decided at trial, where a volume of evidence was introduced showing that substantial independent investigations had been

carried out by medical professionals, the police, and the prosecuting attorney. Second, the court found that the defendant and her daughter had done nothing but fully and fairly tell their story to the doctors, and then cooperated with subsequent law enforcement investigations when medical personnel, complying with their mandatory reporting obligations under state law, reported their findings to law enforcement. And finally, neither the defendant nor her daughter initiated the complaint. They had simply sought medical treatment, and the daughter reported to those treating her that she had been abused by the plaintiff. 388 B.R. at 189. Based upon this evidence, the court found that the defendant had done nothing but encourage her daughter to speak fully and fairly to medical personnel and law enforcement, and therefore the debtor was not a substantial cause of the plaintiff's investigation. 388 B.R. at 189.

This case differs from *Trammel* in all those particulars. Here, there is no evidence regarding what investigation was undertaken. There is little evidence reflecting the extent to which Defendant was involved in the ultimate decision to pursue the Indictment. And, unlike *Trammel*, Defendant affirmatively sought out law enforcement to make his complaint. Defendant's argument is based solely upon his abstract and general description of the indictment process under New Jersey law. Since that argument is unconnected to any evidence in the record, Defendant did not satisfy his burden Rule 56(a) to establish the lack of a triable issue of fact on the issue of causation. Summary judgment is therefore denied on the causation issue.

2. **The Court Cannot Grant Summary Judgment on the Issue of Willful and Malicious Injury**

The Defendant's final argument is that the Court should grant summary judgment on the issue of intent. He asserts that his intent in making the Police Report was to recover the $5,000 payment. He argues that this intent, establishes just cause and negates any finding that he acted willfully or maliciously as a matter of law. Plaintiff responds that the issue of intent is almost

always inherently fact-specific and not a proper issue for summary judgment, and that the evidence here supports an inference that Defendant made a false police report willfully and maliciously.

Where a party's intent or state of mind are crucial elements of a claim, summary judgment is seldom appropriate, because of the likelihood of self-serving testimony and the need for a factfinder to make credibility determinations. *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1437 (6th Cir. 1987). In this vein, courts have recognized that willfulness and malice will almost never be admitted by the debtor, so they may be shown by inference from the circumstances surrounding the injury. *O'Brien v. Sintobin (In re Sintobin)*, 253 B.R. 826, 831 (Bankr. N.D. Ohio 2000). But when the evidence is so one-sided that a reasonable factfinder could only find that the defendant had acted with fraudulent intent, summary judgment is appropriate even in cases involving a party's state of mind. *In re ClassicStar Lease Litigation*, 727 F.3d 473, 484-86 (6th Cir. 2013).

In this case, to a significant extent, whether Defendant willfully and maliciously filed a false Police Report or instead simply acted with just cause to recover money to which he believed he was entitled depends upon the nature of the agreement between the Parties surrounding the payment of the Check. And as set forth above, the evidence and inferences, construed most favorably to the Plaintiff, would support a finding in Plaintiff's favor. In particular, the Invoice, which was signed by both parties, makes no reference to Defendant having any right of refund if he ultimately decided not to go forward with the Pizza Shop. Instead, the Invoice, which both Parties signed, states that Precision Home Builders would prepare construction drawings, plans, and specifications for the Pizza Shop at a cost of $5,000, and that Defendant had paid in advance. The Invoice seems inconsistent with the idea that the Check was a deposit against unspecified future services. The Invoice describes neither a transaction that is conditional upon future

agreement nor a payment that is refundable. Further, having signed the Invoice, Defendant was presumed to be aware of its contents. *See Stout v. J.D. Byrider, Inc.*, 228 F.3d 709, 715 (6th Cir. 2000). Defendant has not attempted to rebut that presumption. Taken together, this evidence supports the reasonable inference that Defendant knew he was not entitled to a refund when he made the Police Report.

While *Trammell*, 388 B.R. at 189, indicates that a full and fair disclosure of the facts to law enforcement can defeat liability for malicious prosecution, the converse is also true. A selective and misleading disclosure to the police can create an inference of both intent to inflict harm and conscious disregard for the rights of others, but the evidence leaves in question whether that is what happened here. And finally, the Police Report indicates that Defendant told the police that Plaintiff had agreed to provide the refund but said he was having financial difficulties, all facts which Plaintiff has disputed.

Accordingly, a trial is required on Count II so that the Court can resolve Count II based upon a full evidentiary presentation where the record will presumably be better developed, and the credibility of the evidence and witnesses can be evaluated by the Court.

VI. Conclusion

For the reasons stated above, the Motion is **GRANTED** with respect to Count I (11 U.S.C. § 523(a)(2)) and is otherwise **DENIED**. The Case will proceed to trial on Count II of the Complaint. The Court will conduct a telephonic pretrial conference at a time and date to be set by separate notice to schedule a trial date with respect to Count II of the Complaint.

IT IS SO ORDERED.

Copies to:
Laura Nesbitt, counsel for Plaintiff (via ECF)
Nathaniel Sinn, counsel for Defendant (via ECF)