UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

In re:	*	
	*	**BAP NO. MB 97-072**
BRIAN G. JUNG,	*	
Debtor	*	
**********	*	
DANIEL BRITTON,	*	**Case No. 95-18016-WCH**
Plaintiff/Appellee	*	
	*	**ADV. No. 96-1085**
v.	*	
	*	
BRIAN G. JUNG,	*	
Defendant/Appellant	*	
**********		

Before GOODMAN, LAMOUTTE and DEJESUS, U.S. Bankruptcy Judges.

ORDER DISMISSING CASE

PER CURIAM.

Before the Bankruptcy Appellate Panel is Appellant's Renewed Motion for Leave to Proceed In Forma Pauperis with the requisite affidavit attached indicating appellant's, Brian G. Jung's, financial status.[1] It appearing that appellant has met the threshold requirement of 28 U.S.C. § 1915[2] and Rule 24 of the

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1 This renewed petition is submitted subsequent to this Panel's denial of appellant's first petition on September 19, 1997 for failure to file an affidavit disclosing financial status.

2 Title 28 U.S.C. § 1915 provides in pertinent part:

> Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

Federal Rules of Appellate Procedure,[3] we are able to consider the petition. After review of the facts and pertinent law, we deny the petition and dismiss the appeal.

DISCUSSION

I. In Forma Pauperis

Title 28 U.S.C. § 1915[4] provides that a petition to proceed in forma pauperis is granted or denied at the discretion of the court, however, this discretion is limited to the determination of poverty, good faith of the applicant and the meritoriousness of the appeal. Kinney v. Plymouth Rock Squab Co., 236 U.S. 43, 46 (1915).

We are satisfied that Jung has met the requisite showing of poverty. Jung's affidavit indicates that he is unemployed and currently being supported by his sister. In addition, he attests to considerable indebtedness with minimal assets. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339-40(1948)(petitioner need not be absolutely destitute to benefit from the statute).

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28 U.S.C. § 1915(a)(1).

3 Rule 24 is similar to 28 U.S.C. § 1915 in that applicant must file an affidavit with the requisite financial information. In addition, however, the affiant must include a statement of issues on appeal and the request must have been presented to district court and denied. In the case at bar, Jung initially requested permission to pursue an appeal in forma pauperis at the conclusion of the bankruptcy court hearing. This request was denied. *See* Trial Transcript, July 9, 1997, 23-24.

4 As amended in 1996, the statute provides, in part, that "the court shall dismiss the case at any time if the court determines that-- the allegation of poverty is untrue; or the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from relief." 28 U.S.C. § 1915(e)(2).

Upon determination of the applicant's financial eligibility, the court has the duty to examine the merits of the appeal to ensure that judicial and public resources are not expended needlessly on an appeal which has no basis in law or fact. E.g., Neitzke v. Williams, 490 U.S. 319, 325-29 (1989); Adkins, 335 U.S. at 337. Probable success on the merits need not be shown, however, where any nonfrivolous or colorable issue on appeal exists, the court is required to grant a motion for leave to file in forma pauperis. Coppedge v. U.S., 369 U.S. 438, 445 (1962). Dismissal of an in forma pauperis complaint should only occur when the allegations lack any factual basis and not where the allegations are simply unlikely. Denton v. Hernandez, 504 U.S. 25, 31-33 (1992).

II. State Court Proceedings

Jung's appeal arises from the bankruptcy court's reliance on the principles of collateral estoppel in determining that a judgment claim is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). The judgment was the result of a state court action initiated by Jung's landlord for nonpayment of rent. In addition, Jung had counterclaimed and filed a third-party complaint against the landlord's agents (the Fosters) who had been sent to repair the apartment. Jung alleged assault and battery, destruction of property, impairment of his civil rights, infliction of severe emotional distress and violation of Mass. G.L., ch. 93(a). After a three-day trial, the state court found against Jung in virtually all claims except destruction of property against the Fosters and

the security deposit claim against the landlord. Finding that substantially all the counterclaims and defenses were wholly insubstantial, frivolous and not advanced in good faith, the state court sanctioned Jung for attorney fees and costs totaling approximately $25,000.00[5] under Mass. G.L. ch. 231, § 6F.[6]

The debtor subsequently filed a bankruptcy petition and the landlord initiated an adversary proceeding. Upon review of the state court proceedings, the bankruptcy court applied the principles of collateral estoppel and found the judgment claim nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

III. Collateral Estoppel

At the outset, we note that while the bankruptcy court has exclusive subject matter jurisdiction to determine dischargeability of a claim, where the elements necessary to such finding were litigated in the prior proceeding, collateral estoppel applies. Grogan v. Garner, 498 U.S. 279, 284-285 nn.10 & 11 (1991).

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5 This includes $13,859.00 and $9,136.00 awarded to the landlord and the Fosters, respectively, for Jung's violation of § 6F.

6 Massachusetts G.L. ch. 231, § 6F provides in pertinent part:

> Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or other finder of fact, the court may determine after a hearing and as a separate and distinct finding that all or substantially all of the claims, defenses, setoffs or counterclaim of a factual, legal or mixed nature made by any party who is represented by counsel during all of the proceedings were wholly insubstantial, frivolous and not advanced in good faith. If such a finding is made with respect to a party's claims, the court shall award reasonable counsel fees and other costs and expenses.

The doctrine of collateral estoppel operates in tandem with the Full Faith and Credit Clause of the United States Constitution made applicable to federal courts by 28 U.S.C. § 1738.[7] U.S. Const. art. IV, § 1. Thus, where a party had a full and fair opportunity to litigate an issue in state court, federal courts are required to give full faith and credit to state court judgments. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483 n.24 (1982). As such, state court proceedings will have equal force and effect in the federal system as attributed in the state forum. Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 50 (1st Cir. 1997); Kyricopoulos v. Town of Orleans, 967 F.2d 14,16 (1st Cir. 1992).

Determination of the preclusive effect of a state court judgment under the principles of collateral estoppel requires review of state law. Massachusetts has adopted the traditional

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7 Title 28 U.S.C. § 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge or court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

view of collateral estoppel which provides that a party is precluded from relitigating a factual or legal issue which was actually decided in previous litigation between the same parties whether or not the same claim was pursued. Keystone Shipping, 109 F.3d at 51. *See, also,* Miles v. Aetna Cas. & Sur. Co., 412 Mass. 424, 589 N.E.2d 314 (1992); Almeida v. Travelers Ins. Co, 383 Mass. 226, 418 N.E.2d 602 (1981). A party who seeks to invoke the principles of collateral estoppel must establish the following: 1) the issue sought to be precluded must be the same as that involved in the prior action; 2) the issue must have been actually litigated; 3) the issue must have been determined by a valid and binding final judgment; and 4) the determination of the issue must have been essential to the judgment. Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30 (1st Cir. 1994).

Where an issue of fact was submitted for its determination and an actual determination was made, the fact is considered actually litigated. Santopadre v. Pelican Homestead & Sav. Ass'n, 937 F.2d 268, 273 (5th Cir. 1991). However, where prior judicial proceedings are ambiguous insofar as it cannot be ascertained with certainty what was litigated or decided, issue preclusion is not proper. Mitchell v. Humana Hospital-Shoals, 942 F.2d 1581, 1583-84 (11th Cir. 1991).

IV. 523(a)(6)

Pursuant to 11 U.S.C. § 523(a)(6), discharge of a claim is prohibited where the claim arises from "willful and malicious injury by debtor to another entity or to the property of another

entity." The First Circuit has recently defined "willful and malicious" by adopting the rule cited in In re Lubanski, 186 B.R. 160, 165 (Bankr.D.Mass. 1995). Printy v. Dean Witter Reynolds, Inc., 110 F.3d 853, 859 (1st Cir. 1997). Therein, the First Circuit construed a "willful and malicious" injury intentional, committed without just cause or excuse, done in conscious disregard of one's duty and which necessarily produces injury. Printy, 110 F.3d at 859. Furthermore, the court stated that while a mere voluntary act does not satisfy the requisite scienter, specific intent to injure is not required. In construing maliciousness, the court stated that the acts must have been deliberate and intentional and were intended to cause harm or that harm was certain or substantially certain to result therefrom. Printy, 110 F.3d at 859.

Finding the debt nondischargeable, the bankruptcy court relied upon findings in the October 22, 1994 order issued by the state court subsequent to trial; ruling in open court, the Hon. W.C. Hillman stated:

> With respect to the landlord-tenant claims, Justice Smith found that the only defective conditions in the apartment consisted of a hole in one of the closet walls, a small hole in the closet ceiling and a hole in the living room wall. He expressly found that these defective conditions did not breach the warrant of habitability, violate the state Sanitary Code or, quote, "--even remotely rise to the level of a substantial interference of the quiet enjoyment of the property." In addition, Justice Smith found that, quote, "It is simply ludicrous for the defendant to assert that the arrival of the Fosters at his request amounts to a substantial interference of his quiet enjoyment."
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> With respect to the assault and battery claims, Justice Smith found that: "The assault and battery claim was at best a weak one. Besides a weak claim, the claim was quite troubling because the evidence strongly suggests

> that the defendant Jung contrived some of the evidence in order to bolster his weaker assault and battery claim," end quote.
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> Justice Smith further found that, quote, "The Fosters did not trash the apartment at all; rather, defendant Jung caused the mess in his apartment, which is depicted in photographs, after the Fosters and Mr. Adler left his apartment and prior to calling the police in order to bolster his assault and battery claims and other claims arising out to the alleged assault and battery."

See Trial Transcript, July 9, 1997, 9:6-10:11. In summary, the bankruptcy court held that the state court's findings were akin to malicious prosecution and that any injury resulting therefrom was excepted from discharge. Trial Transcript, July 9, 1997, 11:10-16.

V. Analysis

Jung asserts that the trial court "erred in a number of respects, including its views on collateral estoppel, its lack of willingness to consider unclean hands of the plaintiff/appellant (sic), and the mens rea requisite for intentional harm." Affidavit of Jung, ¶ 2.

We find that the bankruptcy court was correct in applying the principles of collateral estoppel. Initially, we note that the elements of collateral estoppel are satisfied insofar that the parties are the same in both actions, the facts relied upon by the bankruptcy court were actually litigated in the state court, the state court's findings were essential to its judgment awarding attorneys fees and costs to the landlord and the Fosters and the state court judgment is valid, final and binding upon the parties.

We further find that the bankruptcy court's statement that claims arising from malicious prosecution are deemed excepted from

discharge is a correct statement of the law. Baldino v. Wilson (In re Wilson), 116 F.3d 87 (3d Cir. 1997); Papadakis v. Zelis (In re Zelis), 66 F.3d 205 (9th Cir. 1995). However, although the acts sanctioned pursuant to § 6F appear similar to malicious prosecution, a question remains as to whether the malice requirement for malicious prosecution was actually litigated. *Compare,* Hahn v. Planning Bd. of Stoughton, 403 Mass. 332, 529 N.E.2d 1334 (1988); Bartlett v. Greyhound Real Estate Finance Co., 41 Mass.App.Ct. 282, 669 N.E.2d 792 (Mass.App.Ct. 1996) & Wynne v. Rosen, 391 Mass. 797, 464 N.E.2d 1348 (1984); Hubbard v. Beatty & Hyde, Inc., 343 Mass. 258, 178 N.E.2d 485 (1961). In any event, we need not address the viability of this conclusion as the findings of fact in state court alone satisfy the elements for exception to discharge pursuant to § 523(a)(6).

While the claims were not identical in the state court and federal court actions, the state court's findings of fact satisfy the exception to discharge for willful and malicious injury.[8] After three days of trial and on a motion for attorneys fees and costs, the state court made specific findings including that Jung pursued claims which were wholly insubstantial, frivolous and not in good faith as well as the fact that he bolstered marginal claims by fabricating evidence, reported such evidence to the police and

8 This case is distinguishable on the facts from an earlier bankruptcy court decision rejecting collateral estoppel effect of a state court judgment issuing sanctions pursuant to § 6F. Savitsky v. Katz, 20 B.R. 394 (D. Mass. 1982)(mental state for violation of § 6F does not satisfy finding of malice under § 523(a)(6)).

then pursued legal action against the landlord and Fosters in state court based on this false evidence.

During the hearing, Jung argued that the state court judgment failed to establish that he acted with the requisite malicious intent. In support thereof, an offer of proof was made by counsel indicating that Jung would testify that he "believed his home had been invaded. He was upset, and when people are upset, they tend to do things that in cooler hindsight appear to have been maybe not the best course of action" (Trial Transcript, July 9, 1997, 16:4-7) and that his "client believed that the photographs were an accurate depiction of his apartment at the time that the Fosters left." Trial Transcript, July 9, 1997, 17:5-7.

The bankruptcy court rejected this argument stating that Jung's subsequent acts of contacting the police and pursuit of claims based on fabricated evidence leaves no doubt that "there was a deliberate act done intentionally which had a substantial certainty of causing harm." Trial Transcript, July 9, 1997, 21:2-4. We agree. Section 523(a)(6) is satisfied as the injuries sustained were the result of Jung's deliberate, rather than negligent or reckless, acts done without just cause or excuse and substantially certain to cause injury to the landlord and the Fosters. Contrary to Jung's allegations, actual intent to harm is not necessary for a willful and malicious injury. Printy, 110 F.3d at 859.

Addressing the second point, the records below indicate that allegations of plaintiff's "unclean hands" are actually assertions that the plaintiff concealed evidence from the state court. Trial

Transcript, July 1, 1997, 4:1-9. Jung's argument goes to the integrity of the proceedings below and may be addressed in that forum pursuant to Rule 60(b) of the Massachusetts Rules of Civil Procedure.[9] The principle of comity dictates that federal court not review state court judgments but, rather, the aggrieved party must seek relief from a final and binding judgment in the same forum which rendered the ruling. Lundborg v. Phoenix Leasing, Inc., 91 F.3d 265, 272 (1st Cir. 1996).

9 Mass. R. Civ. P. 60(b) provides relief identical to Fed. R. Civ. P. 60(b).

CONCLUSION

Rendering full faith and credit to the state court judgment, collateral estoppel precludes relitigation of the issues decided in state court. Finding that the state court judgment satisfies nondischargeability of the judgment claim under § 523(a)(6), we find that the appeal has no basis in law and fact. Accordingly, Jung's petition to proceed in forma pauperis is hereby DENIED and the appeal is DISMISSED. Neitzke, 490 U.S. at 327-28 (dismissal proper where the legal argument for the factual contentions lack an arguable basis).

SO ORDERED.

On this 23rd day of January, 1998.