IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE:	)	
	)	Case No. 16-42612-can7
DEREK FRANCIS LUEBBERT,	)	Chapter 7
	)	
Debtor.	)	Adversary Case No. 16-04165
_____	)	
GLOBAL CONTROL SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 18-0945-CV-W-BP
	)	
DEREK FRANCIS LUEBBERT,	)	
	)	
Defendant.	)	

Derek Francis Luebbert ("Luebbert") filed a Notice of Appeal, appealing the Bankruptcy Court's[1] Order and Judgment of Nondischargeability regarding a debt he owed to his former employer, Global Control Systems, Inc., ("GCS"). The Court concludes that the Bankruptcy Court's factual findings are not clearly erroneous and there is no legal error; accordingly, the Bankruptcy Court's decision is affirmed.

I. BACKGROUND

GCS is in the business of writing software that controls manufacturing equipment. Luebbert, an engineer, began working for GCS in August 2006. At the time of his employment he signed an Employment Agreement that, among other things, contained a three-year covenant not to compete with GCS within 100 miles, prohibited Luebbert from soliciting business from GCS's customers, and included nondisclosure and confidentiality provisions.

[1] The Honorable Cynthia A. Norton, Chief Bankruptcy Judge for this District.

Luebbert's principal (if not exclusive) responsibilities related to one of GCS's customers, Alliant Techsystems Inc., ("ATK"). ATK had contracted with the United States Department of Defense to design ammunition that would have less environmental impact, and ATK had contracted with GCS for software involved in the process. Luebbert's responsibility was to cultivate the relationship between GCS and ATK and provide support for the project.

In December 2009, Luebbert – while still employed by GCS – formed Atlas Industrial Solutions, LLC, ("Atlas"). He testified that one of its purposes was to be a vehicle whereby he could bid on ATK's projects. (Appellant's App. pp. 431-32).[2] A few months later, Atlas bid on a $90,000 project for ATK, which has been referred to by the parties as "PO D95."[3] ATK accepted Atlas's bid in May 2010, and Luebbert immediately resigned his position at GCS. Luebbert had not previously advised GCS about PO D95 or the fact that he (through Atlas) had bid on it. And, while it is not clear that he revealed this information when he resigned, he said enough to cause GCS to suspect that Luebbert had violated the Employment Agreement (by soliciting business from ATK) and that he was going to continue violating the Employment Agreement (by failing to honor the covenant not to compete).

GCS retained counsel and threatened legal action; Luebbert also retained counsel. At this point, GCS believed it had few good options. It wanted to maintain good relations with ATK but feared that ATK would be unhappy if GCS insisted on strictly enforcing the covenant not to compete, thereby depriving ATK of Luebbert's services. GCS also did not want to simply surrender its rights under the covenant not to compete or its business expectations from a relationship with ATK. Accordingly, in June 2010 GCS and Luebbert agreed to a Settlement

[2] "Appellant's App. p. __" is a reference to Appellant's Appendix.

[3] This is a shorthand reference for Purchase Order D37395.

Agreement.[4] The Settlement Agreement temporarily suspended the covenant not to compete and permitted Luebbert to continue working for ATK on PO D95. It further provided that 70% of the proceeds would be paid to GCS and 30% to Luebbert.[5] While not specified in the Settlement Agreement, the parties handled the payments by having ATK issue a check payable to GCS and Luebbert jointly; Luebbert endorsed the checks and sent them to GCS, who endorsed them and returned Luebbert's portion of the payment. Finally, because work on PO D95 was not anticipated to take long, the Settlement Agreement provided that the suspension of the covenant not to compete would last until the work was done, GCS was paid the full amount it was due, or six months, whichever was earlier. At that point, the three-year period on the covenant not to compete would commence.

On at least one occasion, ATK contacted Luebbert about expanding the scope of work covered by PO D95. Luebbert contacted GCS to confirm his understanding that ATK needed to contact GCS directly on such matters, and GCS agreed with Luebbert's understanding.

In November 2010 it became apparent that the work on PO D95 would not be completed within six months for a variety of reasons, including the fact that ATK wished (as mentioned above) to expand the project. Accordingly, in January 2011, GCS and Luebbert agreed to an Amendment to the Settlement Agreement. The Amendment continued the suspension of the covenant not to compete, changed the apportionment of the money paid by ATK to 50/50, and codified the parties' practice of having ATK issue joint checks to GCS and Luebbert. The

[4] Both Luebbert and Atlas were parties to the Settlement Agreement. For ease of discussion, the Court will refer to them collectively as "Luebbert."

[5] This aspect of the Settlement Agreement included a requirement that Luebbert give GCS a promissory note for $66,000 which he was to pay off with the proceeds from PO D95, but this detail is not important to the present discussion.

Amendment also required Luebbert "to keep GCS informed regarding purchase orders, additional work requests, invoices or any other accounting related activities." (Appellant's App. p. 229).

In mid-November 2012, ATK issued new purchase orders to Luebbert; Luebbert did not advise GCS of these purchase orders and did not share the proceeds with GCS. Instead, he asked GCS to amend the agreement to provide him with a larger share of the proceeds from ATK projects, but GCS refused to do so. Luebbert then contacted an attorney and expressed concerns about a potential conflict of interest as well as the unfairness of the Settlement Agreement and the Amendment. According to Luebbert, his role at ATK was changing to permit him to contract with other entities to perform work for ATK, and he perceived a conflict in that he could not refer work to, or contract with, GCS while also sharing in the proceeds paid to GCS. The attorney advised that he believed the Settlement Agreement and Amendment applied only to work done on PO D95 and that Luebbert had no obligation to split any other fees with GCS. He also opined that the non-compete clause was unenforceable. He advised Luebbert to contact GCS and explain the situation, and in the meantime continue complying with the agreements.

In February 2013, Atlas issued two invoices to ATK that related to PO D95. A few days later, Luebbert sent copies of the invoices to GCS, but did not (as his attorney suggested) indicate that continued work for ATK was creating a conflict of interest, that he believed that work on PO D95 was nearing completion, or that he believed that he was performing work that was not covered by the parties' agreement. Instead, he indicated that he anticipated more work from ATK, which would provide additional opportunities for GCS. Later that week, Luebbert sent another email to GCS outlining the potential conflict of interest and suggesting that one solution was for him to simply continue doing the work himself (instead of arranging for ATK to formally contract with

GCS). GCS agreed that Luebbert had described a "huge conflict of interest" and indicated its preference that Luebbert continue doing the work himself.

Meanwhile, Luebbert had begun efforts to have ATK issue checks to Atlas instead of issuing joint checks. At first, ATK continued referencing GCS in the memo line, but Luebbert arranged for those checks to be reissued to omit any reference to GCS. Once these arrangements were in place, on April 5, 2013, Luebbert emailed GCS and advised that he no longer intended to honor the Settlement Agreement or the Amendment because the working relationship was "not sustainable" and because he believed that he had fulfilled all his obligations. (Appellant's App. p. 630.) He also, despite this statement and despite his concerns about a conflict of interest, proposed amending the agreement to provide him with 90% of the profits from any agreements with ATK. He also did not reveal that he had arranged for ATK to stop issuing two-party checks and was keeping 100% of the proceeds for himself.

Thereafter, Luebbert continued receiving checks from ATK without splitting the proceeds with GCS. In some instances, he arranged for ATK to issue the checks to a friend's company (Midwest Controls), which then remitted the funds to Luebbert. Meanwhile, GCS suspected (based on Luebbert's April 5 email) that Luebbert was not honoring the agreement any longer. In June 2013, GCS filed suit against Luebbert in Jackson County Circuit Court, and the case was removed to federal court. The case, captioned *Global Control Systems, Inc. v. Luebbert*, went to trial in late March, 2016.[6] The jury was asked to consider breach of contract claims against both Luebbert and Atlas; the jury returned verdicts for GCS on both claims and found Luebbert liable for $302,631.31 in damages and found Atlas liable for $1.00 in damages. In August 2016 the court amended the judgment to include prejudgment interest, postjudgment interest, and attorney fees.

[6] The Case Number is 14-0657-CV-W-DGK.

Luebbert filed for Chapter 7 relief in September 2016. GCS filed an adversary complaint seeking to except its judgment from discharge, arguing that Luebbert's debt arose from a willful and malicious injury as described in 11 U.S.C. § 523(a)(6).[7] The Bankruptcy Court conducted a trial, at the conclusion of which it concluded that Luebbert's debt to GCS resulted from a willful and malicious injury, and therefore declined to discharge that debt. This appeal followed.[8]

II. DISCUSSSION[9]

A. Standards

"When a bankruptcy court's judgment is appealed to the district court, the district court acts as an appellate court and reviews the bankruptcy court's legal determinations de novo and findings of fact for clear error." *Pension Benefit Guaranty Corp. v. Falcon Products, Inc., (In re Falcon Prod., Inc.),* 497 F.3d 838, 840-41 (8th Cir. 2007) (quotation omitted). "'The bankruptcy court's determination of whether a party acted willfully and maliciously inherently involves inquiry into and finding of intent, which is a question of fact.'" *In re Kantos for Cash Flow Mgmt., Inc.*, 579 B.R. 846, 850 (B.A.P. 8th Cir. 2018) (quoting *Waugh v. Eldridge (In re Waugh)*, 95 F.3d 706, 710 (8th Cir.1996) (citation omitted)); *see also First National Bank of Fayetteville v. Phillips (In re Phillips)*, 882 F.2d 302, 305 (8th Cir. 1989). "A finding is clearly erroneous if, after reviewing the entire evidence, we are left with the definite and firm conviction that a mistake has

[7] GCS also asserted an exception due to fraud pursuant to 11 U.S.C. § 523(a)(2)(A), but later abandoned this theory.

[8] The Court originally raised a question about its jurisdiction, believing that Luebbert did not timely elect to have this appeal decided by the District Court (as opposed to the Bankruptcy Appellate Panel). (Doc. 6.) Without resolving that issue, the Court is persuaded that it has jurisdiction because GCS subsequently made a timely election to have the appeal decided by the District Court. (Doc. 7; 11 U.S.C. § 158(c)(1)(B) (any party other than appellant has thirty days from the filing of the Notice of Appeal to make the election).)

[9] GCS asks the Court to summarily affirm the Bankruptcy Court because Luebbert failed to provide an adequate record to permit meaningful review of the Bankruptcy Court's decision. (Doc. 18, pp. 40-45.) This request is denied because the Court believes that Luebbert has provided appropriate portions of the Record for the Court to consider. This case is unlike those in which the Record on Appeal included only the Bankruptcy Court's decision and did not include the trial transcript. *E.g., Situm v. Coppess (In re Coppess)*, 567 B.R. 543, 545 (B.A.P. 8th Cir. 2017); *Rose v. Rose (In re Rose)*, 483 B.R. 540, 544 (B.A.P. 8th Cir. 2012).

been committed." *Hernandez v. General Mills Fed. Credit Union (In re Hernandez),* 860 F.3d 591, 602 (8th Cir. 2017) (quotations omitted). The Bankruptcy Court's credibility determinations are "virtually unreviewable." *Id.*

A bankruptcy discharge does not discharge any debt incurred "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). The requirements that the injury be "willful" and "malicious" are distinct. *E.g., Fischer v. Scarborough (In re Scarborough),* 171 F.3d 638, 641 (8th Cir. 1999); *Barclays American/Business Credit, Inc. v. Long (In re Long*), 774 F.2d 875, 880-81 (8th Cir. 1985) ("Congress tells us in § 523(a)(6) that malice and willfulness are two different characteristics. They should not be lumped together to create an amorphous standard to prevent discharge for any conduct that may be judicially considered to be deplorable.").

"The word 'willful' in [§ 523](a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger,* 523 U.S. 57, 61 (1998) (emphasis in original). Put another way, the debtor must intend the consequences of his act. *Id.* at 62; *see also Roussel v. Clear Sky Properties, LLC*, 829 F.3d 1043, 1048 (8th Cir. 2016). However, "[i]f the debtor knows that the consequences are certain, or substantially certain, to result from his conduct, the debtor is treated as if he had, in fact, desired to produce those consequences." *Blocker v. Patch (In re Patch*), 526 F.3d 1176, 1180 (8th Cir. 2008). "Maliciousness is conduct targeted at the creditor at least in the sense that the conduct is certain or almost certain to cause financial harm" to the creditor. *Roussel*, 829 F.3d at 1047 (quotation omitted). "Malicious for purposes of § 523(a)(6) means that the debtor targeted the creditor to suffer the harm resulting from the debtor's intentional, tortious act. A wrongful act is malicious if there exists a knowing wrongfulness or knowing disregard of

the rights of another." *Bank of Iberia v. Jeffries (In re Jeffries)*, 378 B.R. 248, 255-56 (Bankr. W.D. Mo. 2007) (cleaned up).

B. Whether Luebbert Injured GCS

The Bankruptcy Court began its legal discussion by determining whether Luebbert injured GCS. This discussion was prompted by Luebbert's testimony (and his attorney's apparent suggestions) that GCS had not been injured. (*E.g.*, Appellant's App. pp. 491, 583-84, 610.) Relying on collateral estoppel, the Bankruptcy Court determined that the jury's verdict and resulting judgment on GCS's breach of contract claim foreclosed any argument that Luebbert had not injured GCS. Luebbert argues that the Bankruptcy Court committed legal error in applying collateral estoppel. In his initial Brief, Luebbert contends that this analysis was erroneous because the Bankruptcy Court did not explain how collateral estoppel applied to the facts of this case. (Doc. 11, p. 16.)[10] At the same time, Luebbert does not explain why he was *not* collaterally estopped from alleging that his actions caused GCS to suffer financial injury. His argument is refined in his Reply Brief; there, he argues that collateral estoppel does not apply because the jury in the civil suit was not asked to determine if he acted willfully or maliciously. (Doc. 21, pp. 9-10.)[11]

The Court concludes that the Bankruptcy Court's application of collateral estoppel was legally correct. "For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits." *Taylor v. Sturgell*, 553 U.S. 880, 891 n.4 (2008). Under Missouri law, "[c]ollateral estoppel, or issue preclusion, bars relitigation of an issue

[10] "Doc. __" is a reference to a document filed in the appeal, and the page numbers are those generated by the Court's CM/ECF system (which may not correspond to the document's original pagination).

[11] Luebbert also argues that the Bankruptcy Court's reference to the *Rooker/Feldman* doctrine was erroneous because the breach of contract claim was litigated in federal court and not state court. While Luebbert is correct, this does not affect the analysis set forth above.

already decided in a different cause of action." *Ideker v. PPG Indus., Inc.*, 788 F.3d 849, 852 (8th Cir. 2015) (quotations omitted). Missouri courts apply four factors to determine whether collateral estoppel applies:

> (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

Id. at 853 (quotations omitted).

There can be little doubt that Luebbert is collaterally estopped from arguing that he did not cause damage or injury to GCS. In rendering judgment on the breach of contract claim, the jury necessarily determined that Luebbert's breach of the Settlement Agreement and the Amendment damaged/injured GCS. While the jury was not asked to determine whether Luebbert acted willfully or maliciously, the Bankruptcy Court explicitly stated that it was not relying on the judgment for these matters; it relied on the judgment only to determine that Luebbert injured GCS. This decision was legally correct.

C. Whether Luebbert Acted Willfully and Maliciously

As a general matter, Luebbert's remaining arguments constitute disagreements with the Bankruptcy Court's decisions regarding the weight to be accorded particular items of evidence, the resolution of disputed facts, inferences to be drawn, and Luebbert's credibility. The Court's review of the Record fails to support a "definite and firm conviction that a mistake has been committed." *In re Hernandez*, 860 F.3d at 602.

Initially, Luebbert faults the Bankruptcy Court for not narrowly construing the evidence in his favor. (*E.g.*, Doc. 11, p. 17; Doc. 21, p. 11.) However, the rule to which Luebbert refers requires that the statutory exceptions to discharge be narrowly construed. *See Geiger v.*

Kawaauhau (In re Geiger), 113 F.3d 848, 853 (8th Cir. 1997) (en banc), *aff'd*, 523 U.S. 57 (1998) (describing the requirement of strict construction as a rule of statutory construction). The rule does not require all evidence on factual matters be construed in his favor, or that all factual disputes be resolved in his favor. Moreover, the Bankruptcy Court correctly stated that GCS bore the burden of proof and that GCS was required to prove the facts necessary to support the exception to discharge by the preponderance of the evidence, so there was no legal error. And, to the extent that Luebbert asks the Court to reweigh the evidence, the request must be rejected as contrary to the Court's obligations under the applicable standard of review.

Luebbert's principal argument is that he did not intend to injure GCS. For support, he primarily relies on (1) his own testimony and (2) the advice from his attorney, both to the effect that he believed he had fully performed his obligations under the Settlement Agreement and Amendment. However, there was evidence to the contrary, and the Bankruptcy Court was entitled to place greater weight on the contrary evidence, evaluate Luebbert's credibility, and find that he specifically intended to deprive GCS of its agreed-upon portions of payments from ATK and keep them for himself.[12] Some of the evidence cited by the Bankruptcy Court – and supported by the Record – includes:

- Luebbert did not follow his attorney's advice, thereby undercutting his claim that he was relying on that advice.
- Luebbert's April 5, 2013 email to GCS did not seek to terminate the relationship or contend that all work under the Settlement Agreement and Amendment had been completed;

[12] While Luebbert's liability to GCS arises from a breach of contract, this does not preclude a finding that he also willfully and maliciously injured GCS. *E.g., Williams v. IBEW Local 520 (In re Williams)*, 337 F.3d 504, 510 (5th Cir. 2003); *Hearing Assocs., Inc. v. Gervais*, 579 B.R. 516, 525 (D. Minn. 2016). Similarly, the fact that Luebbert intended to enrich himself does not preclude a finding that he did so by willfully and maliciously injuring GCS.

instead, Luebbert demanded a renegotiation that would provide him with 90% of the proceeds – contradicting his stated belief that he had fulfilled all his obligations.

- Luebbert secretly arranged for ATK to stop issuing joint checks, and in doing so not only failed to relate his actions to GCS, but also misled ATK as to the reasons for doing so.
- Luebbert arranged for payments to be paid to Midwest Controls so they could be passed to him without being detected by GCS.
- Luebbert did not remit GCS's share of some checks that were inarguably related to PO D95.
- Luebbert did not advise GCS of ATK's new work requests (regardless of whether they related to PO D95) and instead worked on them and kept the profits.
- Luebbert knew that the Amendment applied to new work requests from ATK, as demonstrated by the facts that (1) on numerous occasions GCS indicated that such requests should be forwarded to GCS and (2) Luebbert had previously discussed such new work with GCS. Indeed, it was his desire to garner a larger share of those proceeds at GCS's expense that motivated Luebbert to breach the Settlement Agreement and Amendment.

Likening Luebbert's actions to a conversion of GCS's funds, the Bankruptcy Court found that this (and other) evidence demonstrated that Luebbert's testimony that he did not intend to harm GCS was "not credible," and that Luebbert knew that withholding money from GCS would harm GCS. Recognizing that the same facts may be relevant to determining both willfulness and maliciousness, the Bankruptcy Court also found that Luebbert intended to harm GCS by withholding its money. These factual determinations are supported by the Record and are not clearly erroneous. Certainly, the Bankruptcy Court (as the finder of fact) could have credited Luebbert's testimony and resolved the evidence in his favor – but it was not obligated to do so,

and the Court is not left with the definite and firm conviction that the Bankruptcy Court's determination was a mistake.

III. CONCLUSION

For the foregoing reasons, the Bankruptcy Court's decision denying Luebbert a discharge of his debt to GCS is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE: July 15, 2019