UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In Re:

CASEY MARIE ANTHONY,

Debtor.
_____/

Case No. 8:13-bk-00922-KRM
Chapter 7

ROY KRONK,

Plaintiff,

v.

CASEY MARIE ANTHONY,

Defendant.
_____/

Adversary Proceeding

Case No. 8:13-ap-00629-KRM

PLAINTIFF'S RESPONSE TO DEBTOR/DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS WITH INCORPORATED MEMORANDUM OF LAW

Comes now Plaintiff Roy Kronk ("Plaintiff"), by and through his undersigned counsel, and hereby files this Response to Debtor/Defendant Casey Marie Anthony's ("Debtor" or "Defendant") Motion for Judgment on the Pleadings, (the "Motion"), and respectfully submits as follows:

Introduction

1. Plaintiff served his Amended Complaint to Determine Dischargeability of Debts on November 26, 2013 [Docket No. 21].

2. Defendant/Debtor filed her Answer and Affirmative Defenses on January 13, 2014 [Docket No. 27].

3. Defendant/Debtor filed her Motion for Judgment on the Pleadings on January 7, 2016 [Docket No. 68] seeking a Judgment on the pleadings in her favor and against Plaintiff, requesting a finding by the Court that: (a) the allegations in the Amended Complaint, taken in the light most favorable to the Plaintiff, do not state a cause of action upon which Plaintiff can prevail under Section 523(a)(6); and (b) any claim of Plaintiff based upon the actions or non-actions of Debtor/Defendant are dischargeable.

4. The Motion requests entry of judgment for the Defendant solely because the Amended Complaint does not allege that Defendant personally made defamatory statements to the media, and that the defamatory statements were made instead by Defendant's instruments and agents, her criminal defense team, with full knowledge of her attorneys' statements and their falsity.

5. In support of the Motion, Defendant relies on case law that denies a non-dischargeability judgment for a willful and malicious act because the subject act was not committed "by the debtor," as required by Section 523(a)(6). However, the case law cited by Defendant does not apply to this case. None of the case law involved facts under which the debtor explicitly directed an agent to commit a willful and malicious act. The case law cited by Defendant merely holds that a debtor's vicarious liability for the willful and malicious acts of others, without knowledge or control over those acts, does not support a non-dischargeability judgment under Section 523(a)(6).

6. If the Defendant's theory of Section 523(a)(6) were sustained, then a debtor may hire an individual to commit murder, file for bankruptcy, and avoid any and all civil liability for the murder because the murder was committed by the debtor's hitman and not by the debtor himself. Accepting Defendant's theory of Section 523(a)(6) would arbitrarily determine the non-

dischargeability of a crime or tort based solely upon whether a debtor personally commits the crime or tort or pays someone else to do so on behalf of the debtor. This would be an absurd result not intended by Congress.

7. That is why courts, like Judge Queenan in *In re Sullivan*, 198 B.R. 417, 424 (Bankr. D. Mass. 1996), distinguish the common rejection of vicarious liability for willful and malicious acts, where such acts were committed by agents on behalf of the debtor, and where the debtor knew of his agent's acts but did nothing about it. Judge Queenan concedes that if the liability had been based "solely on the conduct of others," the debt would be dischargeable. *Id.* The court found, however, that Sullivan "knew [the willful and malicious acts were] being committed but did nothing about it." *Id.* Because the debtor knew his agents were committing these acts, and because the conduct was happening in the scope of the agent-principal relationship, the court found the debtor's conduct to be "deliberate and intentional conduct within the scope of section 523(a)(6)" and found his liability non-dischargeable. *Id.*; *accord In re Brink,* 333 B.R. 560, 571 (Bankr. D. Mass. 2005).

The Evidence Supports Non-dischargeability

8. The evidence in this case will show that Casey Anthony directed her attorneys to publish false and defamatory statements about Plaintiff to the media to portray him as the kidnapper and murderer of Caylee Anthony, for the purpose of redirecting public blame for her daughter's murder to Plaintiff and with full knowledge of the falsity of the statements.[1] Dominic Casey, who was hired to work with Defendant's criminal defense team, testified under oath that "[b]ased on [his] personal knowledge of the events and statements [he] personally heard from Casey Anthony she authorized and permitted her attorneys including, Jose Baez, to make false

[1] Under Fed. R. Civ. P. 12(d), the Plaintiff may present all material pertinent to the Motion, including evidence to support Plaintiff's theory in opposition to the Motion.

statements about Roy Kronk to portray him as a murderer and or kidnapper of Caylee Anthony." *See*, Affidavit of Dominic Casey, ¶ 11, a true and correct copy of which is attached hereto as **Exhibit A**.

9. The evidence will also show that Debtor/Defendant, Casey Anthony, Defendant corroborates the Affidavit of Dominic Casey through her own admissions and interrogatory answers. In her response to Plaintiff's Amended First Set of Requests for Admissions to Defendant, Defendant admits that she "accused others of kidnapping Caylee Marie Anthony." *See,* Response to Request No. 21 in Plaintiff's Amended First Set of Requests for Admissions to Defendant, a true and correct copy of which is attached hereto as **Exhibit B**. In her response to Plaintiff's Amended First Set of Interrogatories to Defendant, Defendant admits that statements by her criminal defense team were made, at least in part, "to offset the negative and prejudicial remarks and purported evidence that was suspected to have been leaked to the press by law enforcement and other members of the State's prosecution team and/or other witnesses. *See*, Response to Interrogatory No. 8 in Plaintiff's Amended First Set of Interrogatories to Defendant, a true and correct copy of which is attached hereto as **Exhibit C**.

10. Ms. Anthony further corroborates the Affidavit of Dominic Casey by refusing to answer numerous other requests for admissions and interrogatories pursuant to her Fifth Amendment right against self-incrimination. For example, an adverse inference can be drawn that Defendant directed, authorized and permitted members of her defense counsel to make statements to the media about Plaintiff being the killer or kidnapper of Caylee Marie Anthony. *See*, Response to Request No. 3 in Plaintiff's Amended First Set of Requests for Admissions to Defendant, Exhibit B. "The general rule is that an adverse inference may be drawn against a party in a civil action when he refuses to testify in response to probative evidence against him."

TemPay, Inc. v. Biltres Staffing of Tampa Bay, LLC, 945 F. Supp. 2d 1331, 1339 (M.D. Fla. 2013) (also holding that a negative inference is sufficient corroborative evidence to support entry of summary judgment).

11. Unlike the debtors in the cases cited by Defendant, the Defendant instructed and hired her attorneys and agents to commit the willful and malicious acts at issue in this case, and the Defendant cannot now avoid civil liability for such acts by hiding behind her own *modus operandi*.

Memorandum of Law in Opposition to Motion for Judgment on the Pleadings

"In determining whether a party is entitled to judgment on the pleadings, we accept as true all material facts alleged in the non-moving party's pleading, and we view those facts in the light most favorable to the non-moving party." *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014).

According to the Amended Complaint, Defendant committed a willful and malicious act by directing her attorneys to make false and defamatory statements to the media to portray Plaintiff as the kidnapper and murdered of Defendant's daughter. However, according to Defendant, because the Amended Complaint alleges that Defendant's acts were committed through her agents, rather than by Defendant, the Court may enter judgment on the pleadings.

As primary support, Defendant cites to *Kalmanson v. Nofziger (In re Nofziger)*, 361 B.R. 236 (Bankr. M.D. Fla. 2006) (J. Jenneman), where Kalmanson accused Nofziger of participating in a conspiracy with third parties to take various criminal acts targeting Kalmanson. 361 B.R. at 240. Nofziger was a witness and friend of the plaintiff's former wife, Donna, and assisted Donna and her attorney, Ducote, in a highly contentious divorce proceeding against the plaintiff, Kalmanson. To support his conspiracy claim, Kalmanson alleged that another third party,

Adams, fraudulently obtained private medical and insurance records of Kalmanson's witnesses for use by Ducote in depositions. Nofziger's only role in the alleged conspiracy was to transmit the witnesses' records from Adams to Donna and Ducote. Accepting as true all allegations in the complaint, Judge Jenneman concluded that the debtor's "[p]articipation in a conspiracy is not enough to establish the intentional wrong needed to make a debt nondischargeable." *Id.* at 243. In other words, the only link between Nofziger and the alleged willful and malicious act was Nofziger's alleged participation in the conspiracy, rather than any act taken by Nofziger against Kalmanson. Despite her minor role in the alleged conspiracy, Nofziger had no control over or knowledge of the acts of Adams in fraudulently obtaining private records.

Likewise, in *In re Eggers*, 51 B.R. 452 (Bankr. E.D. Tenn. 1985), relied upon by Judge Jenneman in *Nofziger*, the court determined that the debtor's vicarious liability under a state statute did not support non-dischargeability. The debtor in *Eggers* signed an application enabling her son to obtain a driver's license. When the debtor's son negligently killed another person by driving his vehicle with excessive speed, while drinking, the debtor became vicariously liable for her son's negligence by operation of state statute. However, the bankruptcy court in *Eggers* determined that the debtor was not responsible for her son's willful and malicious act, as required under Section 523(a)(6), because her "only participation in the chain of events leading up to the wreck was the signing of an application enabling her son to obtain a driver's license." *Id.*at 454. As in *Nofziger*, there was no allegation against Eggers that she knowledge of or control over her son's negligence.

In *In re Austin*, 36 B.R. 306, 311-12 (Bankr. M.D. Tenn. 1984), Judge Lundin goes through great lengths to explain why vicarious liability, by itself, cannot support a finding of a willful and malicious act by the debtor under Section 523(a)(6), and ultimately holds that

> application of vicarious liability would effectively vitiate the § 523(a)(6) requirement that only debts resulting from *willful* acts committed *by the debtor* be nondischargeable. **Vicarious liability as a social policy or legal fiction ignores the master's knowledge and imposes fault and financial responsibility without regard to culpability or intent.** Section 523(a)(6) is founded on the contrary notion that only a debt resulting from the deliberate acts of the debtor can be excepted from discharge in bankruptcy.

Id., 36 B.R. at 312. Similar to the debtor in *Eggers*, the debtor in *Austin* was vicariously liable under a state statute prohibiting sale of alcohol to minors when one such minor struck and killed a pedestrian while driving drunk. However, the debtor's vicarious liability did not result from any willful or malicious act on his part, but from the acts of which Austin had no knowledge, committed by a person over whom Austin had no control.

The theories of liability in *Nofziger*, *Eggers*, and *Austin* have a common strand. None of these debtors had knowledge of or control over the culpable party.

The instant case is much closer to the facts of *In re Sullivan*, 198 B.R. 417, 424 (Bankr. D. Mass. 1996) (J. Queenan), where the court found that a debtor knew that his employees were trespassing upon and damaging the property of another, even though the debtor himself never personally trespassed or damaged any property. *Id.* The court stated that, if the liability had been based "solely on the conduct of others," the debt would be dischargeable, consistent with the holding of *Nofziger*. *Id.* The court found, however, that the debtor in *Sullivan* "knew this continuing trespass was being committed but did nothing about it." *Id.* Because the debtor knew his agents were committing these actions, and because the conduct was happening in the scope of the agent-principal relationship, the court found the debtor's conduct to be "deliberate and intentional conduct within the scope of section 523(a)(6)" and found his liability non-dischargeable. *Id.*; *accord In re Brink,* 333 B.R. 560, 571 (Bankr. D. Mass. 2005).

Sullivan stands for the common sense proposition that a principal's liability for the willful and malicious acts of his or her agents is non-dischargeable when the principal was aware of the actions, the actions took place in the ordinary course of the principal-agent relationship, the actions were taken on the principal's behalf and under his control, and the principal did nothing about the actions. A defendant cannot insulate him or herself from non-dischargeable liability simply by having an agent take actions pursuant to his or her instructions. Unlike the species of vicarious liability rejected by Judge Lundin in *Austin*, the liability of a principal for the acts of his agent, under facts similar to those in *Sullivan*, is based upon the principal's knowledge, culpability, and intent to commit the acts perpetrated through his agents.

Even a claim for conspiracy, as in *Nofziger*, does not rise to the same level of culpability as with the agency theory espoused in *Sullivan*. Agency and conspiracy theories differ in material ways. A conspiracy consists of an agreement by two or more parties with an intent to commit an offense. *Ramirez v. State*, 371 So. 2d 1063, 1065 (Fla. 3d DCA 1979); *Kurnow v. Abbott*, 114 So. 3d 1099, 1102 (Fla. 1st DCA 2013). Civil conspiracy, as opposed to criminal conspiracy, also requires "the doing of some overt act in pursuance of the conspiracy," and resulting damage from the act. *Kurnow*, 114 So. 3d at 1102. "Conspiracy is a separate and distinct crime from the offense which is the object of the conspiracy." *Ramirez v. State*, 371 So. 2d at 1065. Thus, one can be liable for conspiring to commit a willful and malicious act, without actually committing the act. In addition, like in *Nofziger*, a conspiring debtor liable for commission of a non-malicious or un-willful act in furtherance of the conspiracy can still discharge liability for the civil conspiracy.

In contrast to a conspiracy claim, "[t]he key element in establishing actual agency is the control by the principal over the actions of the agent." *Hickman v. Barclay's Intern. Realty, Inc.*,

5 So. 3d 804, 806 (Fla. 4th DCA 2009). That is why "[t]he acts of an agent are considered in law to be those of the principal," and "a conspiracy does not exist between a principal and agent." *Friendship Med. Ctr., Ltd. v. Space Rentals*, 62 F.R.D. 106, 112 (N.D. Ill. 1974); *see also Richard Bertram, Inc. v. Sterling Bank & Trust*, 820 So. 2d 963, 966 (Fla. 4th DCA 2002) ("it is well settled that neither an agent nor an employee can conspire with his or her corporate principal or employer"). Where a conspirator may have an agreement with other conspirators to commit a willful and malicious act, conspirators do not necessarily have control over the actions of other conspirators. In contrast, a principal has control over the actions of his agent, and knowingly allows the agent to commit acts within the scope of the principal's authority. Under an agency theory, an act by the agent *is* an act by the principal.

There is also no *per se* rule that liability under an agency theory prevents a non-dischargeability judgment under Section 523(a)(6). For instance, a judgment for malicious prosecution can be non-dischargeable under Section 523(a)(6). *See, e.g., in re Abbo*, 168 F.3d 930 (6th Cir. 19998). If the Court accepted Defendant's theory of Section 523(a)(6), then malicious prosecution would be rendered dischargeable if the debtor prosecuted the case through an attorney, rather than *pro se*. Instead, courts must look at the facts and circumstances of each case to determine whether, in sum, the debtor committed an intentional act "an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *In re Kane*, 755 F.3d 1285, 1293 (11th Cir. 2014) *cert. denied sub nom. Kane v. Stewart Tilghman Fox & Bianchi, P.A.*, 135 S. Ct. 718 (2014); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 61–62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (section 523(a)(6) requires an act intended to injure, not just an injury resulting from the act).

In the case of *In re Thomas*, 288 Fed. App'x 547, 549 (11th Cir. April 18, 2008), the Eleventh Circuit affirmed a non-dischargeability judgment based upon conspiracy and malicious prosecution. In *Thomas*, the debtor's husband was convicted for discharging a firearm into the plaintiff's home and attempted murder. A civil suit followed, and the debtor and her husband were found liable for conspiracy to commit the crimes and for malicious prosecution. The Eleventh Circuit affirmed a non-dischargeability judgment based upon the civil judgment, finding that"[t]he civil judgment against Thomas for conspiracy and malicious prosecution is excluded from discharge under section 523(a)(6) because the acts inflicted 'willful and malicious injury' to the Lovelesses." *Id.* at 549. The fact that the judgment was for conspiracy did not alter the result.

From this backdrop, Judge Jenneman in *Nofziger* held that:

> the debtor directly must commit some type of malicious, intentional tort which the debtor knew would cause harm to the creditor. A conspiracy, i.e., an agreement, to commit a tort or other wrong does not qualify. Actions taken against parties other than the claimant do not qualify. Nor does action taken by someone other than the debtor qualify. See In re Eggers, 51 B.R. 452, 453 (Bankr.Tenn.1985) ("Section 523(a)(6) excepts from discharge a willful and malicious injury by the debtor to another entity. The legislative history accompanying § 523(a)(6) indicates that a debt is nondischargeable only where injury has resulted from some deliberate or intentional act of the debtor ...") (emphasis in original). Simply stated, a co-conspirator's acts can not suffice to establish the elements of Bankruptcy Code Section 523(a)(6), unless the acts were taken directly by the debtor against the objecting creditor. Participation in a conspiracy is not enough to establish the intentional wrong needed to make a debt nondischargeable.

361 B.R. at 243. Although Nofziger may have been part of an agreement to commit a willful and malicious act, she was not the individual who committed the willful and malicious act, and there was no allegation that she had control over that individual or knowledge of the offensive acts.

In its September 17, 2015 Memorandum Opinion (Doc. No. 86 in *Gonzalez v. Anthony*, adv. pro. No. 8:13-ap-0626), the Court stated that Gonzalez's agency theory was legally deficient, relying upon the passage from *Nofziger* excerpted above. However, the Court, considering the totality of the circumstances, concluded that

> Debtor [Anthony] had no consciousness of wrongdoing, even by implication, when she made the Statement. The Statement was not deliberated; there was no ill-will between Debtor and Plaintiff [Gonzalez] when the Statement was made; the Statement was made by Debtor only to her parents without any instruction to republish it; the Statement was not false as to Plaintiff, her character or her conduct; the Statement was not directed at Plaintiff; and it was not substantially certain that utterance of the Statement would injure Plaintiff.

Id. at pp. 17-18.

In stark contrast, the evidence in this case will show that Defendant deliberately committed the alleged acts through her agents, with control over her agents and knowledge of their acts. There is nothing in the applicable case law or the statute to indicate that a debtor's employment of agency to commit a willful and malicious act diminishes the non-dischargeability of the act. Defendant's liability for the defamatory statements is not based solely on vicarious liability by operation of statute, as in *Eggers* and *Austin*, or upon her agreement or relationship to other bad actors, as in *Nofziger*, but rather on her own culpable orchestration of disseminating defamatory statements through media to redirect public blame for her daughter's murder to Plaintiff.

For the foregoing reasons, the Court should deny the Motion, and allow this case to proceed on the merits.

WHEREFORE, Plaintiff, ROY KRONK, moves this Court to DENY Debtor/Defendant, CASEY MARIE ANTHONY's, Motion for Judgment on the Pleadings, and for such further and other relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 15, 2016, a true and correct copy of the foregoing Motion was electronically filed with the Court using the CM/ECF system which will send an electronic service copy to: David L. Schrader, Esq., Counsel for Defendant, at dschraderlaw@gmail.com, dschraderlaw.assistant@gmail.com; and J. Cheney Mason, Esq., Special Counsel for Defendant, at chenmas4@aol.com.

/s/ Jonathan M. Sykes
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