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 IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS ADVERSARY COMPLAINT

COMES NOW, the Plaintiff, Roy Kronk ("Plaintiff" or "Kronk"), by and through his undersigned counsel, and files his Response in Opposition to Defendant's Motion to Dismiss Adversary Complaint (the "Motion")(Doc. 16), and states as follows:

I. BACKGROUND

Casey Anthony, the Defendant herein ("Defendant" or "Ms. Anthony"), was charged with her daughter's murder, was tried, and was subsequently acquitted of that charge, but was convicted of lying to the authorities. *State v. Anthony*, Orange County, Florida, Case No. 2008-CF-015606-A-O (the "Criminal Trial"). Defendant was represented by several attorneys in the Criminal Trial.

As alleged in the Complaint (Doc. 1), Plaintiff found the remains of Defendant's daughter and reported those findings to the authorities. The criminal investigation and

subsequent Criminal Trial were well-publicized, and Defendant, through her agents, made public comments to the media, outside of the courtroom, which defamed Kronk, accusing him of the murder among other things. There is no dispute that Defendant was well aware that Kronk was not involved in the murder of Defendant's daughter.

Ironically, much of the Motion consists of *ad hominem* attacks against Kronk, the exact type of statements which led to this Complaint in the first place. Ignoring the personal attacks and irrelevant allegations, the Motion boils down to three distinct arguments. First, the Motion argues that, since the statements were made by agents, Kronk is legally barred from relief. Second, the Motion argues that Kronk has not plead his allegations with sufficient particularity. Third, the Motion argues that all the alleged defamatory statements are protected by the litigation privilege.

II. ARGUMENT

A. The Elements of Defamation and Non-Dischargeable Defamation

In the Motion, Defendant seeks dismissal of the Complaint pursuant to Fed. R. Civ. P. 12(b) and Fed. R. Bankr. P. 7012(b) arguing that Plaintiff has failed to state a claim upon which relief can be granted. In determining whether to grant a motion to dismiss, "the pleadings are construed broadly" and "the allegations in the complaint are viewed in the light most favorable to the plaintiff." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007).

Defamation is defined under Florida law as "the unprivileged publication of false statements which naturally and proximately result in injury to another." *Wolfson v. Kirk*, 273 So.2d 774, 776 (Fla. 4th DCA 1973). "The elements of a cause of action for defamation are: (1) the defendant published a false statement, (2) about the plaintiff, (3) to a third party, and (4) the

falsity of the statement caused injury to the plaintiff." *In re Nofziger*, 361 B.R. 236, 245 (Bankr. M.D. Fla. 2006).

Malice is an essential element of the tort of defamation. *Wolfson,* 273 So.2d at 776. However, no showing of malice is required where a statement is considered actionable *per se. Wolfson,* 273 So.2d at 776. A "communication is actionable *per se*—that is, without a showing of special damage—if it imputes to another . . . a criminal offense amounting to a felony . . . or conduct, characteristics or a condition incompatible with the proper exercise of his lawful business, trade, profession or office ..." *Id.* Further, under Florida law, punitive damages are available when a defendant makes a false statement for per se defamation as express malice is established. *Rabren v. Straigis,* 498 So.2d 1362, 1363 (Fla. 2nd DCA 1986); *Nodar v. Galbreath,* 462 So.2d 803, 806 (Fla. 1994).

"Section 523(a)(6) excepts from discharge in bankruptcy any debt that results from 'willful and malicious injury by the debtor to another entity or to the property of another entity.'" *In re Jennings*, 670 F.3d 1329, 1333 (11th Cir. 2012). "A debtor is responsible for a 'willful' injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *Id.* (internal quotations omitted). A debtor is responsible for a 'malicious' injury when the action is "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *Id.* (internal quotations omitted). "To establish malice, a showing of specific intent to harm another is not necessary." *Id.* (internal quotations omitted).

"It is well established that under § 523(a)(6) of the Bankruptcy Code, the intentional tort of defamation may constitute 'willful and malicious injury by the debtor to another entity,' as

long as the Debtor knew the published statements were false." *In re Durrance*, 84 B.R. 238, 239 (Bankr. M.D. Fla. 1988).

In the Complaint, Plaintiff has alleged that Defendant authorized, adopted, and permitted her agents to make numerous defamatory and false statements, statements about the Plaintiff, statements published to the media, statements alleging Plaintiff was guilty of a felony, and statements that damaged Plaintiff's reputation. Plaintiff alleges, and the Criminal Trial made clear, that Defendant knew all along that these statements were false.

B. Actions by an Agent May Give Rise to a Non-Dischargeable Debt of a Principal

Generally, there is a presumption that an attorney is an agent of a client whom he professes to represent. *Dreggors v. Wausau Insurance Co.*, 995 So.2d 547, 549 (Fla. 5th DCA 2008). In *Dreggors*, the court found a client can be liable for his attorney making defamatory statements regarding the claimants to Orlando's Channel 9 news. *Id.*

The first legal argument made by the Motion is that Defendant cannot be denied a discharge based on the alleged willful and malicious statements of an agent. Defendant relies upon *In re Maltais*, 202 B.R. 807 (D. Mass. 1996) as the sole authority for this proposition.

1. *Maltais* and Imputation

In *Maltais*, a husband and wife were partners in a business. *Id.* at 809. The wife, however, was a mere figurehead in the business, and the husband ran nearly all aspects of the partnership. *Id.* After finding that the husband had committed willful and malicious acts which were non-dischargeable under § 523(a)(6), the court refused to impute that non-dischargeability to the wife as the wife did not authorize, adopt, permit, or otherwise have any knowledge of the willful and malicious acts. *Id.* at 813. This was because § 523(a)(6) requires the acts be "by the

debtor," and even though the wife was liable for those acts under general partnership law, she did not participate in those acts. *Id.* at 811-12.

While the holding of *Maltais* is understandable, it is not settled law. For example, in *In re Cecchini*, 780 F.2d 1440, 1444 (9th Cir. 1986) (overruled, in part, on other grounds), the Ninth Circuit held that a partner's liability was non-dischargeable "although there [wa]s no evidence in the record" concerning that partner's "direct involvement" in the tortious acts. *Id.* Because the other partner "was acting on behalf of the partnership and in the ordinary course of the business of the partnership" when he committed the acts, that partner's "knowledge and intent are imputed" to the other partner. *Id.* (citing 3 *Collier on Bankruptcy*, ¶ 523.08 at 523–52 and nn. 22–23 (15th ed. 1983)). *See also In re Bullington*, 167 B.R. 157, 163 (Bankr. W.D. Mo. 1994) ("In a dischargeability proceeding for conversion, the willful and malicious acts of one partner, committed in the ordinary course of business, are imputed to other partners such that any debt is non-dischargeable as to them as well.").

This is even more clear in the § 523(a)(2) context, where courts regularly impute non-dischargeable liability to otherwise "innocent" partners and principals based on general partnership and agency law. *See, e.g.*, *Strang v. Bradner*, 114 U.S. 555, 561 (1885); *In re Nascarella*, 492 B.R. 327, 335 (Bankr. M.D. Fla. 2013)("Numerous courts since *Strang* have held that the fraudulent acts of a partner could be imputed to a debtor in determining whether a debt is nondischargeable under § 523(a)(2). . . . Other courts have imputed fraudulent acts of an agent to an innocent debtor."); *In re Croft*, 150 B.R. 955, 959 (Bankr. E.D. Mo. 1993) *amended* 1994 WL 570889 (Bankr. E.D. Mo. Oct. 6, 1994) and *amended*, 174 B.R. 524 (Bankr. E.D. Mo. 1994)("As the Debtor's authorized agent, fraud on the part of Burnett may be imputed to the

Debtor for purposes of determining the dischargeability of the debt owed to the person defrauded.").

In the Complaint, Plaintiff alleges that Defendant knowingly authorized, adopted, and permitted defamatory statements to be made by her agents. But even if Defendant had no knowledge of the statements, the Complaint alleges that the statements were made by agents of Defendant, on behalf of the Defendant, in the ordinary course of the agent-principal relationship, and subject to Defendant's supervision, and under the holdings of *Cecchini* and *Bullington*, Defendant's liability for those "willful and malicious" statements is still non-dischargeable.

2. Regardless, *Maltais* Is Inapplicable

Maltais stands for the proposition that an innocent party's liability cannot be found non-dischargeable when that party's is liable only vicariously and by act of law. *Maltais* did not involve a party who participated in the willful and malicious actions, and *Maltais* is not the universally adopted rule.

But even if this Court agrees with the holding in *Maltais*, that decision is inapplicable to the instant case. The instant case is much closer to the facts of *In re Sullivan*, 198 B.R. 417, 424 (Bankr. D. Mass. 1996), 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 debtor would be dischargeable, consistent with the holding of *Maltais*. *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.

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 the principal did nothing about the actions. The Complaint in the instant action alleges that the Defendant actively instructed, adopted, and permitted her agents to make defamatory statements about Plaintiff even though Defendant knew these statements were false. A Defendant cannot insulate him or herself from non-dischargeable liability simply by having an agent take actions pursuant to his or her instructions, and the Motion should be denied.

C. <u>Plaintiff Has Plead with the Required Particularity</u>

Defendant states in her Motion that the Complaint should be dismissed because it fails to specifically allege and plead certain facts as to the alleged defamation with particularity. Plaintiff alleges in his Complaint that Defendant, through her agents, published false and defamatory remarks about him, and Plaintiff itemized twelve statements representing the gist of the false and defamatory statements. As alleged in the Complaint, such statements were made to the media, including national television shows, and were broadcast and/or published across the country.

The Third District Court of Appeals has held that "when the cause of action for defamation is based on oral statements, it is sufficient that the plaintiff set out the substance of the spoken words with sufficient particularity to enable the court to determine publication was defamatory." *Edward L. Nezelek, Inc. v. Sunbeam Television Corp.* 413 So. 2d 51, 55 (Fla. 3d

DCA 1982). The court further noted that "[t]he general rule in Florida is that allegedly defamatory words should be set out in the complaint for the purpose of fixing the character of the alleged libelous publication as being libel per se." *Id.* "That a plaintiff 'set out' allegedly defamatory words, does not necessarily require that the statements be set out verbatim." *Id.* "This is particularly true where the statements may not easily be retained because they were made orally either in conversation or by radio or television broadcast . . . ." *Id. See also, Scott v. Bush*, 907 So. 2d 662, 667 (Fla. 5th DCA 2005)(a statement that a person has committed a crime is one of the classic slander per se categories and the pleader need not allege specific damages to state a cause of action); *Layne v. Tribune Co.*, 108 Fla. 177, 181, 146 So. 234 (1933)(statements that amount to libel per se were viewed as necessarily evidencing malice and damage, so that the elements were not required to be pleaded or proved).

Further discovery will certainly bring more to light, but the Complaint contains adequate allegations necessary to put the Defendant on notice of the statements her agents made and why those statements are defamatory.

D. <u>Litigation Privilege Is an Affirmative Defense</u>

The Complaint makes very clear that Plaintiff's allegations are based on statements made outside of the courtroom, and therefore are not subject to the litigation privilege. Regardless, privilege is an affirmative defense, and unless facts giving rise to the defense are readily apparent in the initial complaint, privilege should be plead as a defense rather than raised in a motion to dismiss." *Suarez v. School Board of Hillsborough County*, 2013 WL 5653435 *3 (M.D. Fla. Oct. 16, 2013), citing *Kirvin v. Clark*, 396 So.2d 1203, 1204 (Fla. 1st DCA 1981).

Moreover, the litigation privilege defense is not available in a motion to dismiss context under circumstances in which alleged defamatory statements were made outside of a judicial

proceeding. *Spitalny v. Insurers Unlimited, Inc.*, 2005 WL 1528629 *4 (M.D. Fla. 2005). *See also Ball v. D'Lites Enterprises, Inc.*, 65 So.3d 637, 641 (Fla. 4th DCA 2011)(Statements made to the newspapers or press conferences are not part of a judicial proceeding. Similarly, statements made to the world at large through a website accusing a person of fraud and perpetrating a hoax on the public are not steps in the judicial process or part of a judicial proceeding).

The Complaint is very clear that the statements were made outside of a judicial proceeding, and in fact were made to the media. It is in no way "readily apparent" from the Complaint that the privilege applies, and therefore, the litigation privilege is not relevant and the Motion should be denied.

III. CONCLUSION

Based on the foregoing arguments, the Motion should be denied. Plaintiff's Complaint, when viewed in a light most favorable to him, adequately states a claim against the Defendant and provides the Defendant the factual basis for the claim. If the Court is inclined to grant the Motion, Plaintiff requests that the dismissal be without prejudice to Plaintiff's ability to amend the Complaint.

WHEREFORE, Plaintiff prays that Defendant's Motion be denied and for such other and further relief as this Court deems just and appropriate.

Dated: October 25, 2013

Respectfully submitted,

/s/ Howard S. Marks

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 25, 2013, a true and correct copy of the foregoing was sent via electronic mail to the following:

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