IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re:

JERRY DEWAYNE GADDY, Case No. 17-01568

Debtor.

SE PROPERTY HOLDINGS, LLC,

Plaintiff,

v. Adversary Case No. 17-00054

JERRY DEWAYNE GADDY,

Defendant.

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

This adversary proceeding is before the court on the motion (doc. 16) for judgment on the pleadings filed by defendant/debtor Jerry Dewayne Gaddy ("Gaddy" or "debtor") with respect to the complaint objecting to discharge (doc. 1) filed by plaintiff SE Property Holdings, LLC ("SEPH" or "plaintiff") pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). In summary, the debtor guaranteed in 2006 and 2008 substantial loans made by plaintiff's predecessor Vision Bank related to a real estate project which ultimately failed. Plaintiff contends that the debtor from 2009 through 2014 then undertook an extensive series of transfers of real and personal property to his wife and daughter or entities controlled by his family or him to avoid collection before ultimately filing for bankruptcy in 2017.

This court has jurisdiction under 28 U.S.C. §§ 1334(b) and 157 and the order of reference of the district court. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I), and the court has authority to enter a final order (the parties also so stipulated on the record at a scheduling

conference on September 19, 2017). For the reasons discussed herein, the court grants the debtor's motion.

Background

Gaddy's debt to SEPH arose from the breach of Gaddy's personal guaranty of two business loans to Water's Edge, LLC related to an unsuccessful real estate project in Baldwin County, Alabama (the "project"). Gaddy executed personal guaranties for the two loans in 2006 and reaffirmed those obligations in 2008. Water's Edge defaulted on its obligation to SEPH's predecessor-in-interest Vision Bank in June 2010. SEPH filed suit against Gaddy and other guarantors in October 2010 in the Circuit Court of Baldwin County, Alabama. Gaddy's debt to SEPH was reduced to a judgment on December 17, 2014 in the amount of $9,168,468.14, although the Alabama Supreme Court later held that the judgment was not final because of one defendant's bankruptcy.[1] *See Gaddy v. SE Prop. Holdings, LLC*, 218 So. 3d 315, 324 (Ala. 2016).

SEPH alleges that from 2009 through 2014, with knowledge of Water's Edge potential and then actual default, Gaddy began transferring his property to family members and others. The following is a summary of pertinent events from SEPH's complaint:

12/5/2006	First loan to Water's Edge (#98809) for $10 million
11/28/2006	Gaddy's unlimited guaranty for Loan 1
12/5/2006	Second loan to Water's Edge (#98817) for $4.5 million
11/28/2006	Gaddy's limited guaranty for Loan 2 (limited to $84,392)
4/25/2008	Gaddy reaffirms guaranty of Loan 1 with principal increase to $12.5 million
4/25/2008	Gaddy reaffirms limited guaranty of Loan 2
March 2009	It becomes clear that the project will not be completed on time

[1] SEPH and Gaddy disagree as to whether the judgment is now final. As discussed by the court at oral argument and below, the finality or non-finality of the state court judgment does not affect the court's analysis.

3/13/2009	Guarantors begin missing capital contributions
May 2009	First guarantors file for bankruptcy
10/3/2009	Letter to guarantors from the bank regarding upcoming payment and potential default
10/16/2009	Gaddy deeds Marengo County, Alabama parcels to Rembert, LLC
10/30/2009	Rembert, LLC formed per Secretary of State with debtor, wife Sharon, and daughter Elizabeth as members
11/2/2009	Gaddy transfers 46% of Gaddy Electric & Plumbing, LLC to his wife Sharon
11/20/2009	Gaddy quitclaims three Marengo County parcels to his wife Sharon
June 2010	Water's Edge defaults on both Loans and the bank demands payment from Gaddy pursuant to his guaranties
10/4/2010	Gaddy conveys real property (110 Barley Avenue) to daughter Elizabeth
10/11/2010	SEPH files lawsuit against Water's Edge and guarantors, including Gaddy, in Baldwin County Circuit Court
2/23/2012	SLG Properties, LLC ("SLG") formed by Gaddy's wife Sharon
4/18/2012	Gaddy conveys real property (145 Industrial Park) to SLG
4/18/2012	Gaddy conveys real property (179 Industrial Park) to SLG
11/17/2014	Baldwin County Circuit Court judgment against Gaddy and other guarantors for $9.1 million (later held on appeal to not be final)
11/23/2014	Gaddy transfers $293,945.51 to Gaddy Electric
12/15/2014	Gaddy transfers 41% interest in Gaddy Electric to his wife Sharon
4/26/2017	Gaddy files the above-captioned chapter 7 bankruptcy

Standard

Pursuant to Federal Rule of Civil Procedure 12(c), made applicable by Federal Rule of Bankruptcy Procedure 7012, a party may move for judgment on the pleadings after the pleadings are closed. "Judgment on the pleadings is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1273 (11th Cir. 2008). "All facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party." *Id.* In deciding the motion, "the court considers the complaint, answer[], and the exhibits thereto." *See Barnett v. Baldwin Cty. Bd. of Educ.*, 60 F. Supp. 3d 1216, 1224 (S.D. Ala. 2014).

Discussion

SEPH alleges that the transfers by Gaddy outlined above "were actually fraudulent as to SEPH as they were made to hinder SEPH's collection of its debt owed by" Gaddy, and that Gaddy's "actual fraud in connection with these fraudulent transfers is an exception to discharge to the extent of those transfers under" § 523(a)(2)(A). (*See* Compl., doc. 1, at ¶¶ 69-71). It also contends that in making the transfers Gaddy "willfully and maliciously injured SEPH and/or the property of SEPH[,]" and that "such conduct creates an exception to discharge to the extent of those transfers under" § 523(a)(6). (*See id.* at ¶¶ 73-75). It requests that the court declare its debt nondischargeable pursuant to §§ 523(a)(2)(A) and 523(a)(6).

In its motion for judgment on the pleadings, Gaddy contends that SEPH's allegations do not state a claim under either § 523(a)(2)(A) or § 523(a)(6). SEPH filed a response to the motion, Gaddy filed a reply, SEPH filed a sur-reply, and the court heard extensive oral argument.

I. *BancorpSouth Bank v. Shahid*

The court is not writing on a blank slate; it has considered the issues raised by Gaddy's motion in the case of *BancorpSouth Bank v. Shahid*, Adversary Proceeding No. 16-03009, while sitting as a visiting judge in the U.S. Bankruptcy Court for the Northern District of Florida, Pensacola Division. In *Shahid*, the creditor obtained state court judgments totaling $1.8 million against the debtor, who then undertook a series of allegedly fraudulent transfers to avoid collection. The undersigned granted the debtor's motion to dismiss the bank's nondischargeability actions under 11 U.S.C. §§ 523(a)(2) and 523(a)(6). The bank appealed, and the district court affirmed. *See BancorpSouth Bank v. Shahid*, No. 3:16cv621-RV/EMT (N.D. Fla. 2017). In addition to the district court's affirmance, at least one other court has

adopted this court's holding in *Shahid*. *See, e.g.*, *In re Wilson*, No. 16-3068, 2017 WL 1628878, at *8 (Bankr. N.D. Ohio May 1, 2017) (citing this court's *Shahid* opinion with approval); *see also In re Vanwinkle*, 562 B.R. 671, 677-78 (Bankr. E.D. Ky. 2016) (reaching same conclusion as *Shahid*). Because the bankruptcy's and district court's opinions in *Shahid* are not reported, copies are attached as Exhibits A and B, and those opinions are incorporated as if set out fully herein.

II. SEPH's allegations

SEPH contends that the *Shahid* opinions were wrongly decided or can be distinguished on the facts. The court discusses SEPH's arguments below.[2]

A. Bankruptcy Code § 523(a)(6)

Bankruptcy Code § 523(a)(6) creates an exception to discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity . . . ." As discussed in this court's *Shahid* opinion, other courts have held that a debtor's actions after a debt has been incurred cannot support a § 523(a)(6) claims because the "injury" is the underlying debt. *See Shahid* op., Ex. A hereto, at pp. 2-3. This reasoning is also dispositive here. The underlying debt is the result of personal guaranties, not any willful and malicious injury by Gaddy. The parties' disagreement about whether or not the state court judgment based on the guaranties is a final judgment is immaterial; even if the judgment is final, the "injury" is still the debt underlying the judgment. *In re Jennings*, 670 F.3d 1329 (11th Cir. 2012) is distinguishable

[2] Several of SEPH's arguments blur the lines between §§ 523(a)(6) and 523(a)(2). The court's analysis in each section below applies with equal force to both claims, regardless of the section in which the analysis is included.

because the "injury" there arose from the fraudulent transfer itself by the application of California state law. *See Shahid* op., Ex. A hereto, at pp. 3-4.

The only debt that SEPH seeks to have declared nondischargeable in its complaint is the state court judgment based on the guaranties. (*See* Compl., doc. 1, at pp. 14-15). Nevertheless, SEPH's counsel argued in brief and at oral argument that it is not only the underlying guaranties that SEPH seeks to have declared nondischargeable but also a subsequent liability created by Gaddy's allegedly fraudulent transfers.[3] SEPH contends that it suffered a separate "injury" to it or its property under § 523(a)(6) in the form of Gaddy's liability to it under Alabama law for the fraudulent transfers described in the complaint. In this respect, SEPH urges the court to adopt the dicta in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), (*see* SEPH Resp., doc. 25, at p.6), suggesting that a debtor/transferor who transfers property with the intent to defraud creates a new, nondischargeable debt for the value of the transferred property. Thus, the court must examine whether Alabama law supports such a claim.

Alabama Code § 8-9A-7 sets out the remedies available to creditors under Alabama's Uniform Fraudulent Transfer Act ("AUFTA"):

> (1) Avoidance of the transfer to the extent necessary to satisfy the creditor's claim;
>
> (2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by any applicable provision of any other statute or the Alabama Rules of Civil Procedure;

[3] The court has considered this argument even though it is not specifically pleaded in the complaint. For this reason, the court does not find it necessary to allow amendment under Federal Rule of Civil Procedure 15, incorporated by Federal Rule of Bankruptcy Procedure 7015.

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

a. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

b. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

c. Any other relief the circumstances may require.

Although the statute specifically states that the creditor's remedies are not limited to those listed, SEPH has not provided any Alabama law that the debtor/transferor who fraudulently transfers property is liable to a creditor for the value of the transferred property. In Alabama, if a court avoids a fraudulent transfer under Alabama Code § 8-9A-7, title does not revest in the debtor; "[i]nstead, the transferee continues to own the fraudulently transferred assets [and] the transfer is void only as to the creditor, and the creditor can execute on those assets directly" under Alabama Code § 8-9A-7(b). *See Ex parte HealthSouth Corp.*, 974 So. 2d 288, 297 (Ala. 2007); *SE Prop. Holdings, LLC v. Center*, No. 15-0033-WS-C, 2017 WL 3403793, at *34 (S.D. Ala. Aug. 8, 2017). Because title remains with the transferee, Alabama law "creates a remedy for the creditor" against the transferee for "(i) a money judgment . . . for the lesser of the value of the asset at the time of transfer or 'the amount necessary to satisfy the creditor's claim;' or (ii) a judgment . . . for conveyance of the asset itself." *See SEPH v. Center*, 2017 WL 3403793, at *34 (citing Ala. Code § 8-9A-8(b)). Alabama law does not contemplate a similar claim against the transferor, though, as Gaddy is here.[4]

[4] The court discusses SEPH's argument that Gaddy was in essence both transferee and transferor below in conjunction with SEPH's § 523(a)(2) claim.

The Alabama Supreme Court did affirm a conspiracy-to-defraud money judgment against a debtor-transferor in *Johns v. T.T. Stephens Enterprises*, 815 So. 2d 511, 516-17 (Ala. 2001). However, the damages awarded against the debtor-transferor were profits which the plaintiff lost as a result of the debtor's inability to perform its contract with the plaintiff because of the fraudulent conveyances, not the value of the transferred property itself as SEPH seeks here. *See id.* at 517. In this district, District Judge William H. Steele recently declined to award SEPH monetary damages against a debtor/transferor because, among other reasons, SEPH had not proven any consequential damages that were the "natural and proximate result of the [borrower and his wife]'s conspiracy to fraudulently transfer assets beyond its reach." *See SEPH v. Center*, 2017 WL 3403793, at *34. In other words, in both those cases, the fraudulent transfer itself did not create a damages claim against the debtor/transferor under AUFTA. SEPH has not alleged in its complaint, briefs, or oral argument that it has suffered damages as a result of the alleged fraudulent transfers, other than the original contractual debt or the value of the transferred property.

Furthermore, it is unclear how creating a separate monetary liability on the part of a debtor/transferor for the value of the transferred property would work under SEPH's theory. Assume a debtor owed a specific creditor $100,000 and fraudulently transferred property worth $20,000; does he now owe the creditor both amounts, for a total of $120,000? If the debtor has ten creditors, does he have a separate liability to each creditor for the $20,000 value of fraudulently transferred property, for a total of $200,000 ($20,000 x 10 creditors)? Is the debtor liable for money damages to even future creditors under Alabama Code § 8-9A-4? In the absence of any law supporting this theory, the court declines to find that an alleged fraudulent

transfer in itself creates an "injury" to an individual creditor by the debtor/transferor that would support a § 523(a)(6) claim.

Finally, as it did in *Shahid*, the court also finds that SEPH cannot sustain a claim under § 523(a)(6) for damage to its property because it has not alleged a security interest, judgment lien, or any other interest in any of the transferred properties. SEPH's inchoate right to collect did not constitute its "property" under § 523(a)(6). *See Shahid* op., Ex. A hereto, at p.3. If the transfers were to SEPH's detriment, it was a detriment that was not specific to itself and that it suffered with all of Gaddy's creditors – both existing and future.

B. Bankruptcy Code § 523(a)(2)

Bankruptcy Code § 523(a)(2) states in pertinent part that a debtor is not discharged "from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . ." (emphasis added). SEPH does not contend that the underlying debt from the guaranties was obtained by fraud or was anything other than a standard contract debt. Instead, it relies on the U.S. Supreme Court's decision in *Husky International Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016), to argue that Gaddy's alleged fraudulent transfer "scheme" after incurring the underlying debt entitles it to have its debt declared nondischargeable under § 523(a)(2). While *Husky* potentially expanded the universe of § 523(a)(2) causes of action against transferees, it does not reach as far as SEPH argues for the same reasons outlined in *Shahid*. *See Shahid* op., Ex. A hereto, at pp. 4-5; *see also, e.g.*, *In re Vanwinkle*, 562 B.R. at 677-78.

SEPH argues that Gaddy was essentially both transferor and transferee, and thus the distinction that this court made in *Shahid* should not apply. However, the court is unaware of any bankruptcy or state law to support a cause of action to set aside a transfer as fraudulent where the same person is both the transferor and transferee which would support a § 523 claim. For example, if SEPH contends that Gaddy controls Gaddy Electric through his family such that Gaddy Electric should be part of the debtor's bankruptcy estate, then it needs to work with the chapter 7 trustee to bring that company into the estate; its remedy is not to have its debt declared nondischargeable under § 523. *In re Bilzerian*, 100 F.3d 886 (11th Cir. 1996), cited by SEPH, did not involve alleged fraudulent transfers and is otherwise distinguishable from the situation presented here.

SEPH further tries to distinguish *Shahid* on the ground that SEPH had filed a fraudulent transfer action against the debtor in district court, which action was stayed by the filing of the bankruptcy case. SEPH argues that it would have obtained a money damages award against Gaddy in the fraudulent transfer action for the value of the transferred property. However, as discussed above in conjunction with SEPH's § 523(a)(6) claim, it has not pointed to any Alabama law which would create a "debt for money, property, services, or an extension, renewal, or refinancing of credit" in favor of a creditor against a debtor/transferor based solely on the value of the fraudulently transferred property.

SEPH's argument that "even a transferor should be subject to § 523(a)(2) to the extent of their fraud[,]" (*see* SEPH Resp., doc. 25, at p.6), ignores that fraudulent transfers such as those alleged here are an offense against all creditors, present and future. Gaddy's schedules reflect significant unsecured debt other than that of SEPH, including $1.631 million owed to Union

State Bank, and $784,991 owed to West Alabama Bank & Trust. Under Alabama law, transfers made by a debtor with the actual intent to hinder, delay, or defraud any creditor can be set aside even as to future creditors whose claims did not arise until after the transfers took place. *See* Ala. Code § 8-9A-4. Under bankruptcy law, the chapter 7 trustee can file actions to set aside such transfers and bring those assets into the bankruptcy estate for the benefit of all creditors, if warranted, and those assets will then be liquidated for the benefit of all creditors based upon the priority scheme set out in the Code. *See* 11 U.S.C. § 548. As discussed above, to the extent that the Seventh Circuit dicta cited by SEPH from *McClellan*, 217 F.3d 890, suggests that a debtor/transferor could create a new, nondischargeable debt to one creditor in the amount of the allegedly fraudulently transferred property that would support a claim under § 523(a)(2), the court declines to follow that suggestion under Alabama or bankruptcy law. And in *McClellan*, the creditor had a security interest (although unperfected) in the transferred assets. *See id.* at 892. Here, SEPH has never contended that it had a security or other interest in the transferred items. *See, e.g.*, *In re Wigley*, 533 B.R. 267, 273 (B.A.P. 8th Cir. 2015) (distinguishing *McClellan* on that basis).

Bankruptcy Code § 727(a)(2)(A) bars the discharge of a debtor who has transferred his property with intent to hinder, delay, or defraud creditors within a year of the bankruptcy petition. A holding that a debtor is not entitled to a discharge under this section benefits all creditors. But to hold that a single unsecured creditor like SEPH can have its debt declared nondischargeable under § 523(a)(2)(A) because of allegedly fraudulent transfers which took place long after its debt arose (and which affect all unsecured creditors equally) would conflate and confuse that section with § 727(a)(2).

Finally, the court is not persuaded by SEPH's attempt to distinguish *Shahid* on the ground that, unlike in *Shahid*, the transfers here took place before the creditor obtained a state court judgment against debtor. Although the fact that the transfers in *Shahid* took place after the judgments had already been entered added color to the point that the judgments were not "obtained by" the alleged fraud, all that is required under § 523(a)(2) is that the extension of credit arose as a result of fraud – not the judgment being entered on the extension of credit.[5]

Conclusion

To the extent the court has not specifically addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. For the reasons discussed above, Gaddy is entitled to judgment as a matter of law on SEPH's claims brought pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). Therefore, the court grants the debtor's motion (doc. 16) for judgment on the pleadings and will enter a separate order dismissing the adversary proceeding.

Dated: January 5, 2018

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE

[5] Although not argued in conjunction with the § 523(a)(6) claim, this analysis similarly applies to the "injury" element of that claim.

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In Re:

CARY PAUL SHAHID, Case No. 15-30868-HAC

Debtor.

BANCORPSOUTH BANK,

Plaintiff,

v. Adv. Proc. No. 16-03009

CARY PAUL SHAHID,

Defendant.

OPINION

This adversary proceeding is before the Court on the defendant debtor's motion (doc. 41) to dismiss the amended complaint seeking exception from discharge. The plaintiff obtained substantial state court judgments against debtor and alleges that the debtor then undertook a variety of transfers and other actions to avoid collection. The legal issue is whether the debtor's alleged fraudulent transfers and other actions taken after the judgments will support a claim that the judgments are non-dischargeable pursuant to Bankruptcy Code §§ 523(a)(2) and/or (6). For the reasons stated below, the Court finds that they do not.

This Court has jurisdiction under 28 U.S.C. §§ 1334(b) and 157 and the order of reference of the district court. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I), and this Court has authority to enter a final order.

The amended complaint (doc. 24) alleges that in September and October 2011 BancorpSouth Bank ("BCS") obtained two final judgments totaling over $1.8 million against debtor Cary Shahid in Florida state court based on defaulted promissory notes he personally guaranteed. [Doc. 46, ¶ 1.] BCS alleges that Shahid thereafter undertook a host of activities to thwart collection efforts, including setting up new corporate entities and diverting funds into accounts owned by those entities (doc. 24, ¶ 4); causing money owed to him to be paid to another corporation (id., ¶ 5); and causing funds of a corporation in which he owned a 60% interest to be paid to a shell corporation, his girlfriend, other creditors, and himself (id., ¶¶ 7-13).

To withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which is applicable pursuant to Federal Rule of Bankruptcy Procedure 7012, a complaint must contain sufficient factual material to state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 566 U.S. 662, 129 S.Ct. 1937, 1949 (2009). In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must accept all factual allegations (although not legal conclusions) in the complaint as true. Id., 129 S.Ct. at 1949-50.

Bankruptcy Code § 523(a)(6) creates an exception to discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity …." Other courts have held that a debtor's actions which occurred after the debt had been incurred or, as here, after judgment on the debt had already been entered, cannot support a § 523(a)(6) claim because the "injury" is the underlying debt. For example, in In re Best, 109 Fed. Appx. 1 (6th Cir. 2004), the Sixth Circuit held that a debtor's postjudgment efforts to thwart collection of a judgment debt did not render that debt nondischargeable because it was not the postjudgment actions which gave rise to the debt. The facts alleged in this case are similar to those in In re Kirwan, No. 15-14012-MSH, 2016 WL 5110677 (Bankr. D. Mass. 2016). The plaintiffs there obtained substantial state

court judgments against the debtor and a corporation he owned; the debtor then set up another corporation and transferred the old corporation's business and assets to the new one. The court rejected the § 523(a)(6) claim based on transfers occurring after the state court judgment:

> As was the case in Best [supra], the conduct alleged in Count III occurred after the judgments were entered. Thus, any injury resulting from the alleged transfers could not have given rise to the debt at issue, and therefore any injury--even if willful and malicious--cannot render the amount due under the state court judgments nondischargeable under Bankruptcy Code § 523(a)(6).

Id. at *4. The court found that the § 523(a)(6) claims also failed because the plaintiffs did not have any interest in the property that was allegedly fraudulently transferred. Id. at *4. See also Rockstone Capital, LLC v. Walker-Thomas Furniture Co., et al, No. 04-01581, 2007 WL 2071626 (Bankr. D.D.C. 2007) (postjudgment transfers of property on which creditor did not have a lien insufficient for § 523(a)(6) claim).

BCS alleges that Shahid injured its "right to recover amounts he owes it and its right to collect on its judgments." [Doc. 24, ¶ 15.] However, hindering the bank's inchoate "right to recover" or "right to collect" does not constitute a separate injury to it or its property under § 523(a)(6). See In re Saylor, 108 F.3d 219, 221 (9th Cir. 1997) (creditor's potential fraudulent transfer remedies do not constitute "debt" or "property" under § 523(a)(6)).

The cases cited by BCS are distinguishable because they do not involve situations, as here, where the debt sought to be nondischargeable arose before the transfers complained of and the creditor did not have an interest in the transferred property. The creditor's § 523(a)(6) claim against the debtor in In re Jennings, 670 F.3d 1329 (11th Cir. 2012), arose from the fraudulent transfer itself. The creditor had already obtained a fraudulent transfer judgment of $3.9 million before filing the § 523(a)(6) case, and it was that fraud judgment, not the related tort claim judgment of $24.8 million, which was held nondischargeable. The Eleventh Circuit

distinguished Saylor, supra, by noting that the creditor there, as here, did not already have a fraudulent transfer judgment. 670 F.3d at 1333-34. In In re Monson, 522 B.R. 721 (Bankr. N.D. Fla. 2015), the debtor had contractually agreed to liquidate his company's equipment to repay a creditor if the business was not profitable; instead, he opened a new business and moved the equipment to his new business. Unlike the case at hand, the creditor had an interest in the transferred property (reflected by a potentially defective financing statement), and the debtor fraudulently breached his separate obligation to surrender the collateral. Similarly, in In re Garcia, 442 B.R. 848 (Bankr. M.D. Fla. 2011), the debtor agreed to give the home equity lender a security interest in real property but quickly sold it before the mortgage could be recorded and the security interest perfected. The debtor's fraudulent transfer of the bank's collateral was a separate injury to the creditor's property interest which supported a § 523(a)(6) claim. Id. at 852.

Because (1) the debtor's "injury" to BCS resulted from promissory notes and guaranties executed and reduced to judgment before the alleged fraudulent transfers and other activities took place and (2) BCS has not alleged any direct injury to itself or any property in which it held an interest, the Court finds that the motion to dismiss should be granted as to the § 523(a)(6) claim.

BSC's amended complaint also contains a claim for nondischargeability under Code § 523(a)(2). Section 523(a)(2)(A) provides that a debtor is not discharged "from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement representing the debtor's or an insider's financial condition …." [Emphasis added.] The U.S. Supreme Court recently held in Husky Int'l Electric, Inc. v. Ritz, 136 S. Ct. 1581 (2016), that a course of action may constitute fraud under this section and that a specific fraudulent statement

is not required. However, the court in Husky did not eliminate the "obtained by" requirement of § 523(a)(2)(A); the individual debtor in Husky was not liable on the original trade debt, and his liability to the creditor arose from the fraudulent transfers he caused the original corporate obligor to make. Husky in dicta may open the door for potential § 523(a)(2) claims against debtor-transferees who have received fraudulently transferred assets. See Deborah Thorne & Brett Newman, What's Next After Husky v. Ritz: Has Pandora's Box Been Opened?, 35 Am. Bank. Inst. J. 20 (2016). However, debtor Shahid here is the alleged fraudulent transferor; with exception of some assets of Eastern Lake Restaurant (doc. 24, ¶ 4), he is alleged to have fraudulently transferred his own assets.

The Supreme Court in Husky did not rule on the "obtained by" issue and remanded the case for further proceedings on that issue. The case at hand differs because Mr. Shahid was already obligated on the original debt, which is the debt plaintiff seeks to have declared non-dischargeable. The debtor in Husky was not; his liability arose from the alleged fraudulent transfer. This Court is not willing to extend the Husky dicta to find that debts "obtained by" Shahid's guaranty of promissory notes and then reduced to judgment can somehow be "re-obtained" and thus rendered nondischargeable by later alleged fraudulent actions.

The two judgments against debtor totaling $1.8 million described in the complaint arose from defendant's guaranty of promissory notes, not from any fraud and not from the alleged later fraudulent transfers and other activities complained of. The debts represented by the judgments were thus not "obtained by" fraud -- whether a course of action or fraudulent statement. Even if the "obtained by" fraud requirement was potentially expanded in Husky, where the debtor's liability arose not from the original debt but his later fraudulent transfers, the judgments which the bank seeks to have declared non-dischargeable do not meet that standard.

For the reasons stated above, the Court will enter a separate order granting the motion to dismiss the amended complaint.

Dated: November 3, 2016

HENRY A. CALLAWAY
U.S. BANKRUPTCY JUDGE

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

BANCORPSOUTH BANK,
a Mississippi banking corporation,
Appellant,

v. Case No.: 3:16cv621-RV/EMT

CARY PAUL SHAHID,
Appellee.
_____/

ORDER

In September and October 2011, BancorpSouth Bank (BCS) obtained two final judgments totaling over $1.8 million against Cary Paul Shahid in Florida state court based on defaulted promissory notes that he personally guaranteed. BCS contends that Shahid thereafter engaged in various acts and fraudulent transfers to thwart collection efforts. On August 21, 2015, Shahid filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code, and BCS filed an adversary proceeding seeking to except its claims against Shahid from discharge, pursuant to Bankruptcy Code §§ 523(a)(2)(A) and/or 523(a)(6).[1] By written order dated November 3, 2016, the Bankruptcy Court

[1] Section 523(a) provides, in relevant part, that:

> A discharge under [Chapter 11] 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;
>
> . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

(Judge Henry A. Callaway) granted Shahid's motion to dismiss the complaint, holding that his purported fraudulent transfers and other acts to avoid collection—which were taken *after* BCS's state court judgments—do not render the debts non-dischargeable under Section 523(a)(2)(A) and/or Section 523(a)(6). BCS has filed this appeal.

District courts function as appellate courts in reviewing decisions reached by bankruptcy courts. *See, e.g., In re Graupner*, 537 F.3d 1295, 1299 (11th Cir. 2008) ("In a bankruptcy case, the district court functions as an appellate court . . . .") (Vinson, J.); *In re Colortex Indus. Inc.*, 19 F.3d 1371, 1374 (11th Cir. 1994) (noting same). I review the Bankruptcy Court's legal conclusions *de novo*, but I must accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. *See In re JLJ Inc.*, 988 F.2d 1112, 1116 (11th Cir. 1993).

After full review, I agree with Judge Callaway for all the reasons articulated in his order. As Shahid has succinctly and persuasively noted in his brief on this appeal, the fundamental error in BCS's position is the lack of a critical element in both its claim for relief under Section 523(a)(2)(A) and Section 523(a)(6)—to wit, the nexus between the "debt" and the allegedly improper conduct. As to the former statute, the debt that BCS seeks to except from Chapter 11 discharge are the two pre-petition state court judgments that were rendered against Shahid based upon his promissory note guarantees. *That* debt was not a "debt for money, property, services, or an extension, renewal or refinancing of credit *to the extent obtained by . . . actual fraud*" as required under Section 523(a)(2)(A). *See In re Wilson*, 2017 WL 1628878, at *8 (Bankr. N.D. Ohio 2017) ("The evidence is that all of the [allegedly fraudulent transfers of property and assets] occurred after the judgment against Defendant in the State Court Action was entered. Any injury . . . arising from the alleged fraudulent transfer(s) could not have given rise to the judgment debt at issue.") (citing and discussing multiple cases, including *In re Vanwinkle*, 562 B.R. 671 (Bankr. E.D. Ky. 2016) (judgment debt for

contract damages not rendered non-dischargeable by allegedly fraudulent scheme to frustrate collection efforts)).[2]

Nor was the debt a "debt for" willful and malicious injury by Shahid to another entity, or to the property of another entity, as required by Section 523(a)(6). *See, e.g.*, *In re Best*, 109 Fed. Appx 1, 5 (6th Cir. 2004) (acknowledging the evidence in that case suggesting the Bests willfully disposed of assets to avoid repaying Steier; concluding, however, that does not render the debt nondischargeable under § 523(a)(6): "Even if the Bests disposed of or concealed assets in a way they knew would prevent Steier from collecting the judgment debt, it is of no avail to Steier because the concealment occurred *after* that debt arose. Thus the concealment could not have caused or given rise to the judgment debt, as required for nondischargeability under § 523(a)(6).") (emphasis in the original).[3]

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[2] In *Husky Int'l Electronics v. Ritz*, — U.S. —, 136 S. Ct. 1581 (2016), the Supreme Court suggested in dicta that Section 523(a)(2) might permit claims against debtor transferees who have received fraudulently transferred assets. However, as Judge Callaway correctly noted, that dicta has no bearing where—as here—the debtor is the purported fraudulent transferor. *In re Wilson, supra*, 2017 WL 1628878, at *8 (citing Judge Callaway's decision in this case with approval and stating: "while *Husky* in dicta may open the door wide for § 523(a)(2) claims against debtor-transferees who have received fraudulently transferred assets, the Defendant here is the alleged transferor of his own property").

[3] In *In re Best*, the Sixth Circuit cited with approval *In re Smith*, 249 B.R. 748 (Bankr. S.D. Ohio 2008), wherein the bankruptcy court stated:

> For a debt to fall within this exception to discharge, the creditor has the burden of proving that it sustained an injury *as a result* of a willful and malicious act by the debtor. Thus, a debtor's actions must be determined to be the cause of the creditor's injury. In this case, there is no dispute that the creditor's "injury," the deficiency balance, is a pre-petition debt. Even if the Debtors' alleged post-petition actions to thwart repossession of the creditors' security are proven true, they cannot be the cause of the creditor's pre-petition claim. Consequently, these actions do not form the basis for declaring the deficiency debt nondischargeable under § 523(a)(6).

Id. at 750 (emphasis in the original).

Accordingly, the decision and judgment rendered by the Bankruptcy Court on November 3, 2016, is hereby AFFIRMED.

DONE and ORDERED this 28th day of September 2017.

/s/ Roger Vinson
ROGER VINSON
Senior United States District Judge