UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: JAMES E. DIDIO,	:	**Chapter 7**
Debtor.	:	**Bky. No. 18-12499 ELF**
MARLA J. GREEN,	:	
Plaintiff,	:	
v.	:	
JAMES DIDIO,	:	**Adv. No. 18-161 ELF**
Defendant.	:	

M E M O R A N D U M

I. INTRODUCTION

In this adversary proceeding, creditor Marla Green ("Green") alleges that her ex-husband, debtor James Didio ("the Debtor"), defrauded her of millions of dollars during their six (6) year marriage. Green filed the instant adversary to have the debt declared nondischargeable under 11 U.S.C. §§ 523(a)(2), (a)(4), and (a)(6).

Presently before the court is the Debtor's Motion for Summary Judgment ("the Motion").

As explained below, I will grant the Motion because Green has not met her burden at the summary judgment stage of producing evidence that supports the elements of her claims.

II. PROCEDURAL HISTORY

The Debtor filed his chapter 7 bankruptcy petition on April 14, 2018. Green filed this adversary complaint on July 16, 2018. (Doc. #1). The Debtor answered the complaint on September 7, 2018 and supplemented his answer on October 11, 2018. (Doc. #'s 4, 11).

The Debtor filed the Motion on February 25, 2019. (Doc. #25). After some delay, Green filed a response to the Motion on May 8, 2019.[1] (Doc. #45).

III. SUMMARY JUDGMENT STANDARD

I described the basic summary judgment framework in a prior opinion as follows:

> Pursuant to Fed. R. Civ. P. 56(a), applicable in this adversary proceeding through Fed. R. Bankr. P. 7056, summary judgment must be granted to a moving party when, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. E.g., Steele v. Cicchi, 855 F.3d 494, 500 (3d Cir. 2017); In re Bath, 442 B.R. 377, 387 (Bankr. E.D. Pa. 2010); see also In re Asbestos Prods. Liab. Litig. (No. VI), 837 F.3d 231, 235-36 (3d Cir. 2016).
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> On a motion for summary judgment, the court's role is not to weigh the evidence, but to determine whether there is a disputed, material fact for resolution at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one in which sufficient evidence exists that would permit a reasonable fact finder to return a verdict for the non-moving party. Id. at 248, 106 S.Ct. 2505. A fact is material "if its existence or nonexistence might impact the outcome of the suit ... A dispute over a material fact is 'genuine' if nonexistence might impact the outcome of the suit ...." Betz v. Satteson, 715 Fed. Appx. 213, 215 (Nov. 16, 2017) (non precedential) (quoting Wiest v. Tyco Elecs. Corp., 812 F.3d 319, 328 (3d Cir. 2016)) (additional citation omitted).

[1] Green was initially granted an extension to file a response. However, instead of responding in this (new) time frame, Green's counsel moved to withdraw (with Green's consent). I conditioned the grant of leave to withdraw on counsel continuing to represent Green through the filing of a response to the Motion. I also granted a further extension of time to file the response. (Doc. #42). Green's counsel filed the response and was permitted to withdraw his appearance. Green is now *pro se*.

> The parties' respective burdens of proof also play a role in determining the merits of a summary judgment motion. See In re Polichuk, 506 B.R. 405, 421 (Bankr. E.D. Pa. 2014).
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> If the movant is the defendant or the party without the burden of proof, the movant must demonstrate the absence of a genuine issue of material fact, but the movant is not required to support the motion with affidavits or other materials that negate the opponent's claim. Rather, the movant may assert that the party with the burden of proof has not come forward with evidence to support one or more elements of its claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-34, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In re Boltz-Rubinstein, 596 B.R. 494, 501 (Bankr. E.D.Pa. 2019)

This case warrants a more detailed examination of the Celotex summary judgment framework.

When a party moving for summary judgment does not have the ultimate burden of proof at trial, it may simply identify deficiencies in the non-moving party's arguments and record; the moving party need not support its position with affirmative evidence. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000). Courts routinely describe this process as "pointing out" essential deficiencies and indicate that the hurdle for a moving party to clear is relatively low. Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998) ("a movant may make its prima facie demonstration simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim"); see also Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 265 (3d Cir. 2014) ("Where a non-moving party fails sufficiently to establish the existence of an essential element of its case on which it bears the burden of proof at trial, there is not a genuine dispute with respect to a material fact and thus the moving party is entitled to judgment as a matter of law") (citation omitted).[2]

[2] For a further discussion of the nature of the moving party's burden in this context, see Polichuk, 506 B.R. at 422–25.

In response to such a summary judgment motion, a non-moving party who has the burden of proof may make a "Celotex rebuttal" – i.e., providing additional, admissible evidence in its response to the summary judgment motion sufficient to establish the existence of a material factual dispute. See, e.g., Wiest v. Tyco Electronics Corp., 812 F.3d 319, 328 (3d Cir. 2016). The non-moving party is "not required to prove his entire case," but only to raise a triable factual dispute over the deficient aspects pointed out by the moving party. Higgins v. Scherr, 837 F.2d 155, 157 (4th Cir. 1988).

The additional evidence offered in a Celotex rebuttal may be made by affidavits, but "the affidavits must be made on personal knowledge, must set forth facts which would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated." Gallagher v. Magner, 619 F.3d 823, 842 (8th Cir. 2010) (quoting Postscript Enters. v. City of Bridgeton, 905 F.2d 223, 226 (8th Cir. 1990)).

If a Celotex rebuttal raises a disputed issue of material fact, summary judgment must be denied. However, if the respondent fails to raise such an issue, then the moving party is entitled to summary judgment. Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd of Educ., 587 F.3d 176, 197 (3d Cir. 2009) (summary judgment granted when supplemental evidence offered in Celotex rebuttal could not allow plaintiff to win at trial).

IV. SUMMARY

The Debtor's Motion seeks summary judgment for two (2) distinct reasons.

First, the Debtor argues that Green's §§523(a)(2) and (a)(4) claims both require proof of fraud.[3] The Debtor invokes the doctrine of collateral estoppel. He argues that the material facts were determined in prior litigation (an arbitration) between the parties and that Green is precluded from relitigating those facts in this adversary proceeding. The Debtor further contends that the established facts defeat Green's causes of action.

Second, the Debtor relies on the summary judgment framework laid out in Celotex. Under Celotex, Green, as the party with the burden of proof, must produce some evidence supporting each element of her claims in order to establish the existence of a disputed issue of material fact that, if decided in her favor, would permit her to succeed at trial. Given the admissible evidence Green has produced, the Debtor contends that she failed to meet her burden.

As explained below, I conclude that the doctrine of collateral estoppel is applicable, but that the Debtor's argument is only partially correct. While certain facts were conclusively determined in the arbitration, those facts do not negate the elements of Green's claims. However, as stated at the outset, the Debtor is entitled to summary judgment based on Green's failure to offer sufficient evidence to support her claims.

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[3] This argument is overstated. As explained in Part VII.B, supra, under §523(a)(4) a debt may be determined nondischargeable based on defalcation by a fiduciary. Defalcation requires gross recklessness, not an intent to defraud.

V. COLLATERAL ESTOPPEL

A. Pennsylvania Law Applies

The doctrine of collateral estoppel (also known as issue preclusion), is based upon the principle that "a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." Dici v. Commw. of Pa., 91 F.3d 542, 547 (3d Cir. 1996) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107, 111 S.Ct. 2166, 2169, 115 L.Ed.2d 96 (1991)).

The application of collateral estoppel in a federal court action based on a prior state court judgment typically is grounded in the federal full faith and credit statute which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. §1738; accord Marrese v. Amer. Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). Thus, in determining whether the doctrine bars relitigation of an issue previously determined by a state court, a federal court must apply state law to evaluate whether relitigation would be precluded in the courts of the state in which the initial litigation took place. Swineford v. Snyder County PA, 15 F.3d 1258, 1266 (3d Cir. 1994) ("Federal courts must give a state court judgment the same preclusive effect as would the courts of that state"); see also In re Mickletz, 544 B.R. 804, 813–14 (Bankr. E.D. Pa. 2016).

Thus, I apply Pennsylvania law of collateral estoppel in this case.

B. The Required Elements for the Application of Collateral Estoppel

Under Pennsylvania law, collateral estoppel applies when:

(1) an issue is identical to one that was presented in a prior case;

(2) there has been a final judgment on the merits of the issue in the prior case;

(3) the party against whom the doctrine is asserted was a party in, or in privity with a party in, the prior action;

(4) the party against whom the doctrine is asserted, or one in privity with the party, had a full and fair opportunity to litigate the issue in the prior proceeding; and

(5) the determination in the prior proceeding was essential to the judgment.

E.g., Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 511 n.30 (Pa. 2016); In re Stevenson, 40 A.3d 1212, 1228 (Pa. 2012); Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47, 50–51 (Pa. 2005).[4]

C. The Prior Arbitration Decision Has Some Collateral Estoppel Effect

In this case, the prior adjudication was an arbitration. While the Pennsylvania Supreme Court has reserved judgment on the issue, see Taylor 147 A.3d at 511,[5] both the Pennsylvania Superior Court and Commonwealth Court have held that an arbitrator's ruling may serve to preclude further litigation of issues if the arbitral process otherwise met all elements for estoppel. See Irizarry v. Office of Gen. Counsel, 934 A.2d 143, 150 (Pa. Commw. Ct. 2007); Phillip v. Clark, 560 A.2d 777, 780 (Pa. Super. Ct. 1989).

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[4] Many reported cases state a four (4) part test for collateral estoppel, omitting the "essential to the judgment" element. See, e.g., Greenway Ctr., Inc. v. Essex Ins. Co., 475 F.3d 139, 147 (3d Cir. 2007); Tucker v. Phila. Daily News, 848 A.2d 113, 119 n.11 (Pa. 2004); Ewing v. Ewing, 843 A.2d 1282, 1286 (Pa. Super. Ct. 2004). Given the Pennsylvania Supreme Court's continued articulation of the five (5) part test, I conclude that the fifth element is required, notwithstanding the inconsistency in the reported decisions.

[5] In Taylor, the Court described the preclusive effect of arbitration in judicial proceedings as "uncertain." 147 A.3d at 512.

One federal district court agrees that an arbitration may have collateral estoppel consequences under Pennsylvania law:

> Though we recognize that an unconfirmed arbitration award like the one before us is not a 'judicial proceeding' entitled to full faith and credit . . . courts have nevertheless often recognized such awards as having preclusive effect, see, e.g., Witkowski v. Welch, 173 F.3d 192, 199 (3d Cir.1999) ('[u]nder Pennsylvania law, arbitration proceedings and their findings are considered final judgments for the purposes of collateral estoppel") . . . .

Elbaum v. Thomas Jefferson Univ. Hosps., Inc., 2013 WL 6239593, at *6 (E.D. Pa. Dec. 3, 2013) (some citations omitted).

In the circumstances presented here, where Green and the Debtor engaged in a highly contested, lengthy arbitration (described below), I conclude that the Pennsylvania courts would preclude these parties from relitigating the factual and legal issues determined by the arbitrator, if the other elements for the application of collateral estoppel under Pennsylvania law are met.

D. The Arbitration Process and Decision

On August 7, 2015, Green and the Debtor entered into an agreement to arbitrate their marital disputes ("the Arbitration Agreement"). The agreed scope of the Arbitration Agreement was broad:

> all issues relating to the dissolution of the parties' marriage, including, without limitation, spousal support, temporary alimony, alimony, equitable distribution of marital property, interim and final counsel and expert fees, costs and expenses, interim issues that require the exercise of equitable powers, and all issues relating to discovery.

(Exhibit 1, Arbitration Agreement).

In addition, Paragraph 7 of the Arbitration Agreement provided:

> No confirmation of the Award by the Court shall be needed or required. The Award shall be fully enforceable as any other Agreement of the parties under the

> Divorce Code of 1980, as amended, and shall be subject to an action of contempt and award of counsel fees and costs in the event of non-compliance.

Id.

Michael Fingerman ("the Arbitrator") served as the Arbitrator. Prior to his appointment, the divorce court ordered the parties to make financial disclosures to the Savran Benson LLP accounting firm ("the Accountant") to permit the preparation of a forensic accounting report. The Accountant prepared a detailed forensic preliminary accounting report dated July 27, 2015 (Exhibit 3) ("the Report"). The Report described all inflows and outflows of money for both the Debtor and Green for the entire period of their marriage.

Between August 31, 2015 and November 17, 2017, the Arbitrator issued numerous procedural directives to the parties, including at least fourteen (14) directives related to pre-arbitration discovery. The arbitration proceedings were held on December 12 and 13, 2017, during which both parties and their respective counsel were in attendance ("the Arbitration").

On February 9, 2018, the Arbitrator issued his forty-nine (49) page (single-spaced) decision. (Exhibit 2, "the Arbitration Decision" or "Arb. Dec."). The Arbitration Decision described the parties' respective factual and legal positions regarding all of the economic issues arising from the dissolution of their marriage. The decision also exhaustively chronicled the parties' assets and liabilities, as well as major financial transactions that occurred during the marriage.

The factual findings regarding the economic history of the marriage formed the basis for the Arbitrator's decision on child support and the division of marital property. Those factual findings were largely based on the Report, which the parties agreed the Arbitrator could consider in arriving at his conclusions and fashioning an award. (Arb. Dec. at 11).

The Arbitrator awarded Green all the "net marital assets," including all three (3) pieces of real estate (described below), with the proviso that Green would be responsible for all prior and future debts related to the properties. He also determined that Green was obligated to pay Didio monthly child support, $270,000.00 in retroactive child support and alimony pendente lite. Didio was not awarded any post-divorce alimony. (See Arb. Dec. at 47-49).

E. The Parties are Precluded from Relitigating the Factual Issues Determined by the Arbitrator

In this §523(a) nondischargeability proceeding, I first must determine whether the parties are precluded from relitigating the Arbitrator's factual findings. For the reasons explained below, I conclude that those factual findings have preclusive effect because all five (5) elements of collateral estoppel are present.

The first question is whether the issues before me are the same as those that were before the Arbitrator. Under Pennsylvania law, when determining whether collateral estoppel bars relitigation of a mixed fact/law or a purely legal issue determined in a prior proceeding before an administrative agency, a court must examine the underlying policy of the statutes in the prior and current matter. If the court finds the policies underlying the two (2) statutes are not similar, preclusion will not apply. Odgers v. Com., Unemployment Compensation Board of Review, 525 A.2d 359, 362–68 (Pa. 1987); accord Dici, 91 F.3d at 548. However, when a court evaluates whether issues of "pure fact" decided in the prior administrative proceeding are preclusive, the policies underlying the competing statutes are irrelevant. Rue v. K-Mart Corp., 713 A.2d 82, 85 (Pa. 1998).

These cited cases are instructive insofar as they hold that issues of "historical facts" -- i.e., what happened and when it happened -- determined in a non-judicial tribunal may have collateral estoppel effect. The same principle should apply to arbitration decisions.

Thus, to the extent that the Arbitrator made findings of historical facts concerning the financial transactions that occurred during the Green-Debtor marriage, those facts are preclusive.

Next, the second element, a final determination of the prior action on the merits, has been satisfied, given the parties' agreement to be bound by the Arbitration Decision.

Third, it is indisputable that the parties in the two (2) proceedings are the same.

Fourth, there is no doubt that Green had a full and fair opportunity to litigate the issues. The length and intensity of the arbitration process, which lasted almost two and one-half (2 ½) years from inception to completion, demonstrate this.

Finally, I conclude that it was necessary for the Arbitrator to make detailed factual findings to determine the equitable distribution and support issues. The scope of the Arbitration necessitated consideration of all the economic issues arising from the parties' divorce case, which required analysis of numerous financial transactions involving millions of dollars. Therefore, the fifth and final element of collateral estoppel is satisfied.

For these reasons, I conclude that the findings in the Arbitration Decision preclude further litigation of the historical facts. Those facts provide the foundation for evaluating the merits of the Motion.

VI. FACTS

The following facts are established by the Arbitration Decision or are undisputed.

Green, now 60 years old, married the Debtor, now 65 years old, on December 19, 2008. They have one (1) child together, a daughter, who is now 10 years old. Their marriage was short lived. Green and the Debtor separated after approximately six (6) years on September 27, 2014. (Arb. Dec. at 1).

When Green married the Debtor, she had net assets in excess of $14 million. Green had approximately $5.7 million in multiple bank accounts, $1.2 million in jewelry, and two (2) pieces of real estate worth approximately $7.2 million. She also had recently received a total lump sum (two payments over two years) of $15.5 million and was entitled to ongoing annual payments of $680,000 under a divorce settlement with her first husband. Green used these resources to engage in several real estate transactions. Green already owned 1320 Monk Road, Gladwyne, Pennsylvania ("Monk Road"), but that property was subject to a $3.45 million mortgage. After receiving her divorce distribution, she paid off the entire mortgage. Green also bought 7507 Bayshore Drive, Margate, New Jersey ("Margate") for $2.95 million in cash. (Id. at 11-14).

When the Debtor entered the marriage, he had an Individual Retirement Account worth approximately $308k and a checking account worth approximately $14k. (Id. at 2). The Debtor was the CEO of Radnor Trust Company, a wealth management firm and bank branch that Green financed several years prior to their marriage. (Id. at 14-15). Green was also the President for Corporate Philanthropy at the time. Both Green and the Debtor ceased their employment with Radnor Trust Company in July 2009, seven (7) months after marrying. The entity ultimately closed in 2011. (Id. at 15).

The Debtor's only employment during the marriage after leaving the Radnor Trust Company in 2009 was self-employment in businesses funded by Green.

In November 2011, the Debtor and Green bought a controlling stake in a group of related gym businesses in Washington D.C. (Peak Performance). They also rented a penthouse apartment in Washington D.C. and purchased a private aircraft so that they could commute between Philadelphia and Washington D.C. to visit the business. (Id. at 15).

These businesses were never profitable. Acquiring the businesses drained the couple's liquid resources. In order to finance continued operations, the Debtor needed to tap into the equity in the couple's real estate.

In December 2011, Green transferred ownership of Margate into her and the Debtor's names jointly as tenants by the entireties and the couple took out a mortgage for $750,000 on the property. They then subdivided the lot, sold one of the two resulting parcels, paid off that mortgage, and took out $1 million mortgage on the remaining parcel.

In May 2012, Green executed a deed conveying Monk Road to herself and the Debtor as tenants by the entireties. Three (3) weeks later, the couple took out a $1.5 million mortgage on the property. One (1) year later, Green and the Debtor took out a second mortgage for $1.1 million against Monk Road, using the proceeds as the down payment to purchase a third property, 1211 Mirabeau Lane, Gladwyne, Pennsylvania ("Mirabeau"). The remainder of Mirabeau's purchase price of $3.8 million – plus $200,000 in fixtures – was financed by yet another mortgage. (Id. at 28-32).

The Debtor managed all aspects of every account, business, mortgage, and credit card held by himself or Green during their marriage. Over the course of their marriage, all the bank accounts were emptied, all funds and inflows were fully spent, all businesses failed, and all real

estate was sold or fully encumbered by mortgages.[6] The aircraft business's license to fly was revoked and the business sold its sole asset, a custom Airstream jet, at a loss. The gym business was evicted when it defaulted on its lease. Over the course of their six-year marriage, the Debtor and Green spent approximately $19 million.

There were no net assets available at the date of their separation. (Id. at 14-15, 24).

The Debtor filed a divorce complaint in the Montgomery County Common Pleas Court on December 1, 2014. See Didio v. Green, No. 2014-27093 (C.P. Mtgy.). The division of property became a sticking point in the divorce. The Debtor alleged the money was spent on failed businesses and to support the couple's lavish lifestyle. Green alleged that the Debtor not only dissipated their joint funds, but also stole much of the money and hid it in secret accounts. Thus, Green contended that she was entitled to recover whatever assets were in these secret accounts.

In 2015, Green and the Debtor agreed to arbitrate their disputes. The Arbitrator directed them to the Accountant who later prepared the Report, a detailed forensic accounting describing all inflows and outflows of money for both the Debtor and Green for the entire period of their marriage.[7]

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[6] The purchase prices of the real estate appear to indicate millions of dollars in net equity compared to the initial mortgage amounts. In fact, the real estate has not been maintained, and has lost much of its value. Monk Road's value as of the date of the Arbitration was $1.65 million lower than its purchase price, Margate lost $1.85 million in value, and Mirabeau was worth $550,000 less.

[7] While the Arbitration was ongoing, Green filed a civil suit in the Court of Common Pleas of Philadelphia alleging that the Debtor had defrauded her of millions of dollars and committed fraud in his capacity as Green's financial advisor. Green v. Didio, et al, No. 160302832 (C.P. Phila.).

According to Green, the purported fraud was accomplished in two (2) ways: sometimes the Debtor simply transferred money out of an account owned jointly with Green or solely by her. Other times he used their businesses as a conduit, paying (presumably inflated or false) business expenses out of Green's accounts and then using the money for his own benefit through the business. The proceeds of

The Arbitration Decision was issued on February 9, 2018. Adopting many of the Report's findings as his own, the Arbitrator found that the parties had "inflows" – cash available to spend – of around $12.7 million, obtained from the following sources:

Mortgages and refinances on real estate	$ 6.01 million
Proceeds from gym business	$ 1.19 million
Green's prior marital settlement direct payments	$ 1.65 million
Payouts from prior marital settlement trust	$ 1.45 million
Sale of one lot of real estate	$ 0.80 million
Sale of private aircraft	$ 0.564 million
Interest/dividends on investments	$ 0.480 million
Capital gains on investments	$ 0.396 million
Debtor's wages and unemployment	$ 0.058 million
Other	$ 0.071 million
TOTAL	**$ 12.70 million**

The couple spent their money ("outflows") in the following ways:

Credit Cards	$ 4.20 million
Checks/cash/withdrawals	$ 4.19 million
Real estate acquisitions	$ 4.07 million
Mortgage payments on real estate	$ 1.83 million
Purchase of gym business	$ 2.61 million
Private aircraft	$ 0.71 million
Mortgage payoff on sold lot	$ 0.75 million
Pre-marriage line of credit payoff	$ 0.14 million
Other uncategorized	$ 0.79 million
TOTAL	**$ 19.30 million**

The Arbitrator made an equitable division of the marital property with the aid of the Report. He awarded title to all real estate to Green alone. The Arbitrator made this division for several reasons.

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this fraud were purportedly placed into secret accounts. It is the debt from this purported fraud that Green alleges is nondischargeable in this bankruptcy. The state court civil suit was stayed by the instant bankruptcy.

Green raised the same issues in the Arbitration. The Arbitrator found that she produced no evidence of the existence of secret accounts. (See Arb. Dec. at 16, 24).

First, the Arbitrator found that Green failed to show that any secret accounts existed. (See Arb. Dec. at 16, 24). The remaining marital assets of value were held in the form of real estate.

Second, the Arbitrator observed that the Report found that all of the couple's assets had been spent during the marriage, but that the spending had not been "substantially by one party rather than the other," i.e., that expenditures were made for both Green and the Debtor, not for the Debtor's sole benefit out of Green's assets.

Third, the Arbitrator found that, because Green entered the marriage with unencumbered real estate and millions of dollars, it was equitable to distribute the only remaining marital property to her. The Arbitrator recognized that the three (3) real properties distributed to Green were "under water" on their mortgages and represented no net value. However, Green wanted to keep the properties, one of which she had owned for years before the marriage and to which she felt an emotional attachment.[8]

Two (2) months after the Arbitration Decision, on April 14, 2018, the Debtor filed his voluntary petition under chapter 7 of the Bankruptcy Code.

VII. GREEN'S NONDISCHARGEABILITY CLAIMS

The Complaint seeks a determination of nondischargeability based on two (2) Code provisions: 11 U.S.C. §523(a)(2)(A) and 11 U.S.C. §523(a)(4).

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[8] The Arbitrator's award required the Debtor to deed his interest in the three (3) properties – owned by the entireties – to Green by a certain date. Didio deeded over one (1) property but not the other two (2), and then filed this bankruptcy case. Consequently, some interest (likely minimal) in those two (2) properties became property of the bankruptcy estate. See 11 U.S.C. §541(a). In any event, the chapter 7 trustee has filed a "no-asset" report, indicating his belief that the value of the estate's interest in the properties, if any, is insufficient to warrant administering the properties in the bankruptcy case.

The Complaint makes one passing reference to 11 U.S.C. §523(a)(6) (debts incurred for "willful and malicious injury" are nondischargeable), but does not identify that provision in a separate count. Notwithstanding the sloppy pleading, the Complaint alleges that the Debtor converted Green's assets for his own use. The intentional tort of conversion is often employed as a basis for seeking a determination of nondischargeability under §523(a)(6).[9] Therefore, I conclude that the Debtor was on sufficient notice of the legal theory to treat §523(a)(6) as having been expressly pled as a separate count.

A. §523(a)(2)(A)

11 U.S.C. §523(a)(2)(A) states that a chapter 7 discharge does not discharge a 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 . . . .

Section 523(a)(2)(A) provides three (3) grounds for nondischargeability: "false pretenses," "false representations," and "actual fraud." E.g., In re August, 448 B.R. 331, 349–50 (Bankr. E.D. Pa. 2011).

The gravamen of Green's §523(a)(2)(A) cause of action is that the Debtor made numerous misrepresentations to procure money or property from her. (Compl. ¶95). Accordingly, Green's legal theory is that her claim arose from the Debtor's false representations. See In re Ricker, 475 B.R. 445, 456 (Bankr. E.D. Pa. 2012).

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[9] See, e.g., In re Dietrich, 595 B.R. 59, 66 (Bankr. E.D. Pa. 2018); In re Webb, 525 B.R. 226, 233 (Bankr. M.D. Pa. 2015).

Courts regard "false representations" as involving affirmative statements that are false or misleading. See, e.g., In re Giquinto, 388 B.R. 152, 165 n.26 (Bankr. E.D. Pa. 2008). There are five (5) elements comprising a false representations claim under §523(a)(2)(A):

1. the debtor expressly or impliedly made a false representation;
2. at the time of the representation, the debtor knew, or believed, it was false;
3. the false representation was made with the intent and purpose of deceiving the creditor;
4. the creditor justifiably relied upon the representation; and
5. the creditor sustained damage as a proximate result of the misrepresentation.

E.g., In re Ritter, 404 B.R. 811, 822 (Bankr. E.D. Pa. 2009); In re Feld, 203 B.R. 360, 365 (Bankr. E.D.Pa. 1996).

B. §523(a)(4)

11 U.S.C. §523(a)(4) provides that a debtor will not be discharged from any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]"

Section 523(a)(4) renders nondischargeable three (3) distinct types of debts: (1) certain debts arising while the debtor was acting in a fiduciary capacity; (2) debts arising from embezzlement; and (3) debts arising from larceny.

In this adversary proceeding, Green invokes the first category under §523(a)(4): the fiduciary prong.

To prevail under the fiduciary prong of §523(a)(4), a plaintiff first must prove that the debtor was acting in a fiduciary capacity. Here, the Debtor admits that he owed a fiduciary duty to Green. (Ans. to Compl. ¶ 105).

Once the threshold fiduciary relationship has been established, a plaintiff must then prove fraud or defalcation. Fraud in this context means intentional deceit, rather than implied or constructive fraud. Defalcation is the failure to account fully for funds handled in a fiduciary capacity. E.g., In re Bayer, 521 B.R. 491, 500 (Bankr. E.D. Pa. 2014). Defalcation requires a level of scienter involving either intentionally wrongful conduct or gross recklessness. In this context, gross recklessness refers to a conscious disregard or a willful blindness to a substantial or unjustifiable risk that the conduct at issue will violate the standard of care imposed on a fiduciary. Bullock v. BankChampaign, N.A., 569 U.S. 267, 274 (2013); see also In re Pearl, 502 B.R. 429, 440–42 (Bankr. E.D. Pa. 2013).

C. §523(a)(6)

I have summarized the elements of a nondischargeability claim under §523(a)(6) as follows:

> Section 523(a)(6) excepts from discharge any debt 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). "Willful" and "malicious" are distinct elements.
>
> The term "willful" refers to a deliberate or intentional injury, not just a deliberate or intentional act that leads to injury. [A]ctions taken for the specific purpose of causing an injury as well as actions that have a substantial certainty of producing injury are "willful" within the meaning of § 523(a)(6).
>
> "Malice" refers to actions that are wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will.
>
> Thus, [a plaintiff] must establish three (3) elements demonstrating that the debt arose from an injury . . . that was:
>
> (1) willful (i.e., involving deliberate and intentional conduct);
>
> (2) intended or substantially certain to cause injury; and
>
> (3) malicious (i.e., wrongful).

In re Kates, 485 B.R. 86, 100-01 (Bankr. E.D. Pa. 2012) (citing In re Conte, 33 F.3d 303, 307-09 (3d Cir. 1994) and omitting other citations) (quotations and footnote omitted).

VIII. DISCUSSION

A. Overview

As stated earlier, the Debtor seeks summary judgment for two (2) distinct reasons.

First, he invokes the collateral estoppel doctrine and asserts that the Arbitration Decision preclusively decided facts that negate necessary elements of these claims. Second, he asserts that Green, as the party with the burden of proof, failed to offer evidence supporting each element of her claims in order to establish the existence of a disputed issue of material fact that, if decided in her favor, would permit her to succeed at trial.[10]

Green counters with two (2) arguments.

First, she suggests that the court should not reach the merits of either argument and instead, dismiss the Debtor's Motion as procedurally deficient.

Second, Green contends that the existing evidence, in the form of her verified statements, creates a disputed issue of material fact.[11]

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[10] The Debtor does not address Green's §523(a)(6) claim. This is understandable considering how inconspicuous the reference to the claim is in the Complaint. However, the Debtor's arguments described above are easily applied to the §523(a)(6) claim.

[11] To be precise, Green makes a third argument. She argues that none of the prior findings in the Arbitration have preclusive effect in this case. I need not discuss this further because I have already determined that the Arbitration Decision is entitled to preclusive effect insofar as the Arbitrator made findings regarding historical facts.

As explained below, I conclude that:

- Green's request for dismissal of the Motion on procedural grounds is without merit;
- the Debtor's collateral estoppel argument fails because the preclusive facts gleaned from the Arbitration Decision do not negate Green's claims; but that
- notwithstanding her arguments to the contrary, Green failed to produce admissible evidence that would support each element of her claims (i.e., her Celotex rebuttal was insufficient.

B. Green's Procedural Argument Fails

The case management order entered in this adversary required that any motion for summary judgment identify the "material facts that movant contends are not in dispute with supporting citations to the record. Failure to comply with this requirement shall be grounds for summary denial of the motion." (Doc. #5 at ¶7 & n.1). Green asserts that I should deny the Motion because it neither enumerates undisputed facts nor cites to any admissible evidence. She claims that the Motion is not in compliance with my order and therefore is deficient.

I decline Green's invitation to deny the Motion summarily.

Green is correct that the Motion may be technically deficient; it does not specify undisputed facts and is unclear regarding citations to certain exhibits. However, the pleading does direct me to the Arbitration Decision-- evidentiary matter that sets forth certain relevant, preclusive facts. Because these facts are established, the Debtor need not separately enumerate the undisputed facts in his Motion. See In re Aiello, 533 B.R. 489, 494 (Bankr. W.D. Pa. 2015) (summary judgment granted based solely on preclusively-established facts).

In short, the record is sufficient to permit evaluation of the Debtor's Motion without undue burden. Green's argument raises form over substance to an excessive degree; dismissing

a comprehensible pleading just so that it may be filed again with a more formal structure would be a waste of time and resources.

C. The Debtor's Collateral Estoppel Argument Fails

The Debtor contends that the lack of fraud or other misconduct was established during the Arbitration. It was not. While an equitable distribution dispute can involve the issue of fraud, there is no evidence in the Arbitration Decision that such a theory was actually determined adversely to Green.

In the Arbitration, Green alleged 'dissipation' – a theory whereby one spouse uses marital assets for his or her own benefit, wasting them improperly. See 23 Pa.C.S. §3502(a)(7) ("Factors which are relevant to the equitable division of marital property include…the contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker"); Schultz v. Schultz, 184 A.3d 168, 176 (Pa. Super. Ct. 2018) (court's 55-45 split of marital assets properly accounted for husband's dissipation of marital assets in spending on mistresses); Mellon Bank, N.A. v. Holub, 583 A.2d 1157, 1162 (Pa. Super. Ct. 1990) (court's award of 100% of marital assets to wife properly accounted for husband's dissipation in hiring a hitman to kill wife with marital funds).

Green argued in Arbitration that the Debtor spent their money on luxury items for himself while mismanaging businesses into the ground. (Arb. Dec. at 17). But the Arbitrator never made any specific findings regarding dissipation or the Debtor's culpability other than the finding that:

> It is . . . undisputed . . . that Wife's substantial pre-marital/non-marital assets and income were completely dissipated during the marriage, and that Husband was primarily responsible for the day-to-day management of the parties' finances.

This finding neither establishes nor refutes the existence of fraud or other intentional conduct substantially certain to cause harm, the standards of conduct required for a determination of nondischargeability under the Code provisions invoked by Green.

In short, there is an absence of identity of issues that prevents the use of collateral estoppel in the manner requested by the Debtor.

D. Green's Celotex Rebuttal Fails

1.

The Debtor argues that Green offers no evidence of the kind of fraud (or conscious disregard of fiduciary duties) that would support her claims under §§523(a)(2)(A) and (a)(4). The Debtor undoubtedly takes the same position with respect to the requirements of §523(a)(6): that Green lacks evidence of deliberate, wrongful conduct intended or substantially certain to cause harm.

If I considered only the record as of the filing of the Motion, Green would not be able to carry her burden of proof at trial, because the record consisted only of the Arbitration Agreement and the Arbitration Decision,[12] which, by themselves, do not establish the statutory elements of Green's nondischargeability claims. Thus, the Debtor certainly was able to assert, in good faith, that Green's hand must be forced – that she produce evidence supporting her claims or lose on summary judgment.

In attempting to make the Celotex rebuttal, Green attached Exhibits A through N to her Response (described below) and alleges that these documents would be admissible at trial and

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[12] Neither party suggests that discovery was conducted in this adversary proceeding.

would permit her to prevail on her fraud claim. Green is incorrect; the exhibits do not present competent, admissible evidence which, if credited, would allow her to prevail at trial.

2.

Green submitted Exhibits A through E, G and H (loan applications and personal financial statements) to show that the Debtor intentionally misrepresented his income and employment in an effort to qualify for mortgage loans. The exhibits purport to show that the Debtor inaccurately claimed a hefty annual salary from Radnor Trust Company, an entity that was closed at the time he made the disclosures.

Green also offered Exhibits I through L (tax returns and K-1's from businesses) to show that the Debtor's income was minimal at the time he claimed substantial income on the loan applications.

Exhibits M and N consist of approximately five hundred (500) pages of transcript from the Debtor's depositions. Green introduced the transcripts for a single purpose: to show that the "Debtor admitted in a sworn deposition, conducted on June 29, 2016 and July 1, 2016 that he did not have employment since 2009" even though he claimed on loan applications to be gainfully employed in 2012 and 2013. (Response ¶10). She refers to the depositions in a single sentence for that sole purpose.[13]

[13] I will limit Green to that sole purpose. It is not the court's function to do Green's work for her and comb through lengthy depositions searching for relevant, admissible evidence. Carlson v. Boston Scientific Corp., 856 F.3d 320, 325 (4th Cir. 2017) ("The responsibility to comb through the record in search of facts relevant to summary judgment falls on the parties—not the court"); see also Gardner v. First American Title Ins. Co., 218 F.R.D. 216 (D. Minn. 2003) ("Judges are not like pigs, hunting for truffles buried in briefs, and judges need not excavate masses of papers in search of revealing tidbits in support of litigants' motion, not only because rules of procedure place burden on litigants, but also because their time is scarce").

One (1) obvious flaw in Green's presentation is that she cannot establish that she justifiably relied on the Debtor's representation on the loan application that he was employed by Radnor Trust Company. As the owner of the bank, Green undoubtedly was aware that the entity ceased operations and that the Debtor had been unemployed for several years.

Perhaps an even more fundamental flaw in her argument is that while these exhibits might show that the Debtor defrauded the mortgage lenders, they do not show that the Debtor defrauded Green.[14]

The absence of evidence of a misrepresentation to Green (as opposed to the lending institutions) and the absence of evidence of justifiable reliance leaves Green short in her Celotex rebuttal. Even if the exhibits show that the Debtor knowingly lied on financial disclosures to obtain mortgages, Green presented no evidence that she relied upon or was tricked by these lies. These exhibits fall short of providing evidence supporting Green's fraud claim.

3.

Green's primary theory appears to be that the Debtor defrauded her by using proceeds of loans (secured by Green's assets) for improper purposes. This is a straightforward theory: according to Green, the Debtor falsely told Green he needed the loan proceeds for marital or business expenses; he then used these funds solely for his own purpose and benefit.

[14] Green's signature appears on Exhibits B, C, D, E, G and H, all of which are loan applications or personal financial statements. These documents contain claims about Green and the Debtor's finances that were indisputably false when made. While Green alleges that the Debtor may have forged her signature, she makes this allegation without any specificity and never describes which documents were forged. If her signature is present, Green either knowingly made misrepresentations or signed without reading the documents.

Again, Green's Celotex rebuttal fails because the exhibits in the record do not offer evidence supporting this theory.

The only exhibit that offers any potentially relevant evidence is Exhibit F to the Response, Green's verified civil complaint alleging fraud filed in the Philadelphia Common Pleas Court ("the State Court Complaint"). The complaint was signed by Green under a perjury-like penalty and **potentially** could serve as a Rule 56 affidavit in this case. See Pa. R. Civ. P. 76 (verified pleadings are subject to the penalties for unsworn falsification to authorities); 18 Pa.C.S. §4904(c) (unsworn falsification to authorities carries the same criminal penalty as perjury). However, use of the State Court Complaint in this manner to support or oppose a summary judgment motion is not permitted under the Federal Rules of Civil Procedure.

Rule 56 requires that affidavit must be based on personal knowledge and show that the affiant is competent to testify to the matters stated. Fed. R. Civ. P. 56(c)(4). Further, the affidavit must show "how the affiant or declarant came to have personal knowledge of the matter in the affidavit or declaration." 11 Moore's Federal Practice - Civil §56.94 (Matthew Bender 2019).

In this case, Green verified the allegations in the 244-paragraph State Court Complaint as "true and correct **to the best of my knowledge, information and belief**." (emphasis added). This qualification of her sworn statement renders the "complaint/affidavit" non-compliant with Rule 56(c)(4)'s requirement that the allegations be based on personal knowledge with a showing of a proper foundation for the testimony. See Estate of Gustafson ex rel. Reginella v. Target Corp., 819 F.3d 673, 677 n.4 (2d Cir. 2016); Olivares v. U.S., 447 F. App'x 347, 352 n.6 (3d Cir. August 10, 2011) (not precedential); U.S. v. Rocky Mountain Holdings, Inc., 782 F. Supp. 2d 106, 114 (E.D. Pa. 2011); see also Brown v. Nat'l Penn Ins. Servs. Grp., Inc., 2014 WL 4160421,

at *4 n.7 (E.D. Pa. Aug. 22, 2014), aff'd, 614 F. App'x 96 (3d Cir. June 10, 2015); In re McGuire, 450 B.R. 68, 72–73 (Bankr. D.N.J. 2011). For this reason, I will disregard the State Court Complaint in deciding the Motion.

Even if I parsed the State Court Complaint in an attempt to distinguish between allegations made on personal knowledge from those that are not, see Ondo v. City of Cleveland, 795 F.3d 597, 605 (6th Cir. 2015), the State Court Complaint would not satisfy Rule 56(c)(4).

The State Court Complaint contains several long passages describing how the Debtor purportedly defrauded Green of interest payments and loan proceeds. The allegations involve the movement of funds in and out of bank accounts. Green could not prove these allegations at trial merely by offering oral testimony about bank transfers without offering supporting documents.[15] Notwithstanding, the factual averments in the complaint rely on documents not in the record, or documents that may not exist. These averments are not based on personal knowledge and therefore do not provide the necessary evidentiary support for Green's claims.

Further, having failed to produce evidence in support of her fraud theory in the Arbitration, Green is collaterally estopped from relitigating her claim that the Debtor secreted monies to secret accounts.

The only potentially relevant, admissible evidence in the State Court Complaint is that the Debtor controlled all her finances and induced her to sign certain documents. These facts, along with the undisputed fact that the numerous transactions resulted in the dissipation of

[15] Perhaps the closest the State Court Complaint comes to presenting admissible evidence supporting Green's claim are the averments in paragraphs 57 and 75 suggesting that the Debtor falsely represented to her that her Margate and Monk Road properties had to be titled in their joint names in order to obtain bank financing. The problem is that the allegation only goes to one (1) of the elements of fraud: misrepresentation. Further, simply saying that the representation was false does not make it so; Green presented no evidence supporting her contention that this was a false statement, much less an intentional misrepresentation.

Green's considerable pre-marital assets are unfortunate, but insufficient by themselves to support a claim of fraud under §523(a)(2)(A) or willful and malicious injury under §523(a)(6).

The facts stated in the State Court Complaint on Green's personal knowledge do lay the predicate for Green's §523(a)(4) defalcation claim. The facts establish the fiduciary relationship, a fact admitted by the Debtor in his Answer to the Complaint. Nevertheless, the summary judgment record lacks evidence that would support judgment in her favor at trial. Green has not come forward with evidence to explain the cause of the business losses and the other dissipation of assets. The mere existence of those losses does not support the necessary factual finding that her entry into these transactions and her resultant losses were the product of the Debtor's gross recklessness in providing her with financial advice. Such a finding cannot be inferred merely from the existence of Green's severe financial losses themselves. Consequently, Green has not come forward with evidence to support an essential element of her claim under §523(a)(4) claim.

Green's Celotex rebuttal fails. I must grant the Motion.

IX. CONCLUSION

The facts of this case are disturbing. It is unfortunate that the abundant resources Green had after she emerged from her prior marriage have been squandered. However, the only real account of what occurred -- the Arbitration Decision -- is merely a non-judgmental identification of the parties' assets (primarily Green's assets) and the general manner in which they were dissipated. The Arbitration Decision passed no judgment on the respective culpability of Green and the Debtor for the incredibly wasteful spending that occurred during their marriage and made no findings that would permit this court to make that judgment in the context of rendering a dischargeability decision. To succeed in this litigation, Green had to develop

additional evidence to support her legal theory that the Debtor defrauded her or committed a fiduciary defalcation. She has not done so. Green has not demonstrated any triable issue of fact that would allow her to prove fraud or fiduciary misconduct. She cannot prevail at trial, so the Debtor is entitled to summary judgment.

As a result, subject to 11 U.S.C. §§523(a)(5) and (15), to the extent applicable in this bankruptcy, any debts owed by the Debtor to Green are dischargeable.

Date: September 26, 2019

ERIC L. FRANK
U.S. BANKRUPTCY JUDGE

cc: Marla Green
1320 Monk Road
Gladwyne, PA 19035