UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DIANE E. RAFFERTY, a/k/a DIANE MARTELL-RAFFERTY — CASE NO. 97-62066

Debtor — Chapter 7

MHD EMPIRE SERVICE CORPORATION

Plaintiff

vs. — ADV. PRO. NO. 97-70167

DIANE E. RAFFERTY, a/k/a DIANE MARTELL-RAFFERTY

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before this Court is a motion ("Motion") filed on December 24, 1997, by MHD Empire Service Corporation ("MHD") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated by reference in Federal Rules of

Bankruptcy Procedure ("Fed.R.Bankr.P.") 7056, in the adversary proceeding commenced by MHD on July 18, 1997, against Diane E. Rafferty ("Debtor"). The Motion was originally scheduled to be heard on January 6, 1998, but was adjourned on the consent of the parties.

The Court heard oral argument on the Motion on February 17, 1998, at its regular motion term in Syracuse, New York. The parties were afforded the opportunity to submit additional memoranda of law and the matter was submitted for decision on March 3, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and the subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), (b)(2)(A) and (I).

FACTS

MHD indicates that it is in the business of generating and servicing mobile home loans for banks by establishing and maintaining contacts with mobile home dealers. *See* Affidavit of William H. Kest ("Kest's Affidavit") at ¶ 2, incorporated by reference in MHD's statement of material facts, filed on December 31, 1997.[1] As a service to lenders, MHD states that it

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[1]Pursuant to 7056-1 of the Local Rules of Bankruptcy Practice for the Northern District of New York 7056-1, a party opposing a motion for summary judgment shall submit a statement of any material facts it contests with specific citations to the record. Although the Debtor filed a response on February 12, 1998, ("Debtor's Response") containing its view of the material facts, the Court
notes that the Debtor failed to cite to the specific provisions of MHD's statement of material facts with which she disagreed as required by L.R. 7056-1.

guarantees the mobile home loans by assuming the risk of the borrower's default. *See id*. at ¶ 3. Martell-Rafferty, Inc. ("Martell-Rafferty"), a corporation formed by the Debtor, was in the business of selling mobile homes. *See id*. at ¶ 5; Debtor's Response at ¶¶ 4-5. MHD indicates that its Vice-President, William Kest, acted as a liaison between Martell-Rafferty[2] and Empire of America Savings Bank ("Empire Bank").[3] *See* Kest's Affidavit at ¶¶ 6-7.

It is undisputed by MHD and the Debtor (collectively, the "parties") that on or about December 12, 1988, Brian and Cynthia Gorney (the "Gorneys") applied for a loan from Empire Bank through Martell-Rafferty to refinance an existing lien on their mobile home held by Norstar Bank in the amount of $24,625.56. *See* Kest's Affidavit at ¶ 9 and Exhibit 1; Debtor's Response at ¶ 7. Both parties agree that on or about December 13, 1988, Empire Bank issued a check in the amount of $25,855.14 payable to Martell-Rafferty representing the proceeds of its loan to the Gorneys which was deposited into an account at Merchants Bank in the name of Martell-Rafferty ("Account"). *See* Kest's Affidavit at ¶¶ 10-11 and Exhibits 2, 3; Debtor's Response at ¶¶ 8, 10. As of February 9, 1989, it is undisputed that the first lien on the Gorneys' mobile home held by Norstar Bank had not been paid off by Martell-Rafferty. *See* Kest's Affidavit at ¶ 13; Debtor's Response at ¶ 11. Both parties agree that on or about February 9, 1989, William Kest went to Martell-Rafferty's office and notified the Debtor that Norstar Bank's lien had not been satisfied. *See* Kest's Affidavit at ¶ 16; Debtor's Response at ¶ 11. On or about February 9, 1989, MHD

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[2]It is undisputed that the Debtor acted on behalf of Martell-Rafferty as an officer.

[3]MHD contends that the Debtor signed a dealership agreement with Empire Bank to act as a financing agent of Empire Bank. *See* Kest's Affidavit at ¶¶ 6-7. On the other hand, the Debtor states that Martell-Rafferty signed a dealer agreement with MHD. *See* Debtor's Response at ¶ 5. The Court notes that the parties failed to supply the Court with proof of their assertions. However, the Court finds that this is not a material fact.

states that the Debtor had a cashier's check issued to MHD in the amount of $23,725.51 from an account at Merchant's Bank[4] and the Debtor signed a promissory note payable to MHD in the amount of $903.05 for the proceeds of Empire Bank's loan to the Gorneys. *See* Kest's Affidavit at ¶ 17 and Exhibit 5. On or about February 10, 1989, MHD alleges that it paid off Norstar Bank's first lien as the guarantor of Empire Bank's loan to the Gorneys. *See id*. at ¶ 15 and Exhibit 4.

On or about December 1, 1988, both parties indicate that Robert and Poppy Husted (the "Husteds") applied for a loan from Empire Bank through Martell-Rafferty to refinance an existing lien on their mobile home held by Key Bank in the amount of $19,035.92. *See* Kest's Affidavit at ¶ 21 and Exhibit 6; Debtor's Response at ¶ 18. On or about December 5, 1988, it is undisputed that Empire Bank issued a check to Martell-Rafferty in the amount of $21,150 consisting of its loan to the Husteds which was deposited into the Account on or about December 7, 1988. *See* Kest's Affidavit at ¶¶ 22-23 and Exhibits 3, 7; Debtor's Response at ¶¶ 19-20. Both parties agree that Martell-Rafferty did not pay off the first lien held by Key Bank. *See* Kest's Affidavit at ¶ 24; Debtor's Response at ¶¶ 20-21. MHD asserts that as guarantor of Empire Bank's loan to the Husteds, it paid Key Bank's first lien. *See* Kest's Affidavit at ¶ 25.

The parties assert that on or about January 4, 1989, Terry Ricker and Jean Calkins ("Ricker/Calkins") applied for a loan from Empire Bank through Martell-Rafferty in order to refinance the first lien on their mobile home held by the Savings Bank of Utica in the amount of $13,715.63. *See id*. at ¶ 27 and Exhibit 9; Debtor's Response at ¶ 22. On or about January 5,

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[4]The cashier's check specifically references "Martell-Rafferty Inc." *See* Exhibit 5 of Kest's Affidavit. The Debtor indicates that MHD received $23,725.51 from Martell-Rafferty's account. *See* Debtor's Response at ¶ 12.

1989, the parties indicate that Empire Bank issued a check payable to Martell-Rafferty in the amount of $15,321.47 representing the proceeds of its loan to the Ricker/Calkins which was thereafter deposited into the Account. *See* Kest's Affidavit at ¶¶ 28-29 and Exhibits 10, 11; Debtor's Response at ¶¶ 23-24. MHD alleges that after learning that the first lien on the Ricker/Calkins mobile home had not been paid off, MHD paid the Savings Bank of Utica, as guarantor of Empire Bank's loan to the Ricker/Calkins. *See* Kest's Affidavit at ¶¶ 30-31.

It is undisputed that Henry and Karen Buckman (the "Buckmans") entered into a contract with Martell-Rafferty to purchase a mobile home on or about October 16, 1988. *See id*. at ¶ 33 and Exhibit 12; Debtor's Response at ¶ 26. The parties indicate that the Buckmans applied for a loan from Empire Bank on or about October 16, 1988. *See* Kest's Affidavit at ¶ 36; Debtor's Response at ¶ 29. MHD alleges that Martell-Rafferty did not notify Empire Bank that the Buckmans' mobile home purchase was contingent upon the sale of their residence. *See* Kest's Affidavit at ¶ 36. It is undisputed that on or about October 26, 1988, Empire Bank issued a check in the amount of $34,141 payable to Martell-Rafferty representing the proceeds of its loan to the Buckmans to finance their mobile home purchase. *See* Kest's Affidavit at ¶ 37 and Exhibit 18; Debtor's Response at ¶ 30. The Debtor states that these proceeds were deposited into the Account. *See* Debtor's Response at ¶ 31. MHD indicates that the Buckmans did not purchase a mobile home from Martell-Rafferty because the sale of their residence was never consummated. *See* Kest's Affidavit at ¶ 38. On or about December 27, 1988, the parties state that Martell-Rafferty used the proceeds of the Buckmans' loan to purchase a mobile home from Dave's Mobile Home Service, another local dealer. *See* Kest's Affidavit at ¶ 40 and Exhibit 19; Debtor's Response at ¶ 32. It is undisputed that MHD subsequently repossessed the mobile home which

MHD asserts was done to satisfy its obligation as guarantor of Empire Bank's loan to the Buckmans. *See* Kest's Affidavit at ¶ 43; Debtor's Response at ¶ 36. MHD indicates that the mobile home was sold for $7,606.48 less then the balance due on the Buckmans' loan. *See* Kest's Affidavit at ¶ 45.

MHD indicates that on or about September 18, 1991, it commenced an action in New York State Supreme Court, Onondaga Court ("State Court") by the service of summons and complaint upon the Debtor and Martell-Rafferty (collectively, the "defendants") alleging claims on the grounds of breach of contract, conversion, misrepresentation, and malicious, willful and wanton conversion.[5] *See* MHD's Motion at ¶ 5 and Exhibit "D." MHD's complaint sought damages in the amount of $41,261.08 for conversion,[6] $500,000 in punitive damages for malicious willful and wanton conversion and $41,261.08 for fraudulent misrepresentations. *See* Exhibit "D" of MHD's Motion. The Debtor filed an answer.[7] *See id*; Debtor's Response at ¶ 46. MHD filed a motion for summary judgment seeking $41,261.08 which the Debtor failed to oppose. *See* MHD's Motion at ¶¶ 7-9 and Exhibit "D." On or about March 6, 1995, the Honorable Leo F. Hayes, Justice of the State Court, granted MHD's motion for summary judgment pursuant to an order. *See* Exhibit "E" of MHD's Motion. Thereafter, on or about

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[5]Specifically, MHD alleged that the "[d]efendants' conversion of the proceeds of the . . . loans was malicious, willful and wanton, and was undertaken with reckless disregard for the harm that it would cause." *See* Exhibit "D" of MHD's Motion.

[6]Specifically, MHD sought damages against the Debtor in the amount of $903.05 on the promissory note with interest. As to the defendants, MHD sought (1) $19,035.92 plus interest for the converted proceeds of the Husted loan (2) $13,715.63 plus interest for the converted proceeds of the Ricker/Calkins loan (3) $7,606.48 plus interest for the remainder of the converted proceeds of the Buckman loan.

[7]The Debtor asserted affirmative defenses on the basis of failure to state a claim, statute of limitations and the doctrine of laches.

March 7, 1995, Judge Hayes entered a judgment ("State Court Judgment") against the Debtor and Martell-Rafferty in the amount of $63,945.11 which represented the sum of $41,261.08, plus interest, and costs. *See* Exhibit "F" of MHD's Motion.

On April 7, 1997, the Debtor filed a voluntary petition ("Petition") seeking relief under chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code").[8] The Debtor listed MHD as a secured creditor holding a claim based upon a Judgment in the amount of $63,945.11 in Schedule D attached to her Petition. MHD commenced an adversary proceeding against the Debtor with the filing of a complaint ("Complaint") on July 18, 1997, seeking a finding that the Judgment is nondischargeable pursuant to Code §§ 523(a)(2)(A), (a)(4) or (a)(6). *See* Complaint at ¶¶ 48-62. The Debtor filed an answer and counterclaim ("Answer") on August 20, 1997. The Debtor alleges in her Answer as an affirmative defense that she never personally engaged in any of the transactions and therefore by way of counterclaim seeks punitive damages in the amount of $15,000 for false and malicious pleading. *See* Answer at ¶¶ 12-13.

ARGUMENTS

MHD argues that collateral estoppel precludes the Debtor from contesting that the State Court Judgment arose from conversion. With respect to the State Court proceeding, MHD points out that it moved for summary judgment asserting conversion as the only basis for recovery. As such, MHD argues that the issue of conversion was raised and decided against the Debtor in State

[8]The Debtor listed a 60% interest in Martell-Rafferty which the Debtor indicated had been inactive since 1987. *See* Schedule B.

Court. MHD further asserts that pursuant to New York law, a judgment entered by default on a summary judgment motion can be given collateral estoppel effect. MHD contends that the Judgment was for intentional conversion and is, therefore, nondischargeable pursuant to Code § 523(a)(6).

In response, the Debtor argues that the Court should not apply collateral estoppel to any issues litigated in State Court. The Debtor contends that she had insufficient funds to hire counsel to oppose MHD's motion for summary judgment in State Court.[9] The Debtor asserts that she did not have a full and fair opportunity to litigate any issues in State Court. Additionally, the Debtor points out that the elements under Code § 523(a)(6) are proof of conduct by the Debtor that is both willful and malicious. According to the Debtor, the record, pleadings, order and Judgment of the State Court do not establish malice and intent. Therefore, the Debtor argues that MHD has failed to establish the identity of the issues between Code § 523(a)(6) and the State Court Judgment. The Debtor further asserts that there remain issues of fact as to whether that Judgment is nondischargeable.

Assuming *arguendo* that the Court does not give collateral estoppel effect to the State Court's determination of conversion, MHD argues that it is entitled to summary judgment herein. MHD points out that Kest's Affidavit indicates that the Debtor converted proceeds of loans given by Empire Bank to the Gorneys, Husteds, Ricker/Calkins, and Buckmans (collectively, "Loan Proceeds") resulting in MHD becoming obligated to payout $41,261.80 as the guarantor of those loans. It is MHD's position that there are no defenses to its Complaint creating any material

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[9]The Debtor indicates that her attorney filed an answer but then requested for leave to withdraw from the case. *See* Debtor's Memorandum of Law, filed March 3, 1998, at 4..

questions of fact precluding summary judgment in its favor. MHD argues that the Debtor's counterclaim fails to set forth a claim and should be dismissed.

The Debtor responds that summary judgment should not be granted to MHD because there is an issue of fact as to whether the Loan Proceeds received by Martell-Rafferty were misappropriated. The Debtor alleges that Martell-Rafferty received the Loan Proceeds and deposited the same in its corporate account for future disbursement. While acknowledging that corporate officers who commit a tort can be held personally liable, the Debtor argues that there is no evidence of tortious or fraudulent conduct by the Debtor. As such, the Debtor argues that she should not be responsible for the corporate debt.

DISCUSSION

Fed.R.Civ.P. 56(c), as incorporated by reference in Fed.R.Bankr.P. 7056, provides that summary judgment must be granted when there is "no genuine issue as to any material fact [such] that the moving party is entitled to judgment as a matter of law." *Federal Deposit Ins. Corp. v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991). In deciding a motion for summary judgment, a court must initially determine whether there are issues of material fact to be tried by drawing all inferences and ambiguities in favor of the nonmoving party. *See LaFond v. General Physics Servs. Corp*., 50 F.3d 165, 171 (2d Cir. 1995).

The issue before the Court is whether a debt arising from a State Court Judgment is nondischargeable pursuant to Code § 523(a)(6). MHD must establish by a preponderance of the evidence that its claim, the State Court Judgment, is nondischargeable. *See Grogan v. Garner*,

498 U.S. 279, 291, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991). MHD argues that the State Court previously determined that the Debtor's actions constituted conversion and this finding should be given preclusive effect through the application of the doctrine of collateral estoppel. Collateral estoppel essentially bars the relitigation of an issue previously litigated and decided in a prior action. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649, 58 L. Ed. 2d 522 (1979). The Supreme Court has concluded that the doctrine of collateral estoppel is applicable in Code § 523(a) dischargeability proceedings. *See Grogan*, 498 U.S. at 284-85 n.11, 111 S. Ct. at 658 n.11. In order to determine the preclusive effect of an issue previously decided by a state court, a federal court looks to the law of the state where the action occurred. *See New York v. Sokol* (*In re Sokol*), 113 F.3d 303, 306 (2d Cir. 1997) (citing 28 U.S.C. § 1738). Therefore, the Court will look to New York's preclusion rules as the State Court Judgment was obtained there. According to New York law, the applicability of the collateral estoppel doctrine depends upon whether the issue sought to be precluded in the present proceeding is (1) identical to an issue necessarily decided in the prior action; and (2) the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *See id.* (citing *Kaufman v. Eli Lilly and Co*., 65 N.Y.2d 449, 455-56, 482 N.E.2d 63, 67, 492 N.Y.S.2d 584, 588, (1985); *Ryan v. New York Tel. Co*., 62 N.Y.2d 494, 501, 467 N.E.2d 487, 491, 478 N.Y.S.2d 823, 827 (1984)). The party seeking to use collateral estoppel has the burden of establishing that an identical issue was decided in a prior forum and the party opposing its use has the responsive burden of establishing a lack of a full and fair opportunity to litigate. *See id*.

The Debtor argues that this Court cannot even discern what issues relative to the

pleadings and motion for summary judgment were decided in State Court because no findings of fact were made. Additionally, the Debtor asserts that the Judgment was granted solely on the basis of the Debtor's default and therefore no issues were actually decided by Judge Hayes. Although no transcript or findings of fact exists, there is a record consisting of the pleadings, motion papers, order, and Judgment in the State Court proceeding from which this Court can determine what issues were actually raised and decided. *See Financial & Real Estate Consulting Co. v. New York*, 63 A.D.2d 802, 803, 405 N.Y.S.2d 150, 152 (N.Y. App. Div. 3d Dept. 1978) (finding that although a motion for summary judgment was granted, it was clear by its decision that the court found no triable issues of fact and the record consisted of the papers presented on the motion). MHD sought relief in State Court on the grounds of (1) conversion, (2) breach of contract, (3) misrepresentation and (4) willful, wanton and malicious conversion and sought damages in the total amount of $582,522.16. MHD's motion for summary judgment in State Court, however, only requested damages in the amount of $41,261.08 plus interest.[10] For support, MHD incorporated the affidavits of John H. Callahan ("Callahan's Affidavit") and Kest's Affidavit which indicated that MHD was seeking summary judgment solely on the ground of conversion.[11] The Debtor filed an answer to MHD's complaint but failed to file any opposition or appear with respect to MHD's motion for summary judgment. Judge Hayes granted MHD's

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[10]Based upon the motion alone, MHD could have been asserting a recovery on the grounds of conversion or misrepresentation because MHD sought relief in this amount for both of these claims in its complaint.

[11]John H. Callahan asserted that the defendants converted the proceeds of loans, causing the plaintiff to expend $41,261.08 as the guarantor of the loans. *See* Callahan's Affidavit at ¶ 6. William H. Kest indicated that the defendants converted the Loan Proceeds which caused damage to MHD in the amount of $41,261.08. *See* Kest's Affidavit at ¶¶ 9-46.

motion for summary judgment pursuant to an order indicating that he gave "due deliberation" to the notice of motion, Callahan's Affidavit, Kest's Affidavit and the testimony of MHD's counsel at the hearing on the motion. *See* Exhibit "E" of MHD's Motion. Although Judge Hayes did not indicate which cause of action he granted summary judgment on, the Court finds that Judge Hayes made a determination on the claim of conversion which is the cause of action upon which MHD sought relief in its motion. *See Conroy v. Swartout*, 135 A.D.2d 945, 947, 522 N.Y.S.2d 354, 356 (N.Y. App. Div. 3d Dept. 1987) ("A motion for summary judgment on one claim in any action does not permit a searching of the record to grant summary judgment on a separate, unrelated claim or defense as to which no motion by any party has been made."). In granting summary judgment in favor of MHD, Judge Hayes found that there was no issue of fact that the Debtor converted the Loan Proceeds thereby entitling MHD to judgment in its favor as a matter of law. *See Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co*., 168 A.D.2d 610, 610, 563 N.Y.S.2d 449, 450 (N.Y. App. Div. 2d Dept. 1990) (noting that in order to grant summary judgment, a judge is required to make a determination based upon the merits). Thus, the State Court Judgment was granted on the merits and not simply because the Debtor failed to oppose the motion for summary judgment. Collateral estoppel applies to a judgment entered pursuant to an unopposed motion for summary judgment. *See Metropolitan Property and Liab. Ins. Co. v. Cassidy*, 127 Misc. 2d 641, 646, 486 N.Y.S.2d 843, 847(N.Y. Sup. Ct. 1985) (holding that the issue of liability was raised and determined in a prior state court action where the judge granted an unopposed motion for summary judgment); *see also Boorman v. Deutsch*, 152 A.D.2d 48, 53, 547 N.Y.S.2d 18, 22 (N.Y. App. Div. 1st Dept. 1989); *cf. Kaufman*, 65 N.Y.2d at 456-57, 482 N.E.2d at 68, 492 N.Y.S.2d at 589 (noting that collateral estoppel is

inapplicable to default judgments) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmts. d, e at 255-57).[12] Therefore, the Court finds that Judge Hayes necessarily determined that the Debtor's conduct constituted civil conversion.

After determining that the issue of conversion was necessarily decided in State Court, the question becomes whether there is an identity of the issues between the State Court action and the current proceeding. In other words, does a finding of civil conversion based upon New York law satisfy the elements of Code § 523(a)(6). Pursuant to New York law, conversion is the "'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.'" *Vigilant Ins. Co. of Am. v. Housing Authority*, 87 N.Y.2d 36, 44, 660 N.E.2d 1121, 1126, 637 N.Y.S.2d 342, 347 (1995) (citations omitted). In order to prevail on a cause of action for conversion, it is not necessary to establish a wrongful intent to assume or exercise control over another's property. *See Key Bank of New York v. Grossi*, 227 A.D.2d 841, 843, 642 N.Y.S.2d 403, 404 (N.Y. App. Div. 3d Dept. 1996)*; see also Pokoik v. Gittens*, 171 A.D.2d 470, 471, 567 N.Y.S.2d 49, 50 (N.Y. App. Div. 1st Dept. 1991) ("a cause of action for conversion need not allege or prove . . . that defendants acted in bad faith"). Indeed, liability for conversion exists when an act of dominion occurs under mistake or misrepresentation. *See Brown v. Garey*, 267 N.Y. 167, 170, 196 N.E. 12, 13 (1935); *see also* 23 NY JUR 2d § 23 (1982) (noting that an individual may be liable for conversion when he does not

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[12]The Restatement takes the position that collateral estoppel is inapplicable to default judgments because "[i]n the case of a judgment entered by . . . default, none of the issues is actually litigated." RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e. (1980). The Restatement notes that "[a]n issue may be submitted and determined on a . . . motion for summary judgment" which indicates that a judgment based upon summary judgment warrants collateral estoppel effect. *See id*. at cmt. d.

intend the consequences of his act). A debt is nondischargeable pursuant to Code § 523(a)(6) "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). It is necessary to establish an "injury" which was both "willful" and "malicious." Conversion is a recognized injury covered by Code § 523(a)(6). *See Martin v. Key Bank of New York, N.A.,* (*In re Martin*), 208 B.R. 799, 803 (N.D.N.Y. 1997); *see also Dahlgren & Co. v. Lacina* (*In re Lacina*), 162 B.R. 267, 272 (Bankr. D.N.D. 1993). Willful means "deliberate or intentional." *Navistar Fin. Corp. v. Stelluti* (*In re Stelluti*), 94 F.3d 84, 87 (2d Cir. 1996). The Supreme Court has recently interpreted Code § 523(a)(6) and held that willful means "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, No. 97-115, slip op. at 4 (U.S. March 3, 1998). Malicious is defined as "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will." *See In re Stelluti*, 94 F.3d at 87. Malice can be implied "'by the acts and conduct of the debtor in the context of the surrounding circumstances.'" *Id*. at 88 (citation omitted). The Supreme Court has recognized that not all tortious acts of conversion constitute a willful and malicious injury because "[t]here may be a conversion which is innocent or technical." *See Davis v. Aetna Acceptance Co*., 293 U.S. 328, 332, 55 S. Ct. 151, 153, 79 L. Ed. 393 (1934), *cited with approval in, Kawaauhau*, No. 97-115, slip. op at 6. The issue of conversion was raised and necessarily decided by Judge Hayes and this same issue with regard to the Debtor's conduct was raised and must be established in the dischargeability proceeding before the Court. Therefore, there is an identity of the issues with respect to the issue of conversion and MHD has established the first prong of collateral estoppel. However, liability for civil conversion does not necessarily establish the elements of willful and malicious required

by Code § 523(a)(6).

The Court must consider whether in addition to finding civil conversion, Judge Hayes also necessarily determined that the Debtor's conduct was willful and malicious. MHD contends that its complaint and Kest's Affidavit, with its supporting evidence, all indicated that the Debtor *intentionally* deposited the Loan Proceeds into her own account with the *knowledge* that the funds needed to be used to satisfy liens and then failed to satisfy the liens. According to MHD, the Judgment was for intentional conversion and should be nondischargeable. MHD alleged in its complaint in State Court that the defendants converted the Loan Proceeds to their own personal use.[13] Furthermore, it appears that MHD only raised a technical conversion as a basis for relief in its motion for summary judgment and not a willful and malicious conversion which was a separate cause of action in its complaint. Without a specific finding of fact by Judge Hayes, the Court will not infer any state of mind of the Debtor that is not required under the New York law for civil conversion. *See Rupert v. Krautheimer* (*In re Krautheimer*), 210 B.R. 37, 55 (Bankr. S.D.N.Y. 1997) (noting that courts should not draw inferences from the record for summary judgment purposes). The Court finds that the issue of whether the Debtor's conversion was willful and malicious was not raised and necessarily decided in the prior proceeding. *See Golden & Mandel v. Angeli* (*In re Angeli*), 216 B.R. 101, 108 (Bankr. E.D.N.Y. 1997) (noting that Code § 523(a)(6) requires that the injury was done intentionally and with malice which requires more than legally defined conversion). Therefore, there are material questions of fact with regard to

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[13] The Court notes that based upon the evidence presented to the State Court, which was incorporated by reference in this proceeding, the Loan Proceeds were deposited into an account in the name of Martell-Rafferty, Inc. *See* Exhibits 3, 11 of Kest's Affidavit. Although William Kest alleged that the Debtor deposited the money into her own account, *see* Kest's Affidavit at ¶¶ 11, 23, 29, there is no evidence of this fact.

whether the conversion of Loan Proceeds by the Debtor was intentional and malicious pursuant to Code § 523(a)(6).

Turning to the second prong of collateral estoppel, it is necessary to determine whether the Debtor has shown a lack of a full and fair opportunity to litigate the issue of conversion in State Court. Courts consider the following factors: (1) the nature of the prior forum and the importance of the claim in the prior proceeding; (2) the incentive to litigate and the extent of litigation in the prior forum; (3) the foreseeability of future litigation. *See In re Sokol*, 113 F.3d at 307 (citing *Ryan*, 62 N.Y.2d at 501, 467 N.E.2d at 491, 478 N.Y.S.2d at 827). The Debtor indicates she was acquitted in a criminal proceeding in the New York State Onondaga County Criminal Court ("Criminal Court") of the charge of grand larceny in the third degree for her alleged stealing of $34,000 from the Buckmans.[14] *See* Debtor's Response at ¶¶ 41-42. On or about June 12, 1992, the Debtor states that she commenced an action against William Kest of MHD for malicious prosecution.[15] *See id* at ¶ 43. The Debtor argues that her acquittal in Criminal Court and the pending malicious prosecution action ("Pending action") involved similar issues and reduced her incentive to litigate MHD's action against her in State Court. The Court notes that the Debtor's acquittal in Criminal Court involved only the Buckman transaction and MHD's action in State Court included allegations of liability with respect to the Buckman,

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[14]The Debtor states that she was also charged with the same crime with respect to transactions with the Gorneys, Husteds and Ricker/Calkins which were dismissed. *See* Debtor's Response at ¶ 41.

[15]According to the Debtor, William Kest filed a complaint against her with the New York State Police Department for alleged thefts of loan proceeds for which she was subsequently arrested. *See* ¶¶ 38-39 of Debtor's Response. The Debtor indicates that her action against William Kest for malicious prosecution was dismissed on or about May 26, 1995. *See id*. at ¶ 44.

Ricker/Calkins, Gorney and Husted transactions. Although the Debtor was acquitted in a criminal proceeding of an alleged theft, she could still be found civilly liable with respect to the same conduct because the standard of proof is less in a civil proceeding. Indeed, the Debtor was facing significant civil liability which provided an adequate incentive to litigate. Therefore, the Debtor's acquittal should not have had a significant impact on her incentive to litigate similar issues in the subsequent State Court civil proceeding.[16] Although the Debtor contends that her malicious prosecution action involved the same issues as MHD's action in State Court, it is clear that the actions involved different claims and different parties.[17] The Court finds that the Debtor has failed to establish a lack of a full and fair opportunity to litigate in the prior forum; therefore, based upon New York law, the issue of conversion should be given collateral estoppel effect.[18] Therefore, the Debtor is precluded from litigating whether her actions constituted conversion in the proceeding before the Court. *See Metromedia Co. v. Fugazy (In re Fugazy*), 157 B.R. 761, 765 (Bankr. S.D.N.Y. 1993) (debtor collaterally estopped from litigating the issue of whether he committed the acts in question as this issue was already determine by a prior court).

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[16]Similarly, the alleged dismissal of criminal charges against the Debtor with respect to the Gorney, Husted and Ricker/Calkins transactions should not have impacted her incentive to litigate her civil liability in State Court.

[17]The Debtor has failed to show how the Pending Action against William Kest could have any effect on the subsequent State Court action brought by MHD against the Debtor.

[18]The State Court found that the Debtor was liable for conversion and awarded Judgment against her. Having determined that the Debtor is precluded from re-litigating the issue of whether her debt to MHD, the Judgment, arose from conversion, the Court notes that the Debtor's affirmative defense that she is not personally liable for the corporate debt is moot. In fact, the Debtor concedes that she is individually liable as a corporate officer if a tort was committed. *See* Debtor's Memorandum of Law, filed February 12, 1988, at 10. Additionally, the Debtor's counterclaim for false and malicious pleading has no basis as this Court has found that the Debtor's actions did in fact constitute civil conversion.

Based upon the foregoing, it is hereby

ORDERED that MHD's motion for summary judgment is granted as to the issue of whether the Debtor's conduct regarding the Loan Proceeds amounted to conversion; and it is further

ORDERED that MHD's motion for summary judgment is denied as to the issue of whether the Debtor's conduct with respect to the Loan Proceeds was willful and malicious pursuant to Code § 523(a)(6); and it is further

ORDERED that the Debtor's counterclaim is dismissed in its entirety.

Dated at Utica, New York

this 26th day of June 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge