UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOSEPH W. JERRY — CASE NO. 99-61869

Debtor — Chapter 7

SHAW, LICITRA, BOHNER, ESERNIO & SCHWARTZ, P.C.

Plaintiff

vs. — ADV. PRO. NO. 99-80146A

JOSEPH W. JERRY

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

The Court considers herein the adversary proceeding commenced on June 9, 1999, by Shaw, Licitra, Bohner, Esernio & Schwartz, P.C. ("Plaintiff"). Pursuant to a Stipulation between

Plaintiff and Joseph W. Jerry ("Debtor"), dated September 6, 2000, Plaintiff withdrew all but its Second Cause of Action, which seeks a denial of dischargeability under § 523(a)(6) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Issue was joined by filing of an answer on August 2, 1999. A trial commenced on September 13, 2000. At the close of Plaintiff's proof, Debtor moved to dismiss the complaint. The Court reserved on the motion and adjourned the trial until October 26, 2000. Following a series of subsequent adjournments, a Stipulation was filed on June 18, 2001, by which the parties agreed that no more evidence would be presented. The Court took this matter under submission for decision on June 25, 2001.

JURISDICTIONAL STATEMENT

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

FACTS

Debtor was the president, director and a one-quarter stockholder in Pentavest Development Corporation ("Pentavest"). In order to facilitate Pentavest's possible development projects on its real property in Central Square, New York, Debtor formed a shell corporation, designated as Central Oswego Development Corporation ("Central Oswego"). *See* Transcript

("Tr.") of Trial on September 13, 2000, at p.59.[1] According to Debtor, in 1992, Louis Eusepi, Jr. ("Eusepi") approached Debtor seeking to purchase a portion of Pentavest's Central Square property (the "Property"). *See id.* At that time, Debtor alleges that he offered to allow Eusepi to use Central Oswego as a vehicle for purchasing the Property from Pentavest. *See id.* at p.61.[2] On May 1, 1992, Eusepi caused Central Oswego to purchase the Property from Pentavest for $100,000, paying $50,000 down and executing a note and purchase money mortgage on the property to secure payment of the $50,000 balance. *See* Tr. at p.61; Note and Mortgage, dated May 1, 1992, Joint Exhibit 40. The note and mortgage in favor of Pentavest indicated that the Pentavest mortgage was subordinate to an existing mortgage.[3] Preparing for the possibility of Central Oswego's default on the mortgage, Central Oswego and Pentavest executed an agreement, whereby a deed in lieu of foreclosure (the "Deed in Lieu of Foreclosure") would be held in escrow and recorded only upon Pentavest's declaration of a default by Central Oswego. *See*

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[1]The Trial on September 13, 2000, involved a direct examination of Plaintiff's partner, Stuart I. Gordon ("Gordon") by Plaintiff and a cross examination of Gordon by Debtor. Additionally, Debtor was called as a witness on Plaintiff's direct case.

[2]According to Debtor, Eusepi was planning to proceed with this transaction without counsel. *See* Tr. at p.59. Since Debtor was the president and a shareholder of the selling corporation, the founder of the purchasing corporation and the attorney in this transaction to the selling corporation, he alleges that he tried unsuccessfully to persuade Eusepi against proceeding without counsel. *See id.* at p.60. To that end, Debtor drew a Memorandum of Understanding, between Eusepi and himself, documenting Eusepi's comprehension and acceptance of Debtor's role in the transaction. *See* Memorandum of Understanding, dated May 1, 1992, Plaintiff's Exhibit 41.

[3]Regarding the senior mortgage, the note and mortgage between Pentavest and Central Oswego stated: "This mortgage shall be subordinate to a first mortgage in the amount of One hundred fifty-seven thousand and no/100 ($157,000.00) dollars in favor of First National Mortgage Exchange, d/b/a Finamex Financial dated the [sic] day of May, 1992 and recorded in the Oswego County Clerk's Office." Joint Exhibit 40.

Escrow Agreement, dated May 1, 1992, Plaintiff's Exhibit 42. Although the note and mortgage were recorded, the escrow agreement was not. *See* Tr. 44-45, 65.

Also in 1992, Debtor asserts that, at Eusepi's request, he coordinated a meeting among Plaintiff's partner, Stuart I. Gordon ("Gordon"), Eusepi and another individual, Matthew Young. Eusepi and Young were then the shareholders ("Midtown Shareholders") of Oswego Midtown Hotel Corporation ("Midtown"), which was involved in its own bankruptcy proceedings at the time. *See id.* at p.57. Plaintiff agreed to represent the Midtown Shareholders in Midtown's bankruptcy case. *See id.* at p.57. According to Plaintiff, it subsequently incurred approximately $140,000 in unpaid legal fees for this representation. *See id.* at p.13-15. Plaintiff also asserts that a substantial amount of its contact with the Midtown Shareholders was maintained through Debtor. *See id.* at p.14, 15. When it became apparent that the Midtown Shareholders were unable to pay Plaintiff's legal fees, they, acting through Debtor, offered Plaintiff a mortgage in the sum of $93,000 on the Property to secure their fees.[4] *See id.* at p.16, 71. Plaintiff accepted the offer and on April 8, 1993, Central Oswego executed a Note for $93,000 in favor of Plaintiff, secured by a mortgage on the Property. *See* Note and Mortgage, dated April 8, 1993, Joint Exhibit 45.

Plaintiff concedes that it was aware of prior liens on the Property upon acceptance of the mortgage from Central Oswego and assumed that risk. *See* Tr. at p.37-38. Plaintiff asserts, however, that Debtor assured it that additional financing was to be obtained on the Property through which all of the current lienors would be paid.[5] *See id.* at p.38. According to Plaintiff,

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[4]Plaintiff asserts that the Midtown Shareholders were also represented to be shareholders of Central Oswego. *See* Tr. at p.16.

[5]Notably, a Melvin S. Raichelson was working with Central Oswego to procure this financing. A letter dated July 21, 1993, documents a communication to Debtor that a preliminary

Debtor urged Plaintiff to refrain from recording its mortgage in order for the funding to more easily be obtained.[6] *See* id. at p36; *see also* April 8, 1993, letter of Debtor to Gordon, Joint Exhibit 44. Plaintiff obliged and did not record its mortgage at that time. Testimony indicates, however, that Plaintiff was unaware of the Deed in Lieu of Foreclosure, given by Central Oswego to Pentavest the previous year, and if Plaintiff had known of the existence of that instrument, it would not have accepted the mortgage. *See* Tr. at p.25.

On or about August 1, 1993, Pentavest declared its mortgage in default and recorded the Deed in Lieu of Foreclosure. *See* Tr. at 67.[7] On or about September 30, 1993, Plaintiff learned of the existence and recording of Pentavest's Deed in Lieu of Foreclosure. *See* October 1, 1993, letter of Gordon to Debtor, Joint Exhibit 4. Plaintiff then recorded its own mortgage on October

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approval had been granted for a loan of $705,000.00. *See* July 21, 1993, letter of Melvin Raichelson to Debtor, Joint Exhibit 48. Raichelson was also one of four Pentavest shareholders. *See* Tr. at p.58.

[6]A letter from Debtor to Plaintiff, dated April 8, 1993, states in pertinent part:

> It is our understanding that said Note and Mortgage shall not be recorded until such time as Central Oswego Development Corp. closes on its proposed SBA guaranteed loan, at which time it is anticipated you will be paid.
> If, however, for any reason you are not paid by July 8th, 1993, you may feel free to record the Note and Mortage.

April 8, 1993, letter of Debtor to Gordon, Joint Exhibit 44.

[7]According to the mortgage held by Pentavest, the entire principal of the loan to Central Oswego was due on August 31, 1992. *See* Tr. at p.62. Central Oswego did not make the payment by this deadline. *See id.* at p.63. Pentavest did not declare the mortgage in default until nearly thirteen months later.

21, 1993. *See* Plaintiff's Memorandum, at p.2; Debtor's Memorandum, at p.2.[8] On November 18, 1993, Plaintiff asserts that it commenced a state court action against Debtor to set aside the fraudulent transfer of the Property from Central Oswego to Pentavest and for fraud related to the April 8, 1993, Note and Mortgage from Central Oswego to Plaintiff. *See* Plaintiff's Memorandum, at p.2. A judgment ("Consent Judgment") was entered by the state court on December 22, 1997, pursuant to Debtor's confession of a $93,000 debt to Plaintiff. *See* Plaintiff's Complaint, Exhibit A, Judgment in New York Supreme Court, Oswego County. In the interim, on November 21, 1995, Pentavest executed a $400,000 mortgage on the Property in favor of a Kennedy Funding, Inc. *See* Public Abstract Corporation, Abstract of Title, dated February 26, 1999, Plaintiff's Exhibit 53. Kennedy Funding commenced a foreclosure action related to the Property on April 1, 1997. *See id.*[9]

Debtor filed for relief under chapter 11 of the Code on April 8, 1999.[10] Plaintiff filed the complaint in this adversary proceeding on June 9, 1999.

ARGUMENTS

Plaintiff's cause of action rests on Debtor's involvement in both the sale of the Property from Pentavest to Central Oswego and the execution of the mortgage by Central Oswego in favor

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[8]On June 13, 2001, Plaintiff and Defendant (Debtor) entered into a Stipulation, pursuant to which the parties' Memoranda of Law were made a part of the evidentiary record.

[9]According to Gordon's testimony, a foreclosure sale took place, but it did not generate enough proceeds to satisfy the Plaintiff's mortgage. *See* Tr. at p.54.

[10]Debtor's case was converted to chapter 7 of the Code on September 20, 1999.

of Plaintiff. According to Plaintiff, Debtor was fully aware of the sale of the Property from Pentavest to Central Oswego on May 1, 1992. Plaintiff also asserts that Debtor knew of the mortgage from Central Oswego to Pentavest and the Deed in Lieu of Foreclosure between the same two parties. Moreover, Debtor played an integral role in all of these transactions. Plaintiff further asserts that Debtor was an active participant in the agreement by Plaintiff to take a mortgage on the Property to secure the payment of the attorney's fees incurred in Plaintiff's representation of the Midtown Shareholders in 1992. Plaintiff argues that, by affirmatively involving himself in all of these transactions, Debtor took upon himself an obligation to disclose to Plaintiff the earlier Deed in Lieu of Foreclosure given to Pentavest by Central Oswego. Had it known of the Deed in Lieu of Foreclosure, Plaintiff asserts that it would not have accepted the subsequent mortgage by Central Oswego because, at the time the mortgage was offered, Central Oswego no longer had title to the property. According to Plaintiff, Debtor's failure to disclose the Deed in Lieu of Foreclosure, coupled with his repeated assurances that Plaintiff's interest would be best served if its mortgage was not immediately recorded, resulted in an injury to Plaintiff within the meaning of Code § 523(a)(6). The injury occurred when Pentavest recorded the Deed in Lieu of Foreclosure and thereafter mortgaged the property to Kennedy Funding, who ultimately foreclosed its mortgage. Plaintiff further asserts that the measure of its damages has already been conclusively decided by the state court, pursuant to the Consent Judgment. More particularly, Plaintiff argues that the Consent Judgment entered by the state court in the amount of $93,000 precludes this Court from questioning the existence of Plaintiff's claim and the amount of damages.

As required by Code § 523(a)(6), Plaintiff asserts that the injury caused by Debtor's

actions was "willful and malicious." According to Plaintiff, Debtor intended to injure Plaintiff's interest with respect to the Property and, therefore, failed to record and disclose the existence Deed in Lieu of Foreclosure until after Plaintiff accepted its mortgage. Plaintiff argues that, if, as Debtor insists, the ultimate recording of the Deed in Lieu of Foreclosure was the product of the legitimate business decision to protect Pentavest's interests in the property, then Pentavest would have recorded the deed months earlier when Central Oswego actually defaulted on its mortgage. Instead, Pentavest refrained from recording the Deed in Lieu of Foreclosure in order to induce Plaintiff to accept a worthless mortgage. According to Plaintiff, such act resulted in the kind of "willful and malicious" injury contemplated by Code § 523(a)(6).

In response, Debtor argues that, when Pentavest recorded the Deed in Lieu of Foreclosure, it took title to the Property subject to Plaintiff's mortgage and, therefore, Plaintiff did not incur the requisite "injury" under the terms of Code § 523(a)(6). According to Debtor, New York State Real Property Law requires that only those who acquire property without knowledge of preexisting defects in title or outstanding rights of others can qualify as bona fide purchasers. Knowledge of Plaintiff's existing mortgage was imputed to Pentavest when it recorded the Deed in Lieu of Foreclosure because of Debtor's position as president, shareholder and director of Pentavest. For this reason, Pentavest was not a bona fide purchaser and acquired the Property subject to Plaintiff's mortgage. Additionally, Pentavest executed the mortgage in favor of Kennedy Funding after Plaintiff recorded its mortgage. Therefore, Kennedy Funding's interest in the property was also subject to Plaintiff's mortgage. According to Debtor's analysis, the actions of neither Pentavest nor Debtor injured Plaintiff's interest in the Property. Because no injury was suffered, Debtor argues that there can be no denial of dischargeability under Code

§ 523(a)(6).

Debtor further notes that, in the event Plaintiff had suffered some injury, Code § 523(a)(6) requires it to be the result of Debtor's "willful and malicious" intent to cause that injury. According to Debtor, the taking and recording of a deed in lieu of foreclosure is a sound business practice regularly employed by those seeking to avoid the cumbersome procedures involved in an action to foreclose a mortgage. For this reason, Debtor argues that he ought not be punished for his prudent business decisions simply because of an unintended adverse impact on Plaintiff.

Debtor also disputes the argument that Plaintiff would not have accepted the Central Oswego mortgage to secure its fees if it had known of the existence of the Deed in Lieu of Foreclosure. According to Debtor, had Plaintiff chosen not to accept the mortgage, it would have had no property interest to secure its debt and no claim in the instant adversary proceeding.

Finally, Debtor asserts that, despite the state court Consent Judgment, this Court is not bound by either *res judicata* or *collateral estoppel* in determining the existence of Plaintiff's claim and the extent of damages. According to Debtor, *res judicata* does not apply because, even where issues involved in a debtor's discharge might be similar to issues considered in a state court action, state law concepts are likely to differ from those under the Code. *Collateral estoppel* only acts as a bar to issues that were actually litigated and determined in a prior action. Debtor argues that consent judgments do not represent actions that were actually litigated and determined, and therefore, cannot serve as a basis for *collateral estoppel.*

DISCUSSION

The extent of this Court's determination of the issues set forth herein initially depends on an analysis of the preclusive effect of the state court Consent Judgment. Debtor has admitted a $93,000 indebtedness in Plaintiff's fraud-based state court action. According to Plaintiff, the Consent Judgment is binding on this Court as to the existence of Plaintiff's claim and the amount of damages. Debtor argues in response that the Consent Judgment is entirely non-binding on this Court because the elements necessary for application of either *res judicata* or *collateral estoppel* are not present in this instance. According to the New York Court of Appeals, a consent judgment is "a conclusive adjudication of all matters embraced in it and a bar to any subsequent action on the same claim." *Canfield v. Harris & Co.*, 252 N.Y. 502, 505, 170 N.E. 121 (1930). Based on this rationale, consent judgments have been found to have *res judicata* effect. *See In re Carrero*, 94 B.R. 306, 309 (Bankr. S.D.N.Y 1988); *see also* 3 N.Y. Prac. Com. Litig. in N.Y. St. Cts. § 43.4 (1995) (citations omitted) (stating that "[a] judgment entered by consent operates as *res judicata* to the same extent as a judgment rendered after a contest.") The Consent Judgment obtained by Plaintiff in state court against Debtor served as an adjudication only as to the existence of Debtor's $93,000 debt to Plaintiff. *See* Plaintiff's Complaint, Exhibit A, Judgment of New York Supreme Court Oswego County. Accordingly, this Court finds itself bound by *res judicata* to the state court Consent Judgment against Debtor only insofar as it establishes Debtor's $93,000 debt to Plaintiff.

In contrast, there are a number of reasons why *collateral estoppel* does not bind this Court regarding issues raised in the state court action. First, the language of the Consent Judgment itself

merely solidifies the stipulation between Debtor and Plaintiff acknowledging the $93,000 debt. It does not set forth any findings regarding Plaintiff's substantive claim. Where consent judgments do not set forth the claim on which liability is based, they do not collaterally estop subsequent litigation regarding issues presented by those claims. *See In re Farley*, 156 B.R. 486, 493 n.2 (Bankr. W.D. Pa. 1993). Likewise, there are significant policy reasons for finding that *collateral estoppel* does not apply to consent judgments. Most significant among these is the judicial goal of encouraging stipulations and settlements. Parties are likely to be dissuaded from entering stipulations where they fear being subsequently bound by those agreements in unintended ways. *See Carrero*, 94 B.R. at 309-10. Consequently, this Court finds that the state court Consent Judgment is binding to the extent that it establishes the existence of Debtor's $93,000.00 debt to Plaintiff, but it is not an admission of liability on the underlying issues involved in the state court action. *See In re Hernandez*, 195 B.R. 824, 829 (D.P.R. 1996) (citing 18 *Fed. Prac. & Proced.* § 4443 (1981 and 1985 Supplement) (stating that consent judgments are generally held to preclude future litigation on the claims but not the issues presented because of the lack of actual litigation).

Given the acknowledgment of Plaintiff's claim in Debtor's bankruptcy case, the issue before this Court becomes the dischargeability of that claim, or the denial thereof, under Code § 523(a)(6). According to Code § 523(a)(6), a discharge under chapter 7 of the Code does not discharge an individual debtor from any debt arising out of the "willful and malicious injury by the debtor to another entity or to the property of another entity." The first step in the analysis of a particular claim's dischargeability under Code § 523(a)(6) is a determination of whether an injury was incurred. *In re Amaranto*, 252 B.R. 595, 598 (Bankr. D. Conn. 2000). Then, if there

was an injury, a conclusion must be drawn as to whether that injury was the consequence of "willful and malicious" conduct. *See id.*

"Injury" has been defined in the Restatement (Second) of Torts to mean "the invasion of any legally protected interest of another." *Restatement (Second) of Torts* §7(1). Therefore, in order to prove the existence of injury under Code § 523(a)(6), Plaintiff must be able to demonstrate that Debtor's actions resulted in an invasion of its legally protected interest. By contract, Plaintiff had a legally protected interest in the fees it incurred through its representation of the Midtown Shareholders. The issue herein is whether Debtor's actions impeded Plaintiff's recovery of its fees, thereby invading Plaintiff's legally protected interest. This Court concludes that Debtor's actions did not the result in an injury to Plaintiff.

Debtor's actions made Plaintiff's recovery of its legal fees no less likely than had Debtor done exactly as Plaintiff charges he should have done. First, Plaintiff asserts that Central Oswego had no interest in the Property when Debtor arranged for Plaintiff's mortgage, and Debtor was aware of this at that time. This is not correct. The Escrow Agreement between Central Oswego and Pentavest indicates that Pentavest would have no interest in the Property "until and unless Pentavest declare[d] the subject purchase money mortgage in default pursuant to the terms therein." Escrow Agreement, Plaintiff's Exhibit 42, at p.2. Regardless of whether Central Oswego was in default when Plaintiff received its mortgage, no such default had been declared by Pentavest as required by the Escrow Agreement. Without declaring the default, Pentavest was unable to acquire title to the Property. For this reason, Central Oswego, not Pentavest, was the legal title holder at the time the mortgage was given by Central Oswego to Plaintiff.

Next, Plaintiff argues that its injury was the combined result of Debtor's failure to disclose

the existence of the Deed in Lieu of Foreclosure and his persuasion of Plaintiff not to record its mortgage. In order for the Court to find that Plaintiff's delay in recording its mortgage resulted in an injury, a demonstration must be made that equity existed in the Property to satisfy Plaintiff's debt had its mortgage been immediately recorded. In adversary proceedings pursuant to Code § 523(a), the creditor seeking denial of dischargeability holds the burden of persuasion by a preponderance of the evidence standard. *See Grogan v. Garner*, 498 U.S. 279, 283-84 (1991). Therefore, the burden is incumbent upon Plaintiff to show that there was equity in the Property. This burden has not been met. First, Plaintiff offered no appraisal testimony to assist the Court in determining the Property's value. The only indication of the value of the Property is the sale price from Pentavest to Central Oswego for $100,000. *See* Offer to Purchase, dated April 20, 1992, Plaintiff's Exhibit 39. Furthermore, although the abstract of title for the property indicates two mortgages senior to Plaintiff's in the original amounts of $157,000 and $50,000 respectively, Plaintiff has offered no evidence of the senior mortgages' balances at the time Plaintiff's mortgage was executed. *See* Public Abstract Corporation, Abstract of Title, Plaintiff's Exhibit 53. Without this information, the Court is unable to conclude that there would have been equity in the Property to satisfy the debt to Plaintiff even if its mortgage had been recorded immediately upon execution. Consequently, there can be no finding that Plaintiff was injured as a result of its compliance with Debtor's request to refrain from recording its mortgage.

Plaintiff further argues that it would not have accepted the mortgage if it had known that Central Oswego had already given Pentavest a Deed in Lieu of Foreclosure. This assertion does nothing to further Plaintiff's position because without any collateral securing its debt, Plaintiff would be no closer to collecting the $93,000. Plaintiff has offered no evidence of other property

belonging to Debtor that might have provided a more successful route to pursue in satisfaction of Plaintiff's claim. Moreover, Debtor has not shown that any alternative options were available to more adequately secure payment of its debt. Plaintiff's legally protected interest in its $93,000 claim would have suffered even in the absence of Debtor's alleged wrongful conduct. Consequently, Plaintiff has not met the "injury" requirement of Code § 523(a)(6).

Under similar circumstances, the Bankruptcy Court for the District of Connecticut held that no injury was suffered pursuant to Code § 523(a)(6). *See In re Lyman*, 254 B.R. 517, 521 (Bankr. D.Conn. 2000). In *Lyman*, assets transferred at the debtor's direction were determined to have been fully encumbered by creditors whose liens were perfected before the objecting creditor's lien was filed. For this reason, the *Lyman* court concluded that the transfers caused no injury to the objecting creditor's interest and, consequently, no denial of dischargeability under Code § 523(a)(6) was granted. In the matter presently under review, the recording of the Deed in Lieu of Foreclosure could not have injured Plaintiff, given the existence of the two senior, recorded mortgages and the Plaintiff's failure to prove equity.

Likewise, in *In re McGalliard*, 183 B.R. 726, 731 (Bankr. M.D.N.C. 1995), no injury was found to have been suffered within the meaning of Code § 523(a)(6). In *McGalliard*, the creditor seeking denial of dischargeability had obtained a monetary judgment against the debtor but failed to acquire a lien against the debtor's property to secure that judgment. *See McGalliard*, 183 B.R. at 731. Because the creditor had no property interest in that case, there could be no denial of dischargeability for "willful and malicious injury to property" under Code § 523(a)(6). In reaching this conclusion, the *McGalliard* court acknowledged that there was a debt to the creditor. However, no injury could be recognized under Code § 523(a)(6) because the debtor's arguably

"willful and malicious" actions did not violate any legally cognizable property right of the creditor. *See id.* In the matter presently *sub judice*, Plaintiff argues that it would have refused the mortgage on the Property had it known that Pentavest held a Deed in Lieu of Foreclosure. Under those circumstances, Plaintiff would find itself in a position identical to that of the creditor in *McGalliard*.

Even Plaintiff's acceptance of the mortgage, however, leaves it without support for a denial of discharge under Code § 523(a)(6) in light of the *McGalliard* rationale. Under New York Real Property Law, only one who acquires property as a bona fide purchaser for value and first records takes title to that property free of any prior, unrecorded liens. *See* N.Y. Real Prop. Law § 291 (McKinney 1989). One who has actual knowledge of a prior, unrecorded mortgage on the property does not qualify as a bona fide purchaser and consequently may only acquire property subject to the prior mortgage. *See Clement v. Congress Hall*, 72 Misc. 519, 132 N.Y.S. 16, 19 (N.Y. Sup. Ct. 1911). Because Debtor prepared the mortgage between Central Oswego and Plaintiff, and because he was also the president, shareholder, director and principal operating agent of Pentavest, he asserts that his knowledge of the mortgage between Central Oswego and Plaintiff was imputed to Pentavest. *See* Tr. at p.71; Pentavest Share Certificates, Plaintiff's Exhibit 55; Debtor's Memorandum, at p.5. Consequently, when Pentavest recorded the Deed in Lieu of Foreclosure, it took title to the Property subject to Plaintiff's mortgage because it had actual knowledge of that mortgage's existence. Since Pentavest took the Deed in Lieu of Foreclosure subject to Plaintiff's lien, its recording of that conveyance did not did not give rise to any new or additional claims for Plaintiff to pursue against Debtor. Under the *McGalliard* analysis, a creditor in this position has suffered no injury pursuant to Code § 523(a)(6). *See*

McGalliard, 183 B.R. at 731. Without satisfaction of the injury requirement, this Court may not find Debtor's $93,000.00 debt to Plaintiff nondischargeable. Because the Court finds no injury under Code § 523(a)(6), no further inquiry is necessary regarding the alleged "willful and malicious" nature of Debtor's conduct.

Based on the foregoing, it is hereby

ORDERED that the relief sought in Plaintiff's complaint with respect to a determination of nondischargeability of the debt owed to it pursuant to Code § 523(a)(6) is denied; and it is further

ORDERED that the motion made on behalf of the Debtor at the close of Plaintiff's proof at the trial to dismiss the Complaint is granted.

Dated at Utica, New York

this 14th day of December 2001

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STEPHEN D.GERLING
Chief U.S. Bankruptcy Judge