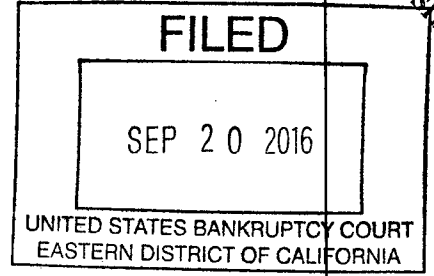


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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

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In re:	)	Case No. 14-31775-B-7
RONALD CHARLES CATHCART, JR.,	)	Adversary No. 15-2034
	)	
Debtor(s).	)	
<hr/>		
DONALD A. ODELL, D/B/A THE LAW OFFICES OF DONALD A. ODELL,	)	
	)	
Plaintiff(s),	)	
v.	)	
RONALD CHARLES CATHCART, JR.,	)	
	)	
Defendant(s).	)	

DECISION AFTER TRIAL

Introduction

This is an adversary proceeding to have a debt excepted from discharge under 11 U.S.C. § 523(a)(6) which excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."

Plaintiff is Donald A. Odell. Plaintiff is an attorney licensed by the State of California. Defendant is Ronald C. Cathcart, Jr. Defendant is the debtor in the underlying chapter 7 case filed on December 2, 2014, as case no. 14-31775.

1 The complaint was initially filed on February 9, 2015. An  
2 amended complaint was filed on March 17, 2016. Defendant  
3 answered the amended complaint on April 20, 2016. Trial was held  
4 on September 12, 2016. Both parties appeared pro se. The  
5 court's findings of fact and conclusions of law made pursuant to  
6 Federal Rule of Civil Procedure 52(a), applicable by Federal Rule  
7 of Bankruptcy Procedure 7052, are set forth below.

#### 8 9 Jurisdiction and Venue

10 Federal subject matter jurisdiction is founded on 28 U.S.C.  
11 § 1334. This adversary proceeding is a core proceeding under 28  
12 U.S.C. §§ 157(b)(2)(A), (I) and (O). To the extent this  
13 adversary proceeding may ever be determined to be a matter that a  
14 bankruptcy judge may not hear and determine without consent, the  
15 parties nevertheless consent to such determination by a  
16 bankruptcy judge. See 28 U.S.C. § 157(c)(2). Venue is proper  
17 under 28 U.S.C. § 1409.

#### 18 19 Findings of Fact

20 In March of 2008, defendant and his brother were sued in  
21 Alameda County Superior Court for breach of contract and  
22 negligence arising out of a landscaping project both were hired  
23 to perform (the "Reed Matter"). In that same month, defendant  
24 met plaintiff at a Starbuck's in Pleasanton, California, to  
25 discuss plaintiff's representation of defendant in the Reed  
26 Matter.

27 During their meeting, the parties discussed the Reed Matter  
28 and what it would cost for plaintiff to represent defendant in

1 that matter. Although defendant had previously filed bankruptcy  
2 and owed the IRS approximately \$50,000, the parties did not  
3 discuss and plaintiff did not ask about defendant's financial  
4 condition. At trial, defendant testified that his bankruptcy  
5 cases were filed thirteen years earlier and the IRS debt was in  
6 non-collection status. Defendant also testified that in 2008 he  
7 earned between \$120,000 and \$140,000, and he gave his 2008 tax  
8 records to plaintiff.

9 At the conclusion of the parties' Starbuck's meeting,  
10 defendant retained plaintiff to represent him in the Reed Matter.  
11 The parties executed a written fee agreement in April 2008.  
12 Plaintiff testified that he agreed to represent defendant because  
13 he understood that plaintiff was willing and able to pay  
14 attorney's fees and costs as required by the written fee  
15 agreement. That understanding, in turn, was based on the absence  
16 of any mention by the defendant about his financial condition.

17 Thereafter, plaintiff represented defendant in the Reed  
18 Matter. Throughout the course of that representation, plaintiff  
19 billed defendant for attorney's fees and costs advanced.  
20 Defendant made sporadic payments in amounts less than invoiced  
21 and sometimes made no payments at all.

22 Based on defendant's sporadic payments and non-payment,  
23 plaintiff threatened to withdraw from the Reed Matter. In  
24 response, defendant told plaintiff that he would continue to make  
25 monthly payments of the attorney's fees and costs he owed and  
26 that he would pay plaintiff in full by May 2009. Defendant also  
27 paid plaintiff \$1,250 in or around December 2008 or January 2009.

28 Defendant and plaintiff had several conversations about what

1 defendant owed plaintiff. Defendant testified that he never told  
2 plaintiff he would not pay what he owed. Defendant also  
3 testified that he told plaintiff he was struggling financially  
4 because of the economy.

5 In early 2009, defendant experienced dire financial  
6 circumstances. Defendant testified that he was unable to  
7 continue making any payments to plaintiff in and around February  
8 2009 because "overnight" his income went from between \$120,000-  
9 \$140,000 in 2008 to about \$20,000 in 2009. Defendant also  
10 testified that at about that time he was without work, he  
11 accepted whatever work he could find, he lost the house he  
12 rented, he lived in a room provided by a friend, his vehicle was  
13 repossessed, and he went through divorce and child custody  
14 proceedings that were not amicable.

15 Receiving no further payment from defendant after February  
16 2009, plaintiff sued defendant in state court for breach of  
17 contract based on defendant's failure to pay the balance of  
18 attorney's fees and costs owed under the parties' written fee  
19 agreement. Plaintiff prevailed after trial and in June of 2011  
20 was awarded a judgment against defendant in the amount of  
21 \$14,154.30, plus interest at 10%. It is that debt that plaintiff  
22 now seeks to have excepted from discharge under § 523(a)(6).

23  
24 Conclusions of Law

25 This § 523(a)(6) action is based on the defendant's breach  
26 of the written fee agreement between the plaintiff and defendant.  
27 The state court judgment entered against the defendant in June of  
28 2011 establishes the breach of the agreement. However, breach

1 alone is not enough to bring the debt within the reach of  
2 § 523(a)(6).

3 The general rule in the Ninth Circuit is that § 523(a)(6)  
4 applies to recoveries based on a tort claim rather than those  
5 based on breach of contract. Thus, an intentional breach of  
6 contract will not support a non-dischargeability claim under  
7 § 523(a)(6) absent additional tortious conduct. See Lockerby v.  
8 Sierra, 535 F.3d 1038, 1043 (9th Cir. 2008); Snoke v. Riso (In re  
9 Riso), 978 F.2d 1151, 1154 (9th Cir. 1992) ("It is well settled  
10 that a simple breach of contract is not the type of injury  
11 addressed by § 523(a)(6).") (citation omitted).

12 In narrow circumstances, a breach of contract claim may be  
13 non-dischargeable under § 523(a)(6) if the breach is both in bad  
14 faith and "accompanied by some form of 'tortious conduct' that  
15 gives rise to 'willful and malicious injury.'" Petralia v.  
16 Jercich (In re Jercich), 238 F.3d 1202, 1206 (9th Cir. 2001).  
17 Whether a debtor's breach of contract is in bad faith and  
18 tortious is determined under state law. Id.; see also Lockerby,  
19 535 F.3d at 1041. Under California law, "[c]onduct amounting to  
20 a breach of contract becomes tortious only when it also violates  
21 an independent duty arising from principals of tort law."  
22 Lockerby, 535 F.3d at 1041. Additionally, "in California, tort  
23 recovery for a bad faith [tortious] breach of contract is only  
24 available when the debtor's conduct also violates a *fundamental*  
25 *public policy* of the state[.]" Coastal Indus. Partners, LLC v.  
26 Lawson (In re Lawson), 2015 WL 1291366 (9th Cir. BAP 2015)  
27 (citing Jercich, 238 F.3d at 1206) (emphasis in original).

28 As stated above, the state court judgment entered against

1 the defendant in June of 2011 establishes defendant's breach of  
2 the parties' written fee agreement. However, in order to bring  
3 that breach within the realm of a bad faith and tortious breach  
4 actionable under § 523(a)(6), plaintiff asserts that the breach  
5 was accompanied by fraud in the inducement and fraud in the  
6 performance of the parties' written fee agreement. As to the  
7 former, plaintiff asserts that defendant induced him to enter  
8 into the written fee agreement and represent him in the Reed  
9 Matter by concealing his financial condition. As to the latter,  
10 plaintiff asserts that defendant's minimal payments, promises of  
11 continued payment, and promises of future payment in full were  
12 made with the intent to deceive plaintiff and to prevent  
13 plaintiff from withdrawing from the Reed Matter. As explained  
14 below, plaintiff has failed to carry his burden of proving fraud  
15 either in the inducement or in the performance of the parties'  
16 written fee agreement.

17 Under California law, an omission is fraudulent only if  
18 there is a duty on the party making the omission to disclose.  
19 SCC Acquisitions, Inc. v. Cent. Pac. Bank, 207 Cal. App. 4th 859,  
20 864 (2012) (quoting Blickman Turkus, LP v. HF Downtown Sunnyvale,  
21 LLC, 162 Cal. App. 4th 858, 868 (2008)). Plaintiff produced no  
22 evidence that defendant was under any duty to disclose his  
23 financial condition. In fact, plaintiff did not even allege the  
24 existence of any such duty.

25 Nevertheless, California law also recognizes that in  
26 transactions that do not involve a duty to disclose, a cause of  
27 action for non-disclosure of material facts may arise in at least  
28 three instances: (1) if the defendant makes representations but

1 does not disclose facts which materially qualify the facts  
2 disclosed, or which render the disclosure likely to mislead; (2)  
3 if the facts are known or accessible only to defendant, and  
4 defendant knows they are not known to or reasonably discoverable  
5 by the plaintiff; or (3) if the defendant actively conceals  
6 discovery from the plaintiff. Marketing West, Inc. v. Sanyo  
7 Fisher (USA) Corp., 6 Cal. App. 4th 603, 613 (1992) (citation  
8 omitted). Plaintiff has not established that any of these  
9 circumstances apply.

10 Inasmuch as the parties did not discuss defendant's  
11 financial condition during their initial Starbuck's meeting,  
12 there was nothing for defendant to materially qualify. Thus, the  
13 first instance does not apply.

14 Regarding the second and third instances, defendant  
15 testified that he gave his 2008 tax information to the plaintiff.  
16 Defendant did not indicate whether he gave his 2008 tax  
17 information to the plaintiff before or after the parties entered  
18 into the written agreement. However, if before, the second and  
19 third instances are inapplicable because there would be no  
20 concealment. Even if after, based on the act of disclosure the  
21 court concludes that defendant's financial condition was not  
22 actively concealed and was reasonably discoverable by and  
23 available to the plaintiff. And in any event, it was such that  
24 defendant, at the time, could afford to pay plaintiff.

25 As to the fraud in the performance, the court is not  
26 persuaded that defendant's minimal and sporadic payments and  
27 defendant's promises to pay plaintiff monthly and in full were  
28 deceptive or made with the intent to deceive plaintiff so that

1 plaintiff would continue to represent defendant in the Reed  
2 Matter. Rather, the evidence is overwhelming and undisputed that  
3 defendant suffered a dramatic decrease in income between 2008 and  
4 2009. "Overnight" defendant's income went from between \$120,000-  
5 \$140,000 to \$20,000. Defendant also lost his house, his car was  
6 repossessed, he had bill collectors after him, he was engaged in  
7 divorce and child custody proceedings, and he was living in a  
8 room provided by a friend. Defendant's testimony on these  
9 matters is undisputed and unchallenged, and the court finds it  
10 credible.

11 The court is persuaded that defendant paid plaintiff what he  
12 could afford and defendant lacked the means to pay plaintiff more  
13 than he did. In other words, plaintiff has failed to establish  
14 that defendant intended to defraud him out of his legal services.  
15 On this issue of intent, the court gives greater weight to  
16 defendant's testimony and finds defendant's testimony more  
17 credible than plaintiff's testimony. In an attempt to establish  
18 defendant's intent to defraud, plaintiff testified that defendant  
19 made no payments to the Reed Matter plaintiffs under a settlement  
20 agreement reached in that case. Plaintiff based that statement  
21 on a conversation he had with the attorney for the Reed Matter  
22 plaintiffs. On cross-examination, however, plaintiff conceded  
23 that he spoke with the attorney for the Reed Matter plaintiffs in  
24 March of 2009 and the Reed Matter settlement agreement did not  
25 require payments by the defendant until May 2009.

26 In short, plaintiff has not established tortious conduct  
27 associated with defendant's breach of the parties' written  
28 agreement. That leaves plaintiff with a breach of contract




1 claim, perhaps even an intentional one. However, that alone does  
2 not support a § 523(a)(6) non-dischargeability claim. See  
3 Lockerby, 535 F.3d at 1043.<sup>1</sup>

4  
5 Conclusion

6 Based on the foregoing, judgment on plaintiff's § 523(a)(6)  
7 claim will be entered for the defendant and against the plaintiff  
8 with plaintiff taking nothing on his § 523(a)(6) claim. Any debt  
9 that defendant owes plaintiff based on the state court judgment  
10 and/or arising out of the parties' written fee agreement will be  
11 discharged in the defendant's chapter 7 case.

12 A separate judgment will be entered.

13 Dated: September 20, 2016.

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16 UNITED STATES BANKRUPTCY JUDGE

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24 <sup>1</sup>Even assuming plaintiff established tortious conduct,  
25 plaintiff's § 523(a)(6) claim would still fail. As stated above,  
26 in addition to tortious conduct, California law also requires the  
27 tortious conduct violate some fundamental public policy of the  
28 state. Plaintiff put forth no evidence of any fundamental public  
policy of the State of California that defendant violated by his  
breach of the parties' written fee agreement. This defect in  
plaintiff's tortious breach of contract claim is fatal to the  
§ 523(a)(6) claim.

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**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Donald A. Odell  
6200 Stoneridge Mall Road #300  
Pleasanton CA 94588

Ronald Charles Cathcart Jr.  
PO Box 3384  
Livermore CA 94551