

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

POSTED ON THE WEBSITE  
NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re:	)	Case No. 05-22777-D-7
	)	
MELANIE HUGHES,	)	
	)	
Debtor.	)	
_____	)	
CLAYEO C. ARNOLD and CLAYEO	)	Adv. Pro. No. 05-2225-D
ARNOLD, PROFESSIONAL LAW	)	Docket Control No. HSM-2
CORPORATION,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
MELANIE HUGHES,	)	
	)	
Defendant.	)	
_____	)	

**This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.**

MEMORANDUM DECISION

On May 22, 2007, Defendant Melanie Hughes filed a Motion for Summary Judgment, bearing Docket Control No. HSM-2 (the "Motion").<sup>1</sup> For the reasons set forth below, the court will deny the motion.

/ / /

1. On the same date, Plaintiffs Clayeo C. Arnold and Clayeo Arnold, Professional Law Corporation, filed a Motion for Partial Summary Judgment. That motion is under submission.



1 attorney's fees and \$19,626.05 in costs. (These awards will be  
2 referred to collectively as "the attorney's fee award.") The  
3 state court's judgment was appealed, but is now final.

4 The Plaintiffs allege in the Complaint that as of March 14,  
5 2005, Arnold was owed \$100,227.72 on the judgment, and the law  
6 corporation, \$153,105.13. In their first and second causes of  
7 action, the Plaintiffs allege that the Debtor prosecuted the  
8 state court action "deliberately and intentionally to cause  
9 injury" to the Plaintiffs, and that the attorney's fee award is  
10 therefore nondischargeable, pursuant to 11 U.S.C. § 523(a)(6).

11 In their third and fourth causes of action, the Plaintiffs  
12 seek to deny the Debtor's discharge, pursuant to 11 U.S.C. §  
13 727(a)(3) and (a)(2)(A), respectively, on the grounds that the  
14 Debtor has failed to keep or preserve books and records from  
15 which her financial condition or business transactions might be  
16 ascertained, and that she has, with intent to hinder, delay, or  
17 defraud creditors, concealed property, within the year preceding  
18 the filing of her bankruptcy petition. The facts underlying  
19 these two causes of action will be further explored below.

20 On July 22, 2005, the Debtor filed a motion to dismiss the  
21 Complaint for failure to state a claim. The motion was denied,  
22 and on September 9, 2005, the Debtor filed an answer to the  
23 Complaint.

24 With the Motion, the Debtor filed a number of exhibits, a  
25 memorandum of points and authorities, declarations of Melanie  
26 Hughes (the Debtor), Marc Hughes, and Thomas P. Griffin, and as  
27 required by Local Bankruptcy Rule 7056-1(a), a separate statement  
28 of undisputed facts. In the Motion, the Debtor seeks summary

1 judgment in her favor on all four of the Plaintiffs' causes of  
2 action, but also asks the court to abstain from determining the  
3 issues raised by the fourth cause of action.

4 On June 6, 2007, the Plaintiffs filed opposition to the  
5 Motion, together with exhibits, a declaration of Clayeo C.  
6 Arnold, and a response to the Debtor's separate statement of  
7 undisputed facts. On June 7, 2007, the Plaintiffs filed certain  
8 exhibits under seal, pursuant to this court's December 22, 2006  
9 order on a discovery motion brought by the Plaintiffs (DCN No.  
10 ARP-1).

11 On June 13, 2007, the Debtor filed a reply to the  
12 Plaintiffs' opposition, together with additional exhibits and  
13 another declaration of Melanie Hughes.

14 On June 20, 2007, the Motion came before the court for  
15 hearing, counsel appeared and presented oral argument, and the  
16 matter was submitted.

17 As to the Plaintiffs' first and second causes of action, the  
18 Debtor argues generally that the attorney's fee award is  
19 dischargeable because it was compensatory in nature, was not tied  
20 to a judgment for an intentional tort, and is not binding on this  
21 court on the issue of willful or malicious injury on the part of  
22 the Debtor.

23 The Plaintiffs respond that the Debtor's conduct in  
24 prosecuting her sexual harassment claims against them was willful  
25 and malicious, that such conduct directly caused injury to the  
26 Plaintiffs, in the form of the attorney's fees and costs they  
27 expended in defending themselves, that the state court judge's  
28 written findings in his order on the Plaintiffs' motions for

1 attorney's fees and costs are preclusive in this court, but that  
2 if the state court's remarks are *dicta*, and the order therefore  
3 not binding on this court, there remain genuine issues of  
4 material fact that preclude summary judgment for the Debtor.

5 As to the Plaintiffs' third and fourth causes of action, the  
6 Debtor argues essentially that the facts support her version of  
7 events. She also argues that the issues raised by the fourth  
8 cause of action are duplicative of the issues raised in a  
9 separate pending state court action, and therefore, that this  
10 court should abstain from deciding them.

11 The Plaintiffs respond, in essence, that the Debtor has not  
12 met her burden of producing evidence negating an essential  
13 element of the Plaintiffs' claims, or alternatively, of showing  
14 that the Plaintiffs do not have sufficient evidence of an  
15 essential element to carry their ultimate burden of persuasion at  
16 trial.

## 17 II. ANALYSIS

18 This court has jurisdiction over the Motion pursuant to 28  
19 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding  
20 under 28 U.S.C. § 157(b)(2)(I) and (J). The Motion was brought  
21 pursuant to Federal Rule of Bankruptcy Procedure 7056, which  
22 makes applicable Federal Rule of Civil Procedure 56.

23 Where a motion for summary judgment is before the court, the  
24 court is to render judgment for the moving party where "the  
25 pleadings, depositions, answers to interrogatories, and  
26 admissions on file, together with the affidavits, if any, show  
27 that there is no genuine issue of material fact and that the  
28 moving party is entitled to a judgment as a matter of law." Fed.

1 R. Civ. P. 56(c). The moving party bears the burden of producing  
2 evidence showing that there is no genuine issue of material fact  
3 and that it is entitled to judgment as a matter of law. Celotex  
4 v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986).

5 Once the moving party has met its initial burden, the non-  
6 moving party must show specific facts showing the existence of  
7 genuine issues of fact for trial. Anderson v. Liberty Lobby,  
8 Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514 (1986). Under  
9 Rule 56, the court also has authority to make an order specifying  
10 those material facts that appear without substantial controversy,  
11 and such facts are deemed established for purposes of trial.  
12 Fed. R. Civ. P. 56(d).

13 A. The § 523(a)(6) causes of action

14 The attorney's fee award was issued pursuant to Cal. Gov't  
15 Code § 12965(b), which provides that the court has discretion to  
16 award reasonable attorney's fees and costs to the prevailing  
17 party in civil actions brought under the California Fair  
18 Employment and Housing Act, Part 2.8 of the Government Code,  
19 under which the Debtor's sexual harassment claims were brought.

20 The Debtor argues that 11 U.S.C. § 523(a)(6) applies only to  
21 damages flowing from intentional torts, and not to compensatory  
22 awards of attorney's fees to prevailing parties under Government  
23 Code § 12965(b). This argument succeeds only if the court  
24 concludes that a section 12965(b) award can never constitute a  
25 form of damages for willful and malicious injury. This the court  
26 declines to do.

27 The Debtor relies heavily on State Bar v. Taggart (In re  
28 Taggart), 249 F.3d 987 (9th Cir. 2001). The court finds Taggart

1 to be easily distinguished from the present case. In Taggart,  
2 the court held that costs awarded to the State Bar of California  
3 in attorney disciplinary proceedings, pursuant to Cal. Bus. &  
4 Prof. Code § 6086.10, are compensation for actual pecuniary loss,  
5 rather than fines, penalties, or forfeitures, and therefore, are  
6 not excepted from discharge under 11 U.S.C. § 523(a)(7). 249  
7 F.3d at 994. The court found Cal. Bus. & Prof. Code § 6086.10 to  
8 be analogous to Cal. C. Civ. Proc. § 1032(a)(4), (b), which  
9 governs cost awards to prevailing parties in civil litigation  
10 generally, because the former permits exonerated attorneys to be  
11 reimbursed for the costs of defending themselves in the  
12 disciplinary proceedings. Id. at 992-93. The analogy was not,  
13 however, essential to the court's decision, and the decision  
14 otherwise had no bearing on attorney's fees and costs awarded  
15 under Gov. C. § 12965(b), and nothing whatever to do with damages  
16 for willful and malicious injury under 11 U.S.C. § 523(a)(6).

17 The court notes also that after Taggart was decided, the  
18 California legislature amended Cal. Bus. & Prof. Code § 6086.10  
19 to provide that costs imposed under that section "are penalties,"  
20 and it has been held that costs imposed under the section as  
21 amended are nondischargeable under 11 U.S.C. § 523(a)(7). State  
22 Bar of Cal. v. Findley (In re Findley), 2007 Bankr. LEXIS 1509,  
23 at 8-10 (Bankr. N.D. Cal. 2007). That holding hardly supports  
24 the conclusion that prevailing party cost awards are always  
25 dischargeable.

26 More on point, but not helpful to the Debtor, is the other  
27 case she cites, Dutton v. Schwartz, 21 B.R. 1014, (D. Mont.  
28 1982), in which the court held that the entirety of the state

1 court judgment in that case, including the award of costs and  
2 attorney's fees, arose from the willful and malicious injury, and  
3 was therefore nondischargeable under 11 U.S.C. § 523(a)(6). 21  
4 B.R. at 1019.

5 In Klingman v. Levinson, 831 F.2d 1292, 1296-97 (7th Cir.  
6 1987), the court held nondischargeable under 11 U.S.C. §  
7 523(a)(4) an award of attorney's fees agreed to in a state court  
8 consent judgment in which the debtor had admitted his breach of a  
9 fiduciary duty owed to the creditor. See also Florida v. Ticor  
10 Title Ins. Co., 164 B.R. 636, 639 (9th Cir. BAP 1994) [attorney's  
11 fees awarded by state court in action under the RICO statute, 18  
12 U.S.C. § 1961, *et seq.*, held nondischargeable under 11 U.S.C. §  
13 523(a)(6) as being of the same character as the underlying debt];  
14 Stokes v. Vierra, 185 B.R. 341, 345, n. 5 (N.D. Cal. 1995) [if  
15 actual damages awarded by state court are nondischargeable under  
16 11 U.S.C. § 523(a)(2) or (4), attorney's fees awarded will also  
17 be nondischargeable].

18 In her reply to the Plaintiffs' opposition, the Debtor  
19 acknowledges certain other cases reaching this result, but  
20 attempts to distinguish them on the basis that in this case,  
21 "there is no underlying state court judgment of tortious conduct  
22 to which the award of fees and costs may attach and become  
23 nondischargeable." Reply to Opposition to Motion for Summary  
24 Judgment, at 4:18-20.

25 A similar argument was raised and rejected in In re Sears,  
26 102 B.R. 781 (Bankr. S.D. Cal. 1989). In that case, the  
27 plaintiffs commenced the state court action seeking declaratory  
28 relief to the effect that certain agreements with the defendant

1 were invalid. The trial court found in favor of the plaintiffs,  
2 declaring the agreements to be void and awarding costs to the  
3 plaintiffs, but awarding no other damages. While the plaintiffs'  
4 memorandum of costs was pending, the defendant filed a bankruptcy  
5 petition. At issue in the defendant's chapter 7 case was  
6 "whether attorney's fees are dischargeable in bankruptcy where  
7 the state court has extinguished a contract due to the debtor's  
8 fraud, and where the only damages sustained are the attorney's  
9 fees incurred in litigating the state court fraud action." See  
10 In re Sears, 102 B.R. 781, 783 (Bankr. S.D. Cal. 1989). The  
11 debtor's argument was that "since there was no underlying debt in  
12 the declaratory relief action, the ancillary debt [for attorney's  
13 fees] has nothing to cling to and therefore is dischargeable."  
14 See *ibid.*

15 The court agreed that the attorney's fees were not ancillary  
16 obligations, but "are in the nature of a primary debt," which was  
17 "the direct and proximate result of the fraud perpetrated by  
18 defendant." 102 B.R. at 784. "As California law has  
19 consistently awarded attorney's fees in a rescission action, the  
20 attorney's fees incurred are the damages suffered by plaintiffs  
21 and constitute the primary or underlying debt." Ibid.

22  
23 It is absurd to suggest that had the superior court  
24 awarded one dollar to plaintiffs as damages their  
25 attorney's fees would be non-dischargeable, but since  
26 no dollar award was made the attorney's fees should be  
27 dischargeable. Nor would it make sense to require a  
28 creditor to wait until a payment is made under a  
fraudulent contract before bringing an action for  
rescission. Equity requires this court to rule that  
the attorney's fees incurred in the state court  
litigation are non-dischargeable.

102 B.R. at 785.

1 Similar considerations pertain here. At the time the  
2 Debtor's bankruptcy case was commenced, the Plaintiffs in this  
3 adversary proceeding were prosecuting a malicious prosecution  
4 action against the Debtor in state court. In that action, they  
5 allege that the Debtor's prosecution of the underlying sexual  
6 harassment claims was willful and malicious, and resulted  
7 directly in damages in the form of the attorney's fees and costs  
8 the Plaintiffs expended in defending themselves, as embodied in  
9 the attorney's fee award. If the Plaintiffs are successful in  
10 that action (and if the court's findings and conclusions are  
11 sufficient), or if they succeed in this adversary proceeding in  
12 proving that the Debtor's conduct was willful and malicious  
13 within the meaning of section 523(a)(6), the attorney's fee award  
14 will be nondischargeable.

15 The Debtor points out that the only jury award for the  
16 Plaintiffs in the original state court action was on their  
17 trespass to chattels claim, on which the jury specifically found  
18 that the Debtor had not acted with malice or oppression. The  
19 Debtor also notes that the state court entered no judgment  
20 against the Debtor for an intentional tort. However, it remains  
21 to be seen whether the Debtor committed an intentional tort in  
22 prosecuting the sexual harassment claims. If she did, the  
23 attorney's fee award would be nondischargeable, because it was a  
24 direct result of that conduct.

25 The Debtor also argues that the trial judge's findings in  
26 his order awarding the attorney's fees were merely *dicta*, and  
27 therefore, are not binding on this court. Assuming for the sake  
28 of this decision only that this is accurate, it remains to be

1 seen whether this court or the state court will determine that  
2 the Debtor's conduct in prosecuting the sexual harassment claims  
3 was willful and malicious.

4 Finally, the Debtor contends that certain remarks made by  
5 the Plaintiffs in their state court appeal brief are an admission  
6 that the attorney's fee award was compensatory, and "not a  
7 penalty and not akin to punitive damages." Debtor's memorandum  
8 of points and authorities, at 9:15-17. Again, this misses the  
9 mark. For purposes of section 523(a)(6), the question is not  
10 whether an award is compensatory or punitive, but whether it  
11 flows directly from willful and malicious conduct. Indeed,  
12 damage awards for willful and malicious injury are almost  
13 invariably compensatory in nature, with punitive damages awarded  
14 in certain circumstances. The absence of a punitive damage award  
15 does not render compensatory damages dischargeable. See, e.g.,  
16 Carillo v. Su (In re Su), 290 F.3d 1140 (9th Cir. 2002)  
17 [remanding for consideration of malice issue; state court  
18 judgment included \$130,000 in economic damages and \$400,000 in  
19 non-economic damages, but no punitive damages].

20 For these reasons, the court concludes that the attorney's  
21 fee award is a direct result of the Debtor's conduct in  
22 prosecuting the sexual harassment claims. Whether that conduct  
23 was willful and malicious, within the meaning of 11 U.S.C. §  
24 523(a)(6), remains to be seen.

25 B. The § 727(a) causes of action

26 1. The third cause of action

27 In the third cause of action of the Complaint, the  
28 Plaintiffs contend that the Debtor failed to keep or preserve the

1 following records from which her financial circumstances might be  
2 ascertained: records relating to (1) her debt to the law firm of  
3 Brayton Purcell, (2) her possible causes of action against  
4 Brayton Purcell for malpractice, and (3) "the pursuit of the  
5 malicious prosecution action against Brayton Purcell and Clayton  
6 Kent." Complaint, at 5:23-25.

7 The Debtor addresses only the first of these points in her  
8 Motion, and on that point, the court concludes that there are  
9 genuine issues of material fact remaining to be decided. First,  
10 the Debtor testifies in her supporting declaration that she  
11 "never received any billings, demands or requests for payment  
12 from Brayton Purcell;" she argues, in essence, that she could not  
13 keep or preserve what she did not receive. Her deposition  
14 testimony was far more equivocal on this point.

15 Q. What efforts did you make to ascertain whether or not  
16 you had such documents?

17 A. First of all, I don't recall ever having any so, you  
18 know, not knowing if I ever had any to begin with, I didn't  
19 really know how to go around looking for something I never  
20 even knew if I had in the first place.

21 Plaintiffs' Exhibit N in support of their opposition to the  
22 Motion, at 4 (page 13 of the deposition transcript).

23 Second, the Debtor has submitted a declaration of her  
24 attorney, Thomas P. Griffin, Jr., in which he states that an  
25 attorney at Brayton Purcell told him the firm does not have any  
26 documents responsive to the Plaintiffs' subpoena for these

27 / / /

28 / / /

1 records, except a retainer agreement.<sup>3</sup> Assuming this hearsay  
2 statement is admissible, it does not support the conclusion that  
3 there are no genuine issues of material fact with respect to the  
4 Debtor's alleged failure to keep or preserve appropriate records.

5 2. The fourth cause of action

6 In their fourth cause of action, the Plaintiffs complain  
7 that the Debtor, with intent to hinder, delay, or defraud  
8 creditors, concealed property of the Debtor within the year  
9 before the date of filing of her bankruptcy petition.  
10 Specifically, the Debtor is alleged to have "intentionally  
11 conspired to provide services to her employer for a salary which  
12 was substantially less than the value of those services."  
13 Complaint, at 6:7-9.

14 The Debtor argues simply that she has disclosed all of her  
15 income, and that her version of the circumstances as to the  
16 changes in her income is the accurate one. In order to grant the  
17 Motion as to this point, the court would have to accept the  
18 Debtor's version of events as true, accept the inferences she  
19 draws therefrom, and reject the testimony of other witnesses and  
20 inferences that might be drawn from the documentary evidence.  
21 The same may be said of the Debtor's response to the Plaintiffs'  
22 argument that she has kept insufficient records of her expenses.  
23 In short, the arguments on both sides of these issues reveal that  
24 / / /

25 \_\_\_\_\_  
26 3. The Debtor characterizes this as a statement that "Brayton  
27 Purcell, LLP never sent a billing statement, demand or request for  
28 payment to the Debtor." Debtor's memorandum of points and  
authorities, at 11:11-17, 11:21-22. Counsel's declaration does not  
show that such records were never sent to the Debtor, only that  
Brayton Purcell claims it does not have such records.

1 there are a host of genuine issues of material fact remaining to  
2 be decided.

3 Finally, the Debtor contends the issues raised in the  
4 Plaintiffs' fourth cause of action are also the subject of  
5 pending state court litigation, and therefore, that this court  
6 should abstain from deciding them. The pending litigation is an  
7 action by the Plaintiffs against the Debtor and her husband and  
8 employer, Marc Hughes, to recover the value of fraudulent  
9 transfers allegedly made by the Debtor to Mr. Hughes in  
10 connection with alleged shifting of income and expenses.  
11 Assuming the automatic stay does not prevent the Plaintiffs from  
12 proceeding with the state court litigation, the difficulty with  
13 the Debtor's argument is that the remedies sought in the two  
14 actions are entirely different. In this adversary proceeding,  
15 the Plaintiffs seek to deny the Debtor's bankruptcy discharge,  
16 which is a matter within this court's exclusive jurisdiction.  
17 Accordingly, there is no basis for this court to abstain from  
18 determining whether the Debtor is entitled to a discharge.

19 III. CONCLUSION

20 For the reasons set forth above, the court will issue an  
21 order denying the Motion.

22  
23 Dated: July 10, 2007

\_\_\_\_\_  
/s/  
ROBERT S. BARDWIL  
United States Bankruptcy Judge