

conclusions of law with respect to the summary judgment motions in accordance with Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

I. Factual Background

A. The Underlying Judgment

This adversary proceeding continues a lengthy and complex dispute over a commercial lease/purchase agreement for a piece of real property located at 827 Dawn Lane, Grapevine, Texas (the “Property”). The almost 20-year history of this dispute began in 1984 when the first contested transfer of the Property occurred. The dispute entered the judicial system in 1989 when the original transferor filed suit against the transferees alleging void deed. Further complications occurred when the transferor was murdered and his cause of action vested in his probate estate. A&W became involved in 1991 when it entered into the agreement described more fully below and thereby obtained certain rights to the Property.

According to the summary judgment record, the Property was originally owned by Wilbert of North Texas, Inc. (“Wilbert”), a corporation formed by brothers Tommy Joe Day and George Day. Certain internal family transactions were intended to grant title to the Property to Tommy Day. However, in 1989, because of either incorrectly completed or fraudulent transactions, the deed or deeds became subject to litigation in the 352nd District Court of Tarrant County, Texas (the “352nd court lawsuit”).¹ Tommy Day filed the 352nd court lawsuit against Shirley Long Day (Tommy’s sister-in-law and the purported owner of Indian Villages), Indian Villages, and the Klutz trust (apparently a Day family trust). The 352nd court lawsuit clouded title to the Property.

¹Although not relevant here, these deeds also spawned criminal forgery convictions against George Day in Cause No. 12-459, *The State of Texas v. George Day*, in the 35th Judicial District Court of Brown County, Texas. See A&W’s Mem. Brief as to Issue Preclusion, Exhibit A, p. 11.

Tommy Day was murdered in 1990 and a second brother, James, and Tommy's ex-wife, Ramona, were named the independent co-executors of his estate.² For tax reasons, the co-executors of the estate wanted to sell the estate assets. However, title to the Property was still in dispute. As a result, on September 11, 1991, Wilbert and A&W "entered into a valid, enforceable Agreement for Acquisition of Assets." *See* Findings of Fact and Conclusions of Law entered by Probate Court No. Two of Tarrant County, Texas (the "Probate Court") dated May 31, 2000 (the "Findings"), p. 2, ¶ 3. Pursuant to that agreement, A&W agreed to lease the Property and, when the cloud on title was removed, A&W would buy the Property. As the Probate Court found, the Agreement for Acquisition of Assets had "attached as Exhibit 'A' a Commercial Lease Agreement containing an Obligation to Purchase provision, obligating Wilbert to sell, and A&W to purchase, the [Property]." *See* Findings, p. 3, ¶ 7. The co-executors of the estate either "authorized (or ratified the actions of) [the officer of Wilbert] to sign the Agreement for Acquisition of Assets on behalf of Wilbert." *See* Findings, p. 3, ¶ 8. While A&W and Wilbert amended the original agreement, the Probate Court found that this amendment was either authorized or ratified by the co-executors. *See* Findings, p. 3, ¶¶ 9 & 10.

On October 28, 1991, Wilbert and A&W entered into the Commercial Lease Agreement that had been attached as Exhibit A to the asset acquisition agreement. *See* Findings, p. 4, ¶ 15. Again, the Probate Court found that the co-executors either authorized or ratified that lease. *See* Findings, p.4, ¶ 18. A&W then took possession of the Property.

²Again, while not directly relevant, Ramona's daughter (Tommy's former step-daughter) murdered Tommy. *See* Opinion (the "Opinion") of the Court of Appeals for the Second District of Texas in Fort Worth (the "Court of Appeals") signed on July 18, 2002 at p. 3. While Tommy had consulted his attorney about changing his will to remove Ramona as a co-executor, he was killed before he signed the new will. *Id.*

At the risk of oversimplifying the next contorted series of events and legal actions,³ Goldblatt obtained a power of attorney to act for the estate. The mortgage on the Property went into default and the holder of the note and mortgage, Landmark Life Insurance Company (“Landmark”), posted the Property for foreclosure. After discussions with other persons interested in the estate, Goldblatt purchased Landmark’s note and thereafter foreclosed on the Property as part of a “conspiracy to commit fraud . . . to divest A&W of its right to purchase [the Property].” *See* Findings, p. 6, ¶ 24.

Various lawsuits were filed in various state courts regarding these events and/or transactions. These lawsuits were consolidated into a single suit in the Probate Court. The Probate Court heard the evidence over twenty-nine (29) trial days and entered judgment in A&W’s favor on May 31, 2000. Pursuant to the Judgment, A&W was awarded actual damages, punitive damages, and attorney’s fees against Goldblatt in the aggregate amount of \$1,054,212.10 (the “Judgment Debt”).⁴

B. Goldblatt’s Bankruptcy Case

Goldblatt filed his voluntary petition under chapter 11 of the Bankruptcy Code on June 6, 2000, just days after the Probate Court issued the Findings and the Judgment. Thereafter, A&W filed its complaint to determine dischargeability of debt in which it seeks a determination that the Judgment Debt is nondischargeable in Goldblatt’s bankruptcy case under §§ 523(a)(2)(A) and/or (a)(6) of the Bankruptcy Code. By Order entered on November 4, 2001, this Court converted Goldblatt’s bankruptcy case to a case under chapter 7 of the Bankruptcy Code.

³For a complete discussion of the underlying facts, *see* the Findings, the Judgment signed by the Probate Court in May 2000 (the “Judgment”), and the 88-page opinion of the Court of Appeals.

⁴ The Judgment also provides that these amounts are subject to increase in the event that a party petitions for review by the Texas Supreme Court or appeals the judgment to federal court. *See* Judgment, p. 3, ¶ 8.

C. A&W's Nondischargeability Complaint

As noted previously, A&W contends that the Judgment Debt is nondischargeable in accordance with §§ 523(a)(2)(A) and/or (a)(6) of the Bankruptcy Code. As regards its § 523(a)(2)(A) claims, A&W contends that:

[t]he trial court and the Court of Appeals, expressly found based on the evidence that was admitted in trial that false representations were made to plaintiff by Goldblatt. Moreover, false representations were made by the other parties to secure a sham judgment that was intended to defeat the plaintiff's rights to the Dawn Lane property, and that such acts constituted a conspiracy to defraud the plaintiff. Because of the active conspiracy, Goldblatt is legally bound by the other defendants [sic] actions or conduct which were done in furtherance of their goal to defraud plaintiff. The trial court found by the evidence that the false representations were material, and were relied upon and damaged the plaintiff.

Plaintiff's Response and Cross Motion, p. 3, ¶ 5. A&W further contends that the "actual fraud" standard of § 523(a)(2)(A) is satisfied in light of the state courts' findings of fraud:

The trial court and the Court of Appeals expressly finds [sic] that the defendant was an active conspirator and intentionally committed the fraudulent and wrongful acts that gave rise to plaintiff's damages. The Court of Appeals could not have legally affirmed the trial court's judgment dated May 11, 2000 unless all of the elements of fraud were found to exist. Moreover the Court of Appeals could not have affirmed the punitive damage assessment that is part of the award if there was not a finding of either malicious acts or other aggravating circumstances.

Id., p. 5, ¶ 7 (emphasis in original).

Regarding its § 523(a)(6) claims, A&W contends that the Judgment Debt is based on acts of fraud and civil conspiracy, which are both intentional torts, and that Goldblatt's acts were knowingly and intentionally committed under aggravating circumstances, thereby entitling A&W to punitive damages. *See* Plaintiff's Response, p. 7, ¶ 9. Thus, according to A&W, the acts

underlying the Judgment Debt are “willful and malicious” as required by the Bankruptcy Code and the Judgment Debt is nondischargeable under § 523(a)(6).

On the other hand, Goldblatt contends that: (i) exceptions to discharge should be strictly construed in his favor to further the Bankruptcy Code’s policy of providing a debtor with a fresh start; (ii) as the objecting party, A&W must establish the exceptions to discharge upon which it relies by a preponderance of the evidence; and (iii) A&W has not met its burden here because the Findings and the Judgment are not legally sufficient to meet the requirements of either §§ 523(a)(2)(A) or (a)(6) of the Bankruptcy Code. Specifically, Goldblatt argues that:

[t]he trial court’s Judgment of May 11, 2000 [and the Findings of Fact and Conclusions of Law] cites no intentional, illegal or malicious act . . . the trial court made no finding of Debtor’s subjective state of mind . . . the trial court made no findings of damages in tort, but only damages in contract, and none of those damages were attributed to Debtor . . . The findings of fact are devoid of any finding of “malice” on the part of any Debtor-aligned party, especially Debtor. . . . The trial court did not find that Debtor made a material representation to Creditor that was false, that Creditor relied on such a statement, or that Creditor suffered any injury as a result of such reliance.

See Debtor’s Motion for Summary Judgment and Brief, p. 6, ¶¶ 38 – 41; p. 18, ¶ 90.

Thus, while the parties disagree as to the legal effect of the Findings and the Judgment, the underlying procedural history is not in dispute. In short, the Probate Court entered its Judgment against Goldblatt for civil conspiracy to defraud and awarded A&W actual damages, punitive damages and attorney’s fees; the Court of Appeals affirmed the Judgment and has recently denied Goldblatt’s motion for rehearing.⁵

⁵In a conference call with the parties on October 29, 2002, the Court was advised by Goldblatt’s counsel that Goldblatt intends to seek review by the Texas Supreme Court. The Court was further advised that the non-debtor appellants do not intend to seek further review of the Judgment.

II. Legal Analysis

A. The Exceptions to Discharge at Issue Here

Section 523 of the Bankruptcy Code excepts certain types of debts from a debtor's discharge. However, these exceptions to discharge are strictly construed in favor of dischargeability to facilitate a debtor's fresh start. *See Texas Lottery Comm'n v. Tran*, 151 F.3d 339, 342 (5th Cir. 1998); *In re Hudson*, 107 F.3d 355, 356 (5th Cir. 1997).

Under § 523(a), a debtor is denied a discharge for “any debt – (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – (A) false pretenses, a false representation, or actual fraud” 11 U.S.C. § 523(a)(2)(A). Moreover, § 523(a)(6) excepts a debt “for any willful and malicious injury by the debtor to another entity or to the property of another entity” from a debtor's discharge. 11 U.S.C. § 523(a)(6). Under both §§ 523(a)(2) and (a)(6), the creditor filing the nondischargeability complaint bears the burden of proof; and to prevail, the creditor must prove its case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991); *FDIC v. Smith (In re Smith)*, 160 B.R. 549, 552 (N.D. Tex. 1993), *aff'd*, 39 F.3d 320 (5th Cir. 1994); *In re Townsley*, 195 B.R. 54, 60 (Bankr. E.D. Tex. 1996); *Everspring Enters., Inc. v. Wang (In re Wang)*, 247 B.R. 211, 213-14 (Bankr. E.D. Tex. 2000); *Hayden v. Hayden (In re Hayden)*, 248 B.R. 519, 523 (Bankr. N.D. Tex. 2000).

B. Summary Judgment Standard

In general, summary judgment is proper if the summary judgment record shows that there is “no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(b); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Abbot v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). As

relevant here, A&W asks this Court to: (i) apply principles of collateral estoppel (now known as issue preclusion) to the Findings, the Judgment, and the Opinion and (ii) conclude, based on those state court determinations, that the Judgment Debt is nondischargeable in Goldblatt's bankruptcy case.

Issue preclusion will prevent a debtor's discharge in bankruptcy court where the issue has been previously litigated. *Grogan v. Garner*, 498 U.S. 279, 287-88 (1991). To determine whether issue preclusion applies in the bankruptcy case, the court must look to the rules of issue preclusion in the state of the underlying judgment. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982). The Fifth Circuit notes that the "Texas courts have indicated that there is 'little difference' between Texas and federal rules of issue preclusion." *State Farm Fire and Cas. Co. v. Fullerton*, 118 F.3d 374, 383 (5th Cir. 1997) (quoting *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 n. 7 (Tex. 1994)).

Texas law applies issue preclusion when the following elements are met: (i) the issue at stake is the same as the one involved in the prior action; (ii) the issue was actually litigated in the prior action; and (iii) the determination of the issue in the prior action was a part of the judgment in the earlier action. *Rolex Watch U.S.A., Inc. v. Meece (In re Meece)*, 261 B.R. 403, 407 (Bankr. N.D. Tex. 2001) (citing *Southmark Corp. v. Coopers and Lybrand (In re Southmark)*, 163 F.3d 925, 932 (5th Cir. 1999)). In addition, under Texas law, "preclusion includes the inherent issues or elements necessary to establish the claim." *Samedan Oil Corp. v. Louis Dreyfus Natural Gas Corp.*, 52 S.W.3d 788, 794 (Tex. App. – Eastland 2001, pet. denied) (applying *res judicata* as broader preclusion doctrine); *see also Robinson v. Callender (In re Callender)*, 212 B.R. 276, 282 (Bankr. W.D. Mich. 1997) (fraud judgment entitled to collateral estoppel effect because "element of

materiality is easily and properly inferred . . .”).

Thus, for a bankruptcy court to apply collateral estoppel or issue preclusion in nondischargeability litigation, the elements that constitute the relevant § 523 claim must have been decided in the underlying litigation, either expressly or as an inherent element of the claim. If the state court decision lacks the specificity required by the Bankruptcy Code, the bankruptcy court cannot determine the judgment debt nondischargeable without making additional factual findings from an evidentiary record made before it. *See In re Miller*, 156 F.3d 598, 606 (5th Cir. 1998) *cert. denied*, 526 U.S. 1016 (1999) (nondischargeability complaint remanded to district court because state court jury findings did not speak to fraudulent intent).

Applying these requirements here, summary judgment in favor of A&W is proper if the underlying state court determinations satisfy the applicable standards for nondischargeability of the Judgment Debt under the Bankruptcy Code. Conversely, summary judgment in favor of Goldblatt is proper if those state court determinations are legally insufficient to satisfy the applicable standards for nondischargeability of the Judgment Debt under the Bankruptcy Code.

C. The Probate Court Findings and Judgment

Here, the Probate Court found or concluded that:

- Goldblatt “wrongfully and intentionally conspired to inflict injury on A&W,” *see* Judgment, p. 2, ¶ 5.
- “A&W entered into the Commercial Lease Agreement attached as Exhibit “A” to the Agreement for Acquisition of Assets on the closing date of October 28, 1991,” *see* Findings, p. 4, ¶ 15;
- “A&W substantially performed under the terms of the Obligation to Purchase provision of the Commercial Lease Agreement,” *see* Findings, p. 5, ¶ 20;
- “Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached the terms of the Obligation to

Purchase provision of the Commercial Lease Agreement entered into between A&W and Wilbert by terminating negotiations and refusing to sell the Leased Premises to A&W at a price to be determined by appraisers,” *see* Findings, p. 5, ¶ 22;

- “The breach of the Obligation to Purchase provision of the Commercial Lease Agreement between A&W and Wilbert was a result of a conspiracy to commit fraud among the following parties [including Goldblatt] to prevent A&W from being able to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement . . .,” *see* Findings, p. 5, ¶ 23;
- “The purchase of the Real Estate Lien Note from Landmark Life and subsequent foreclosure by Kenn Goldblatt on the Leased Premises was the result of a conspiracy to commit fraud among the following parties [including Goldblatt] to divest A&W of its right to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement . . .,” *see* Findings, p. 6, ¶ 25;
- “The following parties [including Goldblatt] were engaged in a conspiracy to defraud A&W evidenced in part by a written Agreement to cooperate to void the Agreement for Acquisition of Assets between A&W and Wilbert, and divest A&W of the assets it rightfully purchased from Wilbert . . .,” *see* Findings, p. 6, ¶ 27; and
- “The conduct of the following parties [including Goldblatt] warrants the assessment of exemplary or punitive damages against them . . .,” *see* Findings, p. 7, ¶ 29.

The Court of Appeals affirmed the Judgment in an 88-page opinion, in which that court concluded that, among other things, “Goldblatt, at the very least, had full knowledge of all the details of the conspiracy,” *see* Opinion, p. 35, and “[t]he evidence of fraud and resulting damages to A&W that we have discussed in section IV is clear and convincing evidence sufficient to support the punitive damages award,” *see* Opinion, p. 37. Moreover, the Court of Appeals rejected the appellants’ contention that the Probate Court’s findings were insufficient to support its various conspiracy conclusions, noting

In this case, however, the trial court concluded that all of the appellants . . .

conspired to commit fraud to prevent A&W from purchasing the [Property] and to void the asset acquisition agreement. As an appellate court, we must give effect to the trial court's intended findings if they are supported by the evidence, the record, and the judgment. . . . This rule is based upon well-settled Texas law that in a nonjury trial every reasonable inference and intendment supported by the record will be drawn in favor of the trial court's judgment. As we have discussed, there is ample evidence to support the trial court's implied findings that [the appellants] conspired to commit fraud. Further, fact findings on the ultimate and determinative fact questions of a case are not to be disregarded simply because they are mislabeled as conclusions of law. . . . We overrule all of appellants' issues concerning conspiracy.

See Opinion, pp. 36-37.

D. Application of the Findings and Judgment to the Nondischargeability Complaint

Given A&W's request that this Court apply collateral estoppel principles to these state court determinations and hold the Judgment Debt nondischargeable in accordance with §§ 523(a)(2)(A) and/or (a)(6), this Court will analyze whether Goldblatt's liability for civil conspiracy to defraud under Texas law satisfies the Bankruptcy Code's requirements for nondischargeability at issue here.

1. Section 523(a)(2)(A)

As noted previously, § 523(a)(2)(A) excepts from discharge any debt for "money, property, services, or credit" obtained by "false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). Thus, to be nondischargeable, there must be a debt: (i) owed by the debtor, (ii) for money, property, services, or credit, (iii) that was obtained by false pretenses, a false representation, or actual fraud. The purpose of § 523(a)(2)(A) is to prevent a dishonest debtor from retaining the benefits of money, property, services, or credit obtained by fraudulent means. *See* COLLIER'S (15th ed.) ¶ 523.08[1][a].

Applying these requirements here, the Court concludes that A&W has not established that

the Judgment Debt is excepted from discharge in accordance with § 523(a)(2)(A). First, Goldblatt did not borrow any money from A&W, fraudulently or otherwise. Second, while the Probate Court found that Goldblatt purchased the Landmark note and foreclosed on the Property as part of a “conspiracy to commit fraud . . . to divest A&W of its right to purchase [the Property],” the Judgment Debt is based on Goldblatt’s liability for conspiracy to defraud, not a fraudulent foreclosure. Third, Goldblatt did not obtain any services from A&W, fraudulently or otherwise. Finally, A&W did not extend (or renew) credit to Goldblatt. In short, § 523(a)(2)(A) is simply inapplicable to the facts as found by the Probate Court.

In its briefs and at the summary judgment hearing, A&W argued that because the Judgment is based on Goldblatt’s fraudulent conduct and/or his co-conspirators’ false representations, the Judgment Debt qualifies as a debt obtained by fraud or false representations. The Court disagrees. In *Grogan v. Garner*, 498 U.S. 279, 282 n. 2 (1991), the Supreme Court stated: “[a]rguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6).” In addition, in *In re Chavez*, 140 B.R. 413, 420 (Bankr. W.D. Tex. 1992), the court held that “[i]n order to show a violation of § 523(a)(2), the money [the debt owed] must come to the debtor because of the representation [or fraud].” *Id.* The *Chavez* court also noted that the “mere fact that a liability arises as a consequence of the false representation [or fraud] is not sufficient on its own.” *Id.*

A&W also argued that the Supreme Court’s holding in *Cohen v. De La Cruz*, 523 U.S. 213 (1998) stands for the proposition that the § 523(a)(2)(A) exception to discharge prevents the discharge of *all liability* arising from a debtor’s fraud. See A&W’s Memorandum Brief as to Issue

Preclusion, p. 10. According to A&W, since the Judgment Debt is based on findings of a civil conspiracy to defraud among various parties, including Goldblatt, the Judgment Debt is nondischargeable as a liability arising from fraud within the meaning of *Cohen*.

Again, the Court disagrees. In *Cohen*, the Supreme Court held that “[o]nce it is established that specific money or property has been obtained by fraud, however, ‘any debt’ arising therefrom is excepted from discharge.” 523 U.S. at 218. As a result, the *Cohen* Court held an award of treble damages (arising from the fraudulently obtained money) nondischargeable. Here, however, Goldblatt does not owe a debt to A&W because he fraudulently obtained any money, property, or services from A&W. Thus, *Cohen* is not controlling.

2. Section 523(a)(6)

As noted previously, § 523(a)(6) excepts from discharge any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6). In the Fifth Circuit, a “‘willful and malicious injury’ results from an act done with the actual intent to cause injury, not from an act done intentionally that causes injury.” *Board of Regents of the Univ. of Texas Sys. v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998) (citing *Kawaauhau v. Geiger*, 523 U.S. 57 (1998)). In this context, “an injury is ‘willful and malicious’ where there is either an objective substantial certainty of harm or a subjective motive to cause harm.” *In re Miller*, 156 F.3d 598, 605 (5th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999).⁶

⁶Prior to its decision in *Miller*, the Fifth Circuit separately defined willful and malicious; “willful” meant intentional, and “malicious” meant without just cause or excuse. *See, e.g., Chrysler Credit Corp. v. Perry Chrysler Plymouth, Inc.*, 783 F.2d 480, 486 (5th Cir. 1986); *Bombardier Capital Inc. v. Black (In re Black)*, 179 B.R. 509, 515-16 (Bankr. E.D. Tex. 1995). However, in *Miller*, the Fifth Circuit found that its prior “‘just cause or excuse’ approach is peculiarly inappropriate, however, given the Supreme Court’s definition of ‘willful . . . injury’ in *Kawaauhau*. Where injury is intentional, as it now must be under *Kawaauhau*, it cannot be justified or excused.” *Miller*, 156 F.3d at 605. Thus, the *Miller* court adopted the unitary standard for willful and malicious injury quoted above.

Here, the Probate Court found Goldblatt liable as a result of a “conspiracy to commit fraud . . . to divest A&W of its right to purchase [the Property]” and/or a “conspiracy to defraud A&W.” See Findings, p. 3, ¶¶ 24 & 27. In Texas, civil conspiracy is an intentional tort, see *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996), that has five elements: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more over unlawful acts; and (5) damages as a proximate result. See *Leigh v. Danek Medical, Inc.*, 28 F.Supp.2d 401 (N.D. Tex. 1998); *Operation Rescue v. Nat’l Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546 (Tex. 1998); *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983).

Significantly, in Texas “[c]ivil conspiracy requires specific intent.” *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d at 614. The “‘gist of a civil conspiracy’ is the injury the conspirators intend to cause.” *Id.* (quoting *Triplex*, 900 S.W.2d at 720).

“For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement. One cannot agree, expressly or tacitly, to commit a wrong about which he has no knowledge. Given the specific intent requirement, parties cannot engage in a civil conspiracy to be negligent.”

Id. (citations omitted).

The Texas Supreme Court’s decision in *Firestone Steel* came as no surprise because the court had earlier stated the specific intent requirement of civil conspiracy law in Texas. See, e.g., *Triplex Communications*, 900 S.W.2d at 716. But, of even greater significance in the context of nondischargeability litigation in the bankruptcy courts, the *Triplex Communications* court specifically rejected an argument that tortfeasors in a civil conspiracy need only intend to engage

in the conduct that resulted in the injury when it stated:

The gravamen of their argument is that the tortfeasors needed only to intend to engage in the conduct that resulted in the injury. We disagree; civil conspiracy requires specific intent. For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement.

Id. at 719.⁷ Similarly, in *Ward v. Sinclair*, 804 S.W.2d 929, 931 (Tex. App. – Dallas 1990, writ denied), the court noted that

“for a defendant to be liable for civil conspiracy to defraud, it must be shown not only that there was such a conspiracy but that the particular defendant charged agreed with one or more of the other conspirators on the claimed illegal object of the conspiracy and intended to have it brought about.”

After considering the Findings and the Judgment in light of these Texas state law requirements, this Court concludes that the Judgment Debt is nondischargeable in accordance with § 523(a)(6) of the Bankruptcy Code. As noted previously, the Probate Court found, among other things, that Goldblatt’s actions in purchasing the Landmark note and subsequently foreclosing on the Property “was the result of a conspiracy to commit fraud . . . to divest A&W of its right to purchase the [Property].” *See* Findings, p. 6, ¶ 24. In light of the underlying state law requirements for a civil conspiracy, the Probate Court’s conspiracy findings satisfy the objective substantial certainty of harm or subjective motive to cause harm standard announced by the Fifth Circuit in *Miller*, 156 F.3d at 598, for a debt to be nondischargeable under § 523(a)(6) of the Bankruptcy Code.

3. Attorney’s Fees and § 523(a)(6)

Both Goldblatt and A&W have asked for an award of attorney’s fees regarding this

⁷Recall the Fifth Circuit’s earlier holding in *Board of Regents of the Univ. of Texas Sys. v. Walker*, 142 F.3d at 813, that “‘willful and malicious injury’ results from an act done with the actual intent to cause injury, not from an act done intentionally that causes injury,” a holding remarkably similar to the *Triplex Communications* court’s holding that specific intent is required for a civil conspiracy under Texas state law. *See* p. 13, *supra*.

nondischargeability litigation. For the reasons set forth below, each party must bear its own expenses and attorney's fees.

Cases brought under federal law are subject to the "American Rule," and the prevailing party ordinarily cannot recover attorney's fees absent specific statutory authority, a contractual right, or special circumstances, such as aggravated conduct. *See Buckhannon Board and Care Home, Inc. v. West Virginia Dept. Of Health and Human Res.*, 532 U.S. 598, 602 (2001); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The American Rule applies to litigation in the bankruptcy courts. *In re S.S.*, 271 B.R. 240, 245 (Bankr. D.N.J. 2002); *In re Jordan*, 927 F.2d 221 (5th Cir. 1991); *Crain v. Limbaugh (In re Limbaugh)*, 155 B.R. 952, 961 (Bankr. N.D. Tex. 1994); *Dennison v. Hammond (In re Hammond)*, 236 B.R. 751, 769 (Bankr. D. Utah 1998). The federal courts have carved out narrow exceptions, such as when a contract or statute provides for attorney's fees; however, none are applicable here. Specifically, neither §§ 523(a)(6) or (a)(2) provides for a recovery of attorney's fees, and there is no general right to recover attorney's fees set forth in the Bankruptcy Code. 11 U.S.C. § 523(a)(2), (a)(6); *see also Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir. 2000). Moreover, attorney's fees incurred in litigating dischargeability issues generally are not recoverable. *See Seimer v. Nangle (In re Nangle)*, 281 B.R. 654, 657 (B.A.P. 8th Cir. 2002) (citing *Sherman v. Reilly (In re Reilly)*, 244 B.R. 46, 50 (Bankr. D. Conn. 2000); *In re Carter*, 240 B.R. 767, 770-71 (Bankr. W.D. Mo. 1999).

Here, the filing of this nondischargeability complaint simply vindicated A&W's right to contest the dischargeability of the Judgment Debt, and Goldblatt's opposition did not amount to bad faith litigation. Thus, the Court concludes that neither Goldblatt nor A&W has established an exception to the American Rule and each must bear its own expenses and attorney's fees.

III. Conclusion

When collateral estoppel effect is given to the Findings and the Judgment of the Probate Court, the Judgment Debt must be found nondischargeable in accordance with § 523(a)(6) of the Bankruptcy Code. However, the Judgment Debt is not excepted from discharge in accordance with § 523(a)(2)(A) of the Bankruptcy Code. Moreover, as the prevailing party, A&W is not entitled to recover its reasonable attorney's fees and expenses in bringing this action.

Thus, each of the summary judgment motions must be granted in part and denied in part. Goldblatt's motion for summary judgment will be granted to the extent A&W sought a determination that the Judgment Debt is nondischargeable in accordance with § 523(a)(2)(A). The balance of Goldblatt's motion for summary judgment will be denied. Conversely, A&W's cross-motion for summary judgment will be granted to the extent A&W sought a determination that the Judgment Debt is nondischargeable in accordance with § 523(a)(6). The balance of A&W's cross-motion will be denied.

A judgment consistent with this Memorandum Opinion will be entered separately.

Signed: November 7, 2002.

Barbara J. Houser
United States Bankruptcy Judge