IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 7
	)	
BETH ELLEN PETERSON,	)	Case No. 01-2393 (MFW)
	)	
Debtor.	)	
	)	
LYNN FREMUTH, Individually and d/b/a KALIKYNO AUSTRALIAN SHEPHERDS,	)	Adversary No. A-01-7489 (MFW)
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BETH ELLEN PETERSON, a/k/a BETH ELLEN ROOP,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION[1]

Before the Court are the Motions for Summary Judgment filed by both the Plaintiff, Lynn Fremuth, d/b/a Kalikyno Australian Shepherds ("Fremuth") and Beth Ellen Peterson, a/k/a Beth Ellen Roop ("the Debtor") on the complaint objecting to the dischargeability of Fremuth's claim under section 523(a)(6) of the Bankruptcy Code.

I. FACTUAL BACKGROUND

Fremuth is engaged in the business of breeding, training and showing Australian Shepherd dogs in the Township of Bloomfield,

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

Oakland County, Michigan. Fremuth and the Debtor entered into an agreement in March of 1996 for the sale of a puppy bred by Fremuth. In June of 1997, the Debtor alleged Fremuth refused to comply with the agreement.

Beginning in 1999, the Debtor began disseminating statements regarding Fremuth's breeding business, including allegations that Fremuth engaged in blackmail, via a web page owned, maintained and published by the Debtor. On May 19, 1999, Fremuth sent a letter to the Debtor requesting a retraction of the defamatory statements. Rather than retract, the Debtor changed her website allegations to state that Fremuth had engaged in extortion. On or about June 30, 1999, Fremuth instituted a civil action against the Debtor in the State of Michigan alleging defamation per se, tortious interference with business relations, breach of contract and conversion. By stipulation dated May 16, 2000, the parties agreed to binding arbitration.

On November 27, 2000, following an evidentiary hearing, the Arbitrator found that the Debtor defamed Fremuth and entered an award in favor of Fremuth for $15,000, plus statutory interest. On February 28, 2001, the Michigan State Court entered judgment in the amount of $16,695.65 against the Debtor.

The Debtor filed a voluntary petition under chapter 7 on July 13, 2001. On October 11, 2001, Fremuth commenced this adversary proceeding, seeking a determination that the state

court judgment is nondischargeable pursuant to section 523(a)(6) of the Bankruptcy Code. On January 25, 2002, Fremuth filed a Motion for Summary Judgment. On February 5, 2002, the Debtor filed a Response and a Motion for Summary Judgment seeking a determination that the state court judgment is dischargeable pursuant to section 523(a)(6). On February, 12, 2002, Fremuth filed its Response to the Motion for Summary Judgment.

II. JURISDICTION

This Court has jurisdiction over these Motions for Summary Judgment, which are core proceedings pursuant to 28 U.S.C. § 1334 and § 157(b)(2)(I).

III. DISCUSSION

A Motion for Summary Judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Robeson Indus. Corp. v. Hartford Accident & Indem. Co. (In re Robeson Indus.), 178 F.3d 160, 164 (3d Cir. 1999). The court must assume that undisputed facts set forth in the record are true. Catanzaro v. Weiden, 188 F.3d 56, 63 (2d Cir. 1999); In re Trans World Airlines, Inc., 180 B.R. 386, 387 (Bankr. D. Del. 1994).

Fremuth's complaint is based on section 523(a)(6) which provides, in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt -
>
> . . .
>
> (6) for willful and malicious injury by the debtor to another entity.

Fremuth argues that the Arbitrator found the Debtor to have acted with willful or malicious intent, collaterally estopping the Debtor from contesting the nature of her conduct. The Debtor, on the other hand, argues that the Arbitrator found the Debtor to have acted with mere negligence, collaterally estopping Fremuth from contesting the Debtor's mental state.

Collateral estoppel (or issue preclusion) applies to bankruptcy dischargeability proceedings. See, e.g., Grogan v. Garner, 498 U.S. 279, 284-85 (1991). Collateral estoppel applies when:

> (1) the issue sought to be precluded is the same as that involved in the prior action;
>
> (2) that issue was actually litigated;
>
> (3) it was determined by a final and valid judgment; and
>
> (4) the determination was essential to the prior judgment.

See, e.g., Wolstein v. Docteroff (In re Docteroff), 133 F.3d 210, 214 (3d Cir. 1997); Graham v. Internal Revenue Service (In re Graham), 973 F.2d 1089, 1096 (3d Cir. 1992); In re McMillan, 579 F.2d 289, 291 (3d Cir. 1978).

For a debt to be nondischargeable as willful and malicious, the injury must be deliberate or intentional; it is not sufficient to allege a deliberate or intentional act which leads to injury. Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998). That is, the debtor must have deliberately acted in a manner which was substantially certain to cause harm. See Conte v. Gautam (In re Conte), 33 F.3d 303, 309 (3d Cir. 1994).

Therefore, the issue before the Court is whether the Arbitrator, after actual litigation, necessarily concluded in a final, valid order that the injury to Fremuth was caused by a deliberate or intentional action of the Debtor which was substantially certain to cause harm.

The Arbitrator in assessing whether the Debtor was liable relied on Michigan law for the standard of defamation. (Exhibit D to Fremuth Motion.) Under Michigan law, to find liability based on defamation, negligence is all that is necessary. See, e.g., Tomkiewicz v. Detroit News, Inc., 635 N.W.2d 36, 40 (Mich. App. 2001)(to establish a claim of defamation plaintiff must show fault amounting to at least negligence).

In this case, the Arbitrator made an express finding that the "malicious and/or negligent use of the Internet and Internet web sites [by the Debtor] in this matter has caused damages." (Exhibit D to Fremuth Motion.) Fremuth asserts that the culpability issue has been fully litigated and focuses on the word "malicious" to infer a finding by the Arbitrator of a

deliberate or intentional act. In contrast, the Debtor focuses on the word "negligent" to infer a finding of no deliberate or intentional act.

We disagree with both parties. The Arbitrator's finding reflects that the issue before us was not actually litigated since it was not necessary for the Arbitrator to make a specific finding of anything more than negligence to establish liability for defamation. Thus, we cannot conclude that the Arbitrator addressed the issue of whether the Debtor acted maliciously. Consequently, collateral estoppel does not apply. The Motions for Summary Judgment are denied.

IV. CONCLUSION

For the foregoing reasons, we deny both Fremuth's and the Debtor's Motions for Summary Judgment.

An appropriate Order is attached.

BY THE COURT:

Dated: April 18, 2002

Mary F. Walrath
United States Bankruptcy Judge

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	)	
Defendant.	)	

O R D E R

AND NOW, this **18TH** day of **APRIL, 2002**, upon consideration of the Motion of Lynn Fremuth, d/b/a Kalikyno Australian Shepherds for Summary Judgment, and the Motion for Summary Judgment of Beth Ellen Peterson, a/k/a Beth Ellen Roop, it is hereby

ORDERED that both Motions for Summary Judgment are **DENIED**; and it is further

ORDERED that trial is set for May 31, 2002, at 2:00 p.m.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

SERVICE LIST

Neal J. Levitsky, Esquire
L. Jason Cornell, Esquire
AGOSTINI, LEVITSKY, ISAACS & KULESZA
824 North Market Street, Suite 810
P.O. Box 2323
Wilmington, DE 19899-2323
Counsel for Plaintiff Lynn Fremuth

William F. Jaworski, Esquire
LAW OFFICE OF WILLIAM F. JAWORSKI, LLC
1679 South Dupont Highway
Suite 9
P.O. Box 854
Dover, DE 19903
Counsel for Debtor-Defendant
Beth Ellen Peterson a/k/a Beth Ellen Roop

OFFICE OF THE UNITED STATES TRUSTEE
J. Caleb Boggs Federal Building
844 King Street
Lockbox 35, Suite 2313
Wilmington, DE 19801