

AUG 08 2007

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|---------------------|---|--------------------------------|------------------|
| In re: |) | BAP No. | CC-06-1042-DMcMo |
| DAYLE MOMI TAMURA, |) | Bk. No. | SA 98-17610-LR |
| Debtor. |) | Adv. No. | SA 98-01650 JB |
| _____ |) | | |
| DAYLE MOMI TAMURA, |) | | |
| Appellant, |) | | |
| v. |) | MEMORANDUM ¹ | |
| JAMES V. LAGUARDIA, |) | | |
| Appellee. |) | | |
| _____ |) | | |

Argued and Submitted on July 26, 2007
at Pasadena, California

Filed - August 8, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable James N. Barr, Bankruptcy Judge, Presiding.

Before: DUNN, McMANUS² and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, FRAP 32.1, it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 In this appeal, we are confronted with an unhappy
2 intersection of domestic relations, criminal and bankruptcy law
3 concerning a relationship gone bad. The appellant, chapter 7
4 debtor Dayle Momi Tamura ("Tamura"), appeals an order granting
5 judgment in an adversary proceeding, after an earlier summary
6 adjudication of issues, in favor of James V. LaGuardia
7 ("LaGuardia"), determining that Tamura's debt to LaGuardia is
8 excepted from discharge in her bankruptcy case under
9 § 523(a)(6).³ We AFFIRM.

10
11 **I. FACTUAL BACKGROUND**

12 The parties were in a relationship over a number of years
13 that produced a son, Antonio LaGuardia ("Antonio"), who was born
14 on or about March 23, 1992. The parties never married. However,
15 they co-parented Antonio from his birth until some time in
16 December 1995.

17 The parties characterize the events of December 1995 very
18 differently. LaGuardia alleges that Tamura told him on or about
19 December 21, 1995 that he could no longer visit Antonio. He
20 further alleges that "[o]n or about December 23, 1995, [Tamura]
21 absconded with Antonio and fled to Australia." First Amended
22 Complaint to Determine Dischargeability of Debt ("Amended
23

24 ³ Unless otherwise indicated, all chapter, section and rule
25 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
26 1330, and to the Federal Rules of Bankruptcy Procedure, Rules
27 1001-9036, as enacted and promulgated prior to the effective date
28 (October 17, 2005) of most of the provisions of the Bankruptcy
Abuse Prevention and Consumer Protection Act of 2005, Pub. L.
109-8, April 20, 2005, 119 Stat. 23.

1 Complaint"), at 2, ¶ 5. Tamura counters that "on December 23
2 through January 23, 1997 [sic] I vacationed in Australia with our
3 son which [sic] whom I shared custody. This was a vacation that
4 had been planned for months and I returned as scheduled."
5 Defendant Dayle Momi Tamura's Declaration in Opposition to Motion
6 for Summary Judgment, at 2, ¶ 4.

7 In any event, after Tamura returned with Antonio from
8 Australia in January 1996, the parties became adversaries in a
9 custody lawsuit before the Los Angeles Family Law Court ("Family
10 Law Court").

11 In July 1996, Tamura took Antonio out of contact with
12 LaGuardia for a period of approximately five months. On or about
13 August 15, 1996, the Family Law Court awarded sole custody of
14 Antonio to LaGuardia. Tamura "was awarded visitation with
15 [Antonio] to be monitored by a peace officer from 10:00 a.m. to
16 6:00 p.m. each Saturday." On or about December 15, 1996, Antonio
17 was recovered, and Tamura was arrested by the Child Abduction
18 Unit of the San Diego County District Attorneys Office.

19 On April 8, 1997, Tamura pleaded guilty ("Guilty Plea") in
20 San Diego County Municipal Court in People v. Dayle Tamura, Case
21 No. CDF 125252, to the following charge:

22 COUNT 2 - CHILD DETENTION WITH RIGHT TO CUSTODY
23 On and between July 20, 1996 and December 04, 1996,
24 DAYLE TAMURA did willfully and unlawfully, while having
25 a right to physical custody and visitation pursuant to
26 an order, judgment and decree of a court which grants
27 another person, guardian and public agency right to
28 physical custody and visitation; and with intent to
deprive another of that right to custody, detain,
conceal, take and entice away ANTONIO within and
without the State of California, in violation of PENAL
CODE SECTION 278.5.

Tamura further admitted that "I deprived the father of his right

1 of custody and visitation in violation of the court order.”
2 Request for Judicial Notice, at 6. Tamura was ordered to pay
3 restitution to LaGuardia in the amount of \$73,728.83 “for the
4 costs expended by [LaGuardia] in searching for Antonio as a
5 result of the second abduction by [Tamura].” Amended Complaint,
6 at 3, ¶ 7.

7 Subsequently, the Family Law Court awarded LaGuardia various
8 amounts for support, attorney’s fees and sanctions against
9 Tamura.

10 On or about December 15, 1996, LaGuardia filed a civil
11 lawsuit against Tamura for damages from the alleged abduction of
12 Antonio. Thereafter, Tamura filed a chapter 7 bankruptcy
13 petition.

14 LaGuardia filed a timely complaint to except Tamura’s
15 obligations to him from her discharge in bankruptcy, pursuant to
16 §§ 523(a)(6) and (a)(15) (“Adversary Proceeding”). He moved to
17 file a First Amended Complaint (“Amended Complaint”) in the
18 Adversary Proceeding on or about March 10, 1999, which motion was
19 granted on April 28, 1999. On May 27, 1999, Tamura filed an
20 Answer to the Amended Complaint.

21 On August 2, 2002, LaGuardia filed a motion for summary
22 adjudication of issues (“Motion”) on the third cause of action
23 stated in the Amended Complaint pursuant to § 523(a)(6) for
24 willful and malicious injury to LaGuardia by Tamura. Concurrent
25 with filing the Motion, LaGuardia filed his separate Statement of
26 Uncontroverted Facts and Conclusions of Law (“Separate
27 Statement”) and a request for judicial notice (“Request for
28

1 Judicial Notice") as to the Guilty Plea. On August 12, 2002,
2 LaGuardia filed a Declaration in support of the Motion.

3 Tamura filed a cross-motion for summary judgment ("Cross
4 Motion") on August 6, 2002. She filed her opposition to the
5 Motion on August 21, 2002, along with a response to the Separate
6 Statement ("Response") and her Declaration. In the Response,
7 Tamura contested virtually all of the "uncontroverted facts"
8 asserted by LaGuardia in the Separate Statement, but she did
9 admit that "[LaGuardia] has a close relationship with his son and
10 this was known by [Tamura]." There is no evidence in the record
11 indicating that Tamura opposed the Request for Judicial Notice.

12 LaGuardia filed his Reply ("Reply") to Tamura's Declaration
13 on September 16, 2002.

14 On October 2, 2002, the bankruptcy court announced a
15 tentative ruling, granting the Motion to except Tamura's
16 obligations to LaGuardia from her discharge, pursuant to
17 § 523(a)(6), but holding the issue of damages for trial.
18 Tamura's Cross Motion was denied. On October 22, 2002, the
19 bankruptcy court entered its order granting the Motion,
20 confirming its tentative ruling, and preserving the issue of
21 damages for trial.

22 On June 12, 2003, after a trial on the issue of damages
23 only, the bankruptcy court entered a judgment in LaGuardia's
24 favor against Tamura, awarding total damages of \$147,108,
25 excepted from Tamura's discharge. On January 13, 2006, a final
26 judgment disposing of all remaining claims was entered in the
27 Adversary Proceeding. Tamura filed a timely Notice of Appeal on
28 January 25, 2006.

1 Tamura filed a chapter 13 bankruptcy case on or about May 2,
2 2006, which caused us to suspend this appeal until we received
3 clarification that relief from the automatic stay was granted to
4 allow this appeal to go forward. On March 13, 2007, Tamura
5 advised the Panel that relief from the automatic stay had been
6 granted to allow this appeal to proceed. The parties further
7 obtained, by stipulation, an order from the bankruptcy court
8 recognizing that all causes of action stated in the Adversary
9 Proceeding have been dismissed or disposed of by final judgments
10 so that this appeal is ripe for determination.

11

12 **II. JURISDICTION**

13 The bankruptcy court had jurisdiction with respect to the
14 Adversary Proceeding pursuant to 28 U.S.C. §§ 1334 and
15 157(b) (2) (I). We have jurisdiction pursuant to 28 U.S.C. § 158.

16

17 **III. ISSUES**

18 Whether the bankruptcy court appropriately entered a summary
19 adjudication in LaGuardia's favor where Tamura opposed the
20 evidence submitted by LaGuardia in support of the Motion through
21 her Declaration.

22 Whether the bankruptcy court appropriately applied issue
23 preclusion with respect to the Guilty Plea.

24

25 **IV. STANDARDS OF REVIEW**

26 We review summary judgments de novo. Paine v. Griffin (In
27 re Paine), 283 B.R. 33, 34 (9th Cir. BAP 2002). We must
28 determine, viewing the evidence in the light most favorable to

1 the nonmoving party, whether there are any genuine issues of
2 material fact and whether the bankruptcy court correctly applied
3 the relevant substantive law. Graulty v. Brooks (In re Bishop,
4 Baldwin, Rewald, Dillingham & Wong, Inc.), 819 F.2d 214, 215 (9th
5 Cir. 1987). "By its very terms, this standard provides that the
6 mere existence of *some* alleged factual dispute between the
7 parties will not defeat an otherwise properly supported motion
8 for summary judgment; the requirement is that there be no *genuine*
9 *issue of material fact*." Anderson v. Liberty Lobby, Inc., 477
10 U.S. 242, 247-48 (1986) (emphasis in original).

11 In bankruptcy, summary judgments are governed by Fed. R.
12 Bankr. P. 7056. Rule 7056, incorporating Fed. R. Civ. P. 56(c),
13 states that summary judgment "shall be rendered forthwith if the
14 pleadings, depositions, answers to interrogatories, and
15 admissions on file, together with the affidavits, if any, show
16 that there is no genuine issue as to any material fact and that
17 the moving party is entitled to judgment as a matter of law."
18 The moving party bears the burden of establishing that there is
19 no genuine issue of material fact. Celotex Corp. v. Catrett, 477
20 U.S. 317, 322-23 (1986). Once that burden has been met, the
21 opposing party "must affirmatively show that a material issue of
22 fact remains in dispute." Frederick S. Wyle P.C. v. Texaco,
23 Inc., 764 F.2d 604, 608 (9th Cir. 1985). "When the nonmoving
24 party relies only on its own affidavits to oppose summary
25 judgment, it cannot rely on conclusory allegations unsupported by
26 factual data to create an issue of material fact." Wepsic v.
27 Josephson (In re Wepsic), 231 B.R. 768, 770 (S.D. Cal. 1998).

28 On appeal, we may affirm a summary adjudication on any

1 ground supported by the record. Newton v. Diamond, 388 F.3d
2 1189, 1192 (9th Cir. 2004).

3 We review whether issue preclusion applies de novo, as a
4 mixed question of law and fact in which legal questions
5 predominate. George v. City of Morro Bay (In re George), 318
6 B.R. 729, 732-33 (9th Cir. BAP 2004), aff'd, 144 Fed. Appx. 636
7 (9th Cir. 2005), cert. denied, ___ U.S. ___, 126 S. Ct. 1068
8 (2006).

9 V. DISCUSSION

10 A. The "intentional infliction of emotional distress" tort is a
11 red herring.

12 At the outset, the parties' briefs reflect some confusion as
13 to the cause of action on which the bankruptcy court ruled in
14 granting the Motion and to which this appeal relates.

15 Unfortunately, the bankruptcy court contributed to the confusion
16 with the following language in its tentative and final rulings:

17 The injury described in the 3rd claim for relief is a
18 claim for intentional infliction of emotional distress.
19 Under California law, "[t]he elements of the tort of
20 intentional infliction of emotional distress are: (1)
21 extreme and outrageous conduct by the defendant with
22 the intention of causing, or reckless disregard of the
23 probability of causing, emotional distress; (2) the
24 plaintiff's suffering severe or extreme emotional
25 distress; and (3) actual and proximate causation of the
26 emotional distress by the defendant's outrageous
27 conduct. . . . Conduct to be outrageous must be so
28 extreme as to exceed all bounds of that usually
tolerated in a civilized community." Christensen v.
The Superior Court of Los Angeles County, 2 Cal. Rptr.
2d 79; 54 Cal. 3d 868, 903; 820 P.2d 181, 202 (Cal.
Supreme Court 1991) (internal quotations omitted).

Plaintiff pled guilty to a violation of California
Penal Code § 278.5--Child Stealing--for taking,
enticing away, keeping, withholding, or concealing a
child and maliciously depriving a lawful custodian of a
right to custody, or a person of a right to visitation.
This is extreme conduct and Plaintiff has shown that

1 there is no genuine issue of material fact with regard
2 to defendant's reckless disregard of the probability of
 causing emotional distress.

3 In her brief to this Panel, Tamura argues that genuine
4 issues of material fact exist as to the elements of the tort of
5 intentional infliction of emotional distress under California law
6 that were not litigated in her criminal proceeding leading up to
7 the Guilty Plea. In his brief, LaGuardia responds to the
8 arguments raised by Tamura, again focusing on the tort of
9 intentional infliction of emotional distress under California
10 law. Both parties frankly miss the point.

11 The bankruptcy court ruled on the third cause of action
12 stated in the Amended Complaint for an exception to discharge
13 pursuant to § 523(a)(6), for willful and malicious injury by
14 Tamura to LaGuardia, a federal cause of action peculiar to the
15 Bankruptcy Code.

16
17 B. Standards for an exception to discharge under § 523(a)(6).

18 Section 523(a)(6) provides in relevant part as follows:

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

22 Accordingly, the elements of a § 523(a)(6) cause of action are
23 (1) willful and (2) malicious (3) injury to the complaining party
24 from the acts of the debtor defendant. The standards for
25 willfulness and maliciousness in deciding § 523(a)(6) cases are
26 distinct.

27 In its definitive decision in Kawaauhau v. Geiger, 523 U.S.
28 57 (1997), the Supreme Court determined that nondischargeability

1 under § 523(a) (6) requires "a deliberate or intentional *injury*,
2 not merely a deliberate or intentional *act* that leads to injury,"
3 noting:

4 [T]he (a) (6) formulation triggers in the lawyer's mind
5 the category "intentional torts," as distinguished from
6 negligent or reckless torts. Intentional torts
generally require that the actor intend "the
consequences of an act," not simply "the act itself."

7 Id. at 61-62 (emphasis in original). However, nothing in the
8 Geiger decision suggests that a necessary element in a federal
9 § 523(a) (6) determination is satisfaction of all of the elements
10 of an underlying tort cause of action under state law. The
11 parties' arguments as to whether all of the elements of the
12 California tort of intentional infliction of emotional distress
13 have been met in this case may be of intellectual interest, but
14 they are basically irrelevant to the issues we face in this
15 appeal. What concerns us here is whether the bankruptcy court
16 satisfied summary adjudication standards in concluding that
17 LaGuardia had met his burden of proof with respect to each of the
18 elements of the federal § 523(a) (6) cause of action.⁴ Our
19 analysis with respect to each of those elements follows.

20
21 C. Willfulness.

22 In order to find that an injury was "willful," the evidence
23 must establish that the debtor acted with either a subjective
24

25 ⁴ The burden of proof standard for exception to discharge
26 adversary proceedings under § 523 is preponderance of the
27 evidence. See Grogan v. Garner, 498 U.S. 279, 286-91 (1991);
28 Stanley v. Hoblitzell (In re Hoblitzell), 223 B.R. 211, 215
(Bankr. E.D. CA 1998); and Garcia v. Coombs (In re Coombs), 193
B.R. 557, 560 (Bankr. S.D. CA 1996).

1 intent to harm or a subjective belief that harm was substantially
2 certain to result from the debtor's conduct. See Carillo v. Su
3 (In re Su), 290 F.3d 1140, 1144-46 (9th Cir. 2002); and Petralia
4 v. Jercich (In re Jercich), 238 F.3d 1202 (9th Cir. 2001).

5 The bankruptcy court found that there was no genuine issue
6 of material fact regarding Tamura's subjective intent to cause
7 emotional distress, and thus injury, to LaGuardia from the
8 following circumstances established by the evidence in the
9 record:

10 Antonio was a minor child born March 23, 1992.
11 [Tamura] admitted, "I deprived the father of his right
12 of custody and visitation in violation of the court
13 order."
14 The felony [Tamura] pled guilty to was a "malicious
15 deprivation of a lawful custodian's rights".
16 [Tamura] absconded with Antonio on two separate
17 occasions. After the first time, a custody proceeding
18 commenced in the Los Angeles Family Law Court.
19 [Tamura] fled again for 5 months, keeping Antonio with
20 knowledge of the custody dispute.
21 The [Family Law] Court, in the original order granting
22 summary judgment, already found that Tamura "abducted
23 Antonio and disappeared for over five (5) months during
24 which time [LaGuardia] had no communication, visitation
25 or contact with Antonio."
26 [LaGuardia] had a close relationship with his son and
27 this was known by [Tamura].
28 [Tamura] intended to flee with Antonio and not come
back. In her letter to "Greg", [Tamura] stated her
intent to permanently immigrate "elsewhere" with
Antonio. [Tamura] also stated her belief that the
custody case would just "go away".
[Tamura] knew that [LaGuardia] had private detectives
"prowling around" her workplace and that [LaGuardia]
had a reward out for the return of Antonio.

24 The bankruptcy court further found, in light of the foregoing
25 evidence in the record, that Tamura's single statement in her
26 Declaration that, "I did not take our son to intentionally cause
27 [LaGuardia] any harm, I did it only to protect Antonio and
28 myself," did not create a genuine issue of material fact as to

1 the element of "willfulness" for purposes of § 523(a)(6).

2 One could quibble with the bankruptcy court's
3 characterization of Tamura's having "absconded" with Antonio on
4 two separate occasions, in light of the parties' conflicting
5 versions of events with respect to Tamura's trip to Australia
6 with Antonio in December 1995 to January 1996. However, the
7 record clearly supports the bankruptcy court's other inferences
8 from circumstantial evidence, supporting the ultimate conclusion
9 that Tamura acted "willfully," with a subjective intent to harm
10 LaGuardia. Tamura's self-serving, conclusory statement in her
11 Declaration that she did not intend to cause LaGuardia any harm
12 is not sufficient to raise a genuine issue of material fact in
13 light of the record in this case.⁵

14
15 D. Malice.

16 A "malicious" injury is "one involving (1) a wrongful act,
17 (2) 'done intentionally, (3) which necessarily causes injury, and
18 (4) is done without just cause or excuse'." Murray v. Bammer (In
19 re Bammer), 131 F.3d 788, 791 (9th Cir. 1997) (citing Impulsora
20 Del Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d
21 1440, 1443 (9th Cir. 1986)). See Su, 790 F.3d at 1146-47.

22 The bankruptcy court held that Tamura's Guilty Plea was
23 enough in itself to satisfy the "malice" element of § 523(a)(6).
24 Tamura admits that she pleaded guilty to "willfully and
25 unlawfully" taking Antonio away with the intent to deprive

26 _____
27 ⁵ In fact, Tamura admitted that she acted "willfully" in
28 her Response. "Willful conduct, yes. Malicious conduct,
definitely not."

1 another person, LaGuardia, of his custody and visitation rights.
2 She specifically admitted in the plea agreement that she
3 "deprived the father of his right of custody and visitation in
4 violation of the court order."

5 In effect, the bankruptcy court applied issue preclusion
6 based on the Guilty Plea with respect to the "malice" element.
7 Issue preclusion can apply in exception to discharge cases, but
8 it only "prevents relitigation of all 'issues of fact or law that
9 were actually litigated and necessarily decided' in a prior
10 proceeding." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th
11 Cir. 1988) (citation omitted).

12 Federal courts apply the issue preclusion law of the state
13 in which the subject decision was rendered to determine its
14 preclusive effect. Id. Since the Guilty Plea was entered in
15 California, we look to the elements for application of issue
16 preclusion under California law, namely:

17 First, the issue sought to be precluded from
18 relitigation must be identical to that decided in a
19 former proceeding. Second, this issue must have been
20 actually litigated in the former proceeding. Third, it
21 must have been necessarily decided in the former
22 proceeding. Fourth, the decision in the former
23 proceeding must be final and on the merits. Finally,
24 the party against whom preclusion is sought must be the
25 same as, or in privity with, the party to the former
26 proceeding.

23 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.
24 2001) (citing Lucido v. Superior Court, 51 Cal.3d 335, 272 Cal.
25 Rptr. 767, 795 P.2d 1223, 1225 (1990)).

26 Through the Guilty Plea, Tamura admitted to a wrongful act,
27 done intentionally and without just cause or excuse, that
28 necessarily would cause injury to the person wrongfully deprived

1 of custody and visitation rights. The Guilty Plea encompasses
2 the requirements to establish the "malice" element in a
3 § 523(a)(6) cause of action. The Guilty Plea finally disposed of
4 the criminal case against Tamura personally. All of the elements
5 for application of issue preclusion under California law are
6 satisfied, and the bankruptcy court appropriately cited the
7 Guilty Plea as establishing "malice" for § 523(a)(6) purposes.

8 Through her Declaration in opposition to the Motion, Tamura
9 attempts to raise an issue of material fact as to whether she
10 acted "without just cause or excuse." In her Declaration, Tamura
11 states that in July 1996,

12 I did go to Hawaii⁶ partly to get away from plaintiff
13 whom I felt was threatening both me and Antonio. I
14 did, and still believe, that Plaintiff is a dangerous
15 and vindictive man. At the time, I felt that I had to
leave and since I had family in Hawaii, that was a
reasonable place to go to protect myself and Antonio.

16 Tamura does not provide any instances of acts by LaGuardia to
17 threaten or physically harm her or Antonio in her Declaration or
18 explain why she might have felt threatened by LaGuardia. She
19 relies purely on conclusory statements, without any evidence to
20 back them up.

21 The bankruptcy court determined that Tamura was precluded by
22 the Guilty Plea from raising such matters as a "just cause or
23

24 ⁶ In her deposition, Tamura testified that she went to
25 Mexico in July 1996, rather than to Hawaii. In his Declaration,
26 LaGuardia states that Tamura went to Mexico in July 1996 and from
27 there, to Hawaii in September 1996. We do not consider where
28 Tamura went with Antonio in the summer of 1996 to be relevant to
this appeal. In fact, the "he said, she said" credibility issues
that appear to obsess the parties are generally not relevant to
the issues of concern in this appeal, namely whether Tamura
raised any genuine issue of material fact that would require us
to reverse the bankruptcy court's summary adjudication decision.

1 excuse." In reaching this conclusion, the bankruptcy court
2 compared the provisions of Cal. Penal Code § 278.5, to which
3 Tamura pleaded guilty, with those of Cal. Penal Code § 278.7.

4 Cal. Penal Code § 278.7 provides an exception⁷ to criminal
5 liability under § 278.5 as follows:

6 (a) Section 278.5 does not apply to a person with a
7 right to custody of a child who, with a good faith and
8 reasonable belief that the child, if left with the
9 other person, will suffer immediate bodily injury or

10 ⁷ Cal. Penal Code § 278.7(c) sets out the criteria to be
11 met to obtain the benefit of the exception:

12 The person who takes, entices away, keeps, withholds,
13 or conceals a child shall do all of the following:

14 (1) Within a reasonable time from the taking, enticing
15 away, keeping, withholding, or concealing, make a
16 report to the office of the district attorney of the
17 county where the child resided before the action. The
18 report shall include the name of the person, the
19 current address and telephone number of the child and
20 the person, and the reasons the child was taken,
21 enticed away, kept, withheld, or concealed.

22 (2) Within a reasonable time from the taking, enticing
23 away, keeping, withholding, or concealing, commence a
24 custody proceeding in a court of competent jurisdiction
25 consistent with the federal Parental Kidnapping
26 Prevention Act (Section 1738A, Title 28, United States
27 Code) or the Uniform Child Custody Jurisdiction Act
28 (Part 3 (commencing with Section 3400) of Division 8 of
the Family Code).

(3) Inform the district attorney's office of any change
of address or telephone number of the person and the
child.

Cal. Penal Code § 278.7(d) states: "For purposes of this article,
a reasonable time within which to make a report to the district
attorney's office is at least 10 days and a reasonable time to
commence a custody proceeding is at least 30 day. . . ."

1 emotional harm, takes, entices away, keeps, withholds,
2 or conceals that child.

3 We agree with the bankruptcy court that "[b]ecause [Tamura] pled
4 guilty to [§ 278.5], [Tamura], necessarily can not show a just
5 cause or excuse."

6 In her brief to this Panel, Tamura admits both the Guilty
7 Plea and her statement admitting her violation of the Family Law
8 Court order granting LaGuardia custody and visitation rights
9 without qualification. Appellant's Opening Brief at 5-6.

10 Nevertheless, Tamura states in her Declaration that at the time
11 she faced criminal charges, she "was under extreme emotional
12 distress caused by the ongoing legal matters and the threats of
13 bodily harm from [LaGuardia]." To the extent Tamura intends this
14 statement as a challenge to the validity of the Guilty Plea, it
15 is made in the wrong forum. Nothing in the record reflects that
16 the Guilty Plea has been challenged before or set aside by a
17 California court.

18 In these circumstances, we find no error in the bankruptcy
19 court's determination that the "malice" element was satisfied.

20
21 E. Injury to LaGuardia from Tamura's acts.

22 Here is the area where the bankruptcy court's reference to
23 the California tort of intentional infliction of emotional
24 distress is perhaps most confusing. However, ultimately, the
25 bankruptcy court found that Tamura's Guilty Plea evidenced
26 "extreme conduct" with a "probability of causing emotional
27 distress," and that "there is no genuine issue of material fact
28 regarding the existence of a willful injury--emotional distress."

1 These conclusions are consistent with the substance of the crime
2 to which Tamura pled guilty and her related admission in the
3 Guilty Plea--willfully and unlawfully taking away a child with
4 intent to deprive another person [LaGuardia] of lawful custody
5 and visitation rights. In his Declaration in support of the
6 Motion, LaGuardia stated that he "suffered severe anxiety,
7 depression and other serious injury as a result" of Tamura's
8 taking Antonio out of all contact with him for five months in
9 1996. Coupled with Tamura's acceptance of the facts that
10 LaGuardia had a close relationship with his son Antonio, and
11 that Tamura was aware of the closeness of their relationship, as
12 uncontroverted, the record in this case establishes that there is
13 no genuine issue of material fact either as to injury to
14 LaGuardia or as to Tamura's subjective understanding that harm
15 was substantially certain to occur to LaGuardia as a result of
16 her actions.

17 Subsequent to the bankruptcy court's summary adjudication of
18 the Motion, holding LaGuardia's claims against Tamura as excepted
19 from her discharge, a trial was held to determine the amount of
20 LaGuardia's nondischargeable damages. Following the trial, the
21 bankruptcy court entered a judgment in LaGuardia's favor for
22 damages of \$147,108 excepted from Tamura's discharge. Tamura
23 does not challenge the bankruptcy court's calculation of damages
24 in this appeal.

25 26 **VI. CONCLUSION**

27 The bankruptcy court's summary adjudication that § 523(a)(6)
28 prevented Tamura from discharging her obligations to LaGuardia

1 was appropriate. All of the elements for a determination that
2 LaGuardia suffered injury from the willful and malicious acts of
3 Tamura were satisfied. Tamura raised no genuine issues of
4 material fact to contradict the bankruptcy court's determination.
5 We AFFIRM.

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