NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY		
In Re: Oliver D. Train, Debtor.	Case No.: Adv. No.:	15-29539-RG 16-1241-RG
Gyongyi Imre, Vanessa Denny, Megan Sander, Connie McBroome, Susan Woods, Plaintiffs v. Oliver D. Train, Defendant.	Chapter: Judge:	7 Andrew B. Altenburg, Jr.

MEMORANDUM DECISION

I. INTRODUCTION

Before the Court are Motions for Summary Judgment filed by both parties. The plaintiffs, employees at a tavern owned by debtor/defendant Oliver Train's company, Train & Train Inc., claim the debt owed to them by Mr. Train is nondischargeable pursuant to 11 U.S.C. § 523(a)(6). The court concludes that the plaintiffs' motion should be denied and the defendant's motion granted.

The court notes that this adversary proceeding is assigned to the docket of the Hon. Rosemary Gambardella. In her current absence however, and after all briefing was complete, the proceeding was assigned to the undersigned. After hearing oral argument, this court finds that the defendant's Motion for Summary Judgment should be granted and the plaintiff's Cross-Motion for Summary Judgment be denied.

II. JURISDICTION AND VENUE

This matter before the court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The court has jurisdiction pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a) and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984, as amended on September 18, 2012, referring all bankruptcy cases to the bankruptcy court. The following constitutes this court's findings of fact and conclusions of law as required by Federal Rule of Bankruptcy Procedure 7052.

III. PROCEDURAL HISTORY

The plaintiffs filed this adversary proceeding on March 29, 2016. Doc. No. 1. Mr. Train filed an answer on June 13, 2016. Doc. No. 13. A mediator appointed by the court on June 16, 2016 filed a report on July 11, 2016 stating that settlement was not reached. Doc. No. 16. After discovery and several amended joint scheduling orders, Mr. Train filed his Motion for Summary Judgment on November 29, 2017. Doc. No. 42. On June 20, 2018, the plaintiffs filed a Cross-Motion for Summary Judgment in Opposition. Doc. No. 45. Mr. Train filed a response on August 13, 2018. Doc. No. 49. The undersigned heard oral argument on May 7, 2019. This matter is now ripe for disposition.

IV. UNDISPUTED FACTS

Both parties alleged that there were no genuine issues of material fact such that they were entitled to judgment as a matter of law. The court thus recites facts based on the documents filed as exhibits to the dueling motions, consisting of email messages, deposition testimony, and decisions of Colorado courts in the prepetition lawsuit brought by the plaintiffs.

Mr. Train resides and works in New Jersey. Doc. No. 45, ex. A, p. 13. He is the sole shareholder of Train & Train, Inc. ("TTI"), a Colorado corporation. *Id.*, pp. 27, 31. He formed it to purchase The Barking Goat Tavern, located in Castle Rock, Colorado in September 2009. *Id.*, p. 32. The transaction was arranged by Train's brother-in-law (his wife's brother), Leon Stolyar ("Leon"), who lives in Colorado. *Id.*, p. 34.

A "significant amount" of the approximately $200,000 for the purchase of The Barking Goat came from Leon. *Id.*, p. 34. He was to operate the business while Train remained in New Jersey, "and when the business was profitable, he would take the profits." *Id.*, p. 36. Leon was never formally employed by TTI, but reported to Train. *Id.*, pp. 55, 57. He assumed on-site supervision responsibilities. *Id.*, pp. 55-57. Problems of the employees were to be raised with Train. *Id.*, p. 57. The tavern never was profitable. *Id.*, p. 44. It stopped operating in April 2010. *Id.*, p. 39.

Apparently, all of the other employees of The Barking Goat were provided by Colorado Leasing Systems, Inc., a PEO (Professional Employer Organization) doing business as StaffScapes, Inc. *See* Doc. No. 42, ex. A. On September 16, 2009, TTI and StaffScapes entered into a Client Service Agreement ("CSA") whereby StaffScapes would be the "administrative employer" and TTI the "supervisory/controlling employer" over these "co-employees." Doc. No. 42, ex. A, ¶ I. *See also* Doc. No. 45, ex. A, p. 51 (Train: "the corporation that owned the bar contracted with StaffScapes to provide employees for the bar. Like we rented employees from them[.]").

Despite this designation, StaffScapes' responsibilities included "to reserve a right of direction and control over co-employees, including the right to hire, terminate, dismiss, discipline and reassign co-employees," and "to share with [TTI] responsibility for addressing co-employee complaints, claims, filings, or requests relating to employment. . . ." *Id.*, ¶ II. It further was "to provide guidance, upon request by [TTI], on compliance with applicable . . . laws, including, but not limited to, . . . Title VII of the Civil Rights Act of 1964. . . ." *Id.*

TTI's responsibilities included "to assure that co-employees who hold supervisory authority exercise that authority in compliance with applicable law(s) . . ." *id.*, ¶ III. Train also stated in deposition that while StaffScapes did not have a supervisory role with the employees, it did present and create policies such as anti-harassment. Doc. No. 45, ex. A, pp. 62-63. "It's basically when you employ a P.E.O., you're outsourcing your H.R. Department, so all the things that H.R. does, StaffScapes would do." *Id.*, p. 63.

While the CSA required StaffScapes to indemnify TTI for any wrongful acts of StaffScapes, it also required TTI to indemnify it, as follows:

> . . . [TTI] agrees to indemnify and defend StaffScapes . . . for any claim or out-of-pocket loss or expense (including attorneys' fees and court costs) arising out of any unlawful, wrongful or negligent act or omission of any representative of [TTI] or any co-employee or agent under the direction and control of [TTI]. . . .

Doc. No. 42, ex. A, ¶ XIV.

In addition, the CSA provided that StaffScapes could "assign its rights, duties and obligations under this CSA to any entity owned or operated by StaffScapes, provided that such entity agrees to deliver the services contemplated under this CSA." *Id.*, ¶ XV. Train signed the CSA on behalf of TTI but also in his personal capacity as guarantor of the obligations of TTI. *Id.*, p. 5.

On December 29, 2009, Train received an email from tavern employee Susan Woods describing problems at the tavern and giving her two-week notice. Doc. No. 42, ex. E. The issues included a "decline in morale, service and quality of food[,]" the "vast majority of this is due to the irrational decisions made by Leon, chiefly when he is under the influence of alcohol[.]" *Id.* She complained that Leon "berate[d] [the employees] for not working together as a team, hanging out at the register, announcing the arbitrary replacement of our glassware, [and] the expansion of hours[.]" *Id.* She continued that

> As a result of Leon's consumption of copious amounts of liquor while here, he has backed women into corners, both staff and customers, and told them how he would like to f**k their brains out, he has reached over and kissed a staff member on the neck, and when told to "stop, what the hell are you thinking", replied "It's my place, I can do whatever the hell I want". These are just a couple of numerous incidents, but you get the gist. Why you haven't heard about this yet is the fact that Leon is a rather physicallv imposing figure, and after a tussle where one of the female staff members landed on her butt, no one feels safe.

Id.

Woods also related that Leon had fired the cleaning crew, claiming he would do the cleaning, but eventually only was emptying the trash in the bathrooms. *Id.* Leon was not spending the amount of time in the kitchen that he had indicated he would. *Id.* Meanwhile, he had cut the kitchen staff so much that wait times for food greatly increased. *Id.* She concluded that "I could go on, but I've been long-winded enough, and after Jan. 5th, it's not my problem. You, however still have one, and I'm glad I'm not in your shoes." *Id.*

Train responded the same day, stating he had no idea that this was going on and that he would do what was necessary to fix the situation. *Id.* Train then contacted Staffscapes to open an investigation into the complaints where they interviewed the complainants and Leon. Doc. No. 45, ex. A, p. 62.

On January 7, 2010, Train flew to Colorado and he and Lora Manternach from StaffScapes met offsite with some of the employees that had complained. *Id.*, p. 68-70. Train later related that at that time, the employees "focused mostly on Leon's a jerk and things like that and the glassware and just personnel like complaints." Doc. No. 45, ex. A, p. 71. "The harassment was there. I mean it's not like it wasn't mentioned at all, but it wasn't front and center. It was weird." *Id.*, p. 72. It appears that this meeting resulted in Train telling Leon to stop drinking. *See* Doc. No. 42, ex. I (email from co-employee Aleta Diaz 13 days later stating, "Your stipulation was that he no longer drink and he was beyond drunk yesterday.").

On January 19, 2010, Susan Woods sent Train three email messages, the first stating that "Leon got so wasted today he was walking into walls, incapable of speech, and passing out at the goat bar by 3:30 this afternoon. His wife had to come and get him. Before he left, he did manage to make a grab for Natasha's breast." Doc. No. 42, ex. H. The second message stated "Clearly we need to talk again." *Id.* The third related that Leon returned to the bar, "did some more shots, and is currently passed out. . . ." *Id.* She continued, "The only reason I'm the one emailing you is because I'm not at work witnessing this debacle. They called his wife to come back and get him, but she refused, saying he wanted to stay there." *Id.* Woods then stated when she was available to talk by phone, but added "Quite frankly though, I don't know what there is to talk about; you laid down the law and he clearly broke it." *Id.* Train responded in two messages the next day, first asking for Woods' phone number and then stating that he had tried to call her but there was no answer. *Id.*

On January 20th, Train heard from Diaz via an email message with the subject line "my resignation." Doc. No. 42, ex. I. She related that "Leon was so drunk he could hardly talk or walk." *Id.* She stated that Leon's wife picked him up but brought him back 10 minutes later because Leon wanted to be there for a poker game and not with her. *Id.* Diaz stated that when she begged Leon's wife to take him back, "[s]he told me we were on our own, that there was nothing she could do about it and could not help us." *Id.* Diaz continued that Leon passed out at the tavern in front of customers, woke about 45 minutes later, joined the poker game and continued to drink. *Id.* He ate food meant for customers and the staff and was "extremely vulgar in his behavior." She related that Leon told a new staff member that he would be happy to have sex with her "and could teach her a few things." *Id.* She stated that he called her a "bitch." *Id.* She ended the message with the following:

> If you haven't come to the conclusion yet that Leon is a problem, then please let me help you. LEON IS A PROBLEM. Your stipulation was that he no longer drink and he was beyond drunk yesterday. Will you now deal with this situation and fire him please? . . . How long will you let this continue?

Id.

Train responded to Diaz the same day with "Clearly you are right. Enough is enough. I can't commit to anything this second, but I will have a solution by tomorrow." *Id.* It appears that this email exchange was then forwarded to both Woods and Manternach. *Id.*

Train flew to Colorado a second time, but at deposition was not clear on the timing, finally deciding it likely was before January 21. Doc. No. 45, ex. A, p. 77. He recalled that he met with Vanessa Denny on that trip and she let him know that the remedial actions were not effective. *Id.*

On January 21, 2010, Train sent an email to Leon and Woods, terminating immediately Leon's supervisory roles and only permitting him on premises outside of business hours to collect the cash drop and clean the bathrooms and floors. Doc. No. 42, ex. J. He accepted Woods' resignation and barred her from inside The Barking Goat at any time. *Id.* In so doing, Train stated that "[o]ur primary goals are to limit conflict and potential liability." *Id. See also* Doc. No. 45, ex. A, pp. 59-60 ("[Train]: I wanted to keep him away from the people who complained, so he came in only at night.").

Train did this without necessarily believing that the complaints about harassment were true. He later stated, "I didn't have enough proof either way and I wanted to err on the side of caution by separating them." Doc. No. 45, ex. A, p. 86. Train believed that Leon complied with his January 21 order not to return to the tavern during business hours. Doc. No. 45, ex. A, pp. 59-60 ("Q: And how did you make sure that that's all he did? A: I had other employees that were telling me that."). He conceded that "Susan's group of people" reported differently, but he believed the managers at the tavern. *Id.*, p. 82.

Train also based his belief that issues were resolved because StaffScapes investigated but did not find the accusations credible. "I think that some – there was obviously some interpersonal things that were inappropriate. I don't know what's true, what's not true. I wasn't there. I know StaffScapes investigated and they didn't think it was true, either." *Id.*, p. 89.

Depositions of James Thibodeau and Jacob Stratton support this. Thibodeau is the owner of StaffScapes. Doc. No. 49, ex. C, p. 3. He stated that StaffScapes "launched an investigation, contacted the appropriate parties involved and any potential witnesses and came up with a course of action recommendation as our normal procedure." *Id.*, p. 6. The investigation was headed up by Manternach and Stratton. *Id.* Thibodeau stated that StaffScapes took no action on the complaints because none of the witnesses spoke to them. *Id.*, p. 8. "[I]t was all hearsay. . . . There was no founding [sic] to any of the claims." *Id.*

Stratton, chief financial officer of StaffScapes, stated that he learned of the complaints from one of the employees. Doc. No. 49, ex. D, pp. 3-4. He stated that StaffScapes' procedure was to investigate and then recommend to Train and Leon what to change, if anything. *Id.*, p. 5. Manternach, who Stratton identified as the senior HR person on staff, conducted the interviews with him. *Id.*, pp. 6, 12. He stated that "[t]he majority of a lot of these claims that came in were hearsay . . . [s]o we could never really get corroboration of anything that happened or any kind of firsthand witnesses." *Id.* They "either could not get ahold of [the] person [who claimed sexual harassment] after trying multiple times or, when we got ahold of them, it was a different story that was told." *Id.*, p. 7. His recollection regarding the interviews he attended was that the complaints "were strictly about management and nothing about sexual harassment. It was all about Leon

changing plate sizes, amount[s] of alcoholic beverages that are supplied. Several other different things like that." *Id.* p. 13.

Train later explained at deposition, "StaffScapes had an opportunity to tell me to fire Leon, if that's where you're going, and they did not tell me to do so. Doc. No. 45, ex. A, p. 96.

On January 26, 2010, Woods sent an email asking Train for her job back, stating that she only resigned because of Leon. Doc. No. 42, ex. K. This email appears to have been forwarded to Manternach, who forwarded it to Stratton. *Id.* On January 28, 2010, Gyonghi Imre also asked Train for her job back via email, which he declined stating that she had been fired for refusing to show up for a shift. *Id.*, ex. L. Imre replied the same day, asking "Just to be clear, you are not conducting an investigation of any sort considering the circumstances?" *Id.* Train replied that it was StaffScapes' responsibility to investigate, and it was in fact investigating. *Id.*

On February 13, 2010, waitress Toni Davidson wrote Train via email advising him of issues at The Barking Goat such as menu needs, cleanliness, and service, and proposing herself to be promoted to floor manager. Doc. No. 49, ex. A. Regarding Leon, she only stated "This is not to attack Leon [sic] in any way because his company is enjoyed by the majority of the staff, but may we recognize the fact that sheer enjoyment only goes so far[,]" and "I am not looking to harm anyone's character and understand Leon [sic] is a defining part of this establishment and I believe he does a good job but more managerial help is a necessity." *Id.* She added that she believed that Woods had stolen his mailing list for The Barking Goat "and in a desperate attempt to slander your good name, has sent a mass e-mail to the majority of your clientele convincing them to go to another bar." *Id.*

On March 9, 2010, Denny wrote Train and Manternach about several issues with managers, new waitstaff, and training. Doc. No. 49, ex. B. Similar to Davidson's message, her two-page email does not contain any allegations of sexual harassment, even though (as will be discussed, below) she filed a complaint with the EEOC on February 19. *Id.* Her only mention of Leon was over a misunderstanding that she had given 30-days' notice, which she denied, but she had decided to offer her two-week notice anyway, stating "The bottom line here is that The Barking Goat Tavern has had its long list of problems since about November of 2009, and now has been turned over to a 19 and 21 year old [Ashley Coroneas and Toni Davidson] with no experience running a restaurant." *Id.* Manternach forwarded the message to Stratton. *Id.*

Accordingly, Train did no more:

> Q. What did you make sure – what did you do to ensure that he no longer would be on the premises for any reason other than what you put in your January 21st E-mail?
>
> A. I didn't do anything specific to guarantee that, but as I said, I received – you have to understand, there's one group of people that's saying one thing, another group of people that's saying something else, so the other group of people which is the managers and supervisors that took over after him are saying that it's better and that he's not there. . . .
>
> I didn't do anything to monitor. I didn't do anything specific to monitor the supervisor.

> Q. And you did nothing to monitor – to ensure that the employees had a harassment-free workplace?
>
> A. After StaffScapes' – after the StaffScapes investigation, there was no determination that there was harassment going on, so, no, there wasn't anything specific that I did with regard to that.

Doc. No. 45, ex. A, pp. 94-95.

Nevertheless, the plaintiffs here—Imre, Denny, Megan Sander, Connie McBroome and Woods (the "Plaintiffs")—plus Diaz and Corey N. Butler (with the Plaintiffs, the "Colorado Plaintiffs"), filed complaints with the EEOC, which issued Right to Sue notices on May 31, 2011.[1] Doc. No. 45, ex. B and certifications after ex. C. Denny's EEOC Charges of Discrimination, dated February 19, 2010 and May 7, 2010, alleged that Leon sexually harassed her and called her racial slurs. Doc. No. 45-5, p. 5. She stated that "[h]e would tell me to take off all of my clothes and dance on the bar, hang on me and say, 'hey baby,' 'how are you sweetie?'" *Id.* She alleged that on January 27, 2010, Train met with employees and said that they would no longer have to work with Leon, but the next day rescinded that and said that they would have to work with him. *Id.* She alleged that the company had no sexual harassment policy. *Id.*

On February 12, 2010, Imre alleged to the EEOC that Leon sexually harassed other employees, and that after she confronted him about it, he took her off the work schedule. Doc. No. 45-6, p. 4. She stated that she had been discharged from her position as server on November 29, 2009. *Id.* She did state, however, that this also occurred after "I felt I wasn't needed at work, and told [Leon] I wasn't coming in although I was scheduled to come in." *Id.*

McBroome alleged on August 4, 2010 that Leon sexually harassed other employees, creating a hostile work environment for her, and discriminated against her because she is female. Doc. No. 45-7, p. 4. She was employed at the tavern from September 22, 2009 to December 23, 2009. *Id.*

On May 26, 2010, Sander complained about a "male manager" who made sexual innuendo comments about her pregnancy, asked her for a kiss, "a real kiss," and made other offensive comments. Doc. No. 45-8, p. 4. She stated that in January 2010, she informed the "male owner" of the tavern and, he "did nothing." *Id.* She alleged that she was constructively discharged from the tavern on March 13, 2010. *Id.*

Woods alleged in her Charge of Discrimination to the EEOC, dated February 18, 2010, that she and other employees were subjected to a sexually hostile work environment and complained that after Leon was removed, the owner declined her request for her job back. *Id.* She alleged sexual and age discrimination. *Id.*

StaffScapes eventually agreed to mediation on advice of counsel. *Id.*, pp. 9-10. By agreement dated July 22, 2011, StaffScapes settled with the plaintiffs for $50,000, plus $15,000 in

[1] Stratton disagreed with the EEOC determinations of probable cause because StaffScapes could not corroborate any of it and because the investigating person at the EEOC told StaffScapes only "that there must be something there because of the number of claims." *Id.*, pp. 14-15.

legal fees. Doc. No. 42, ex. B. Under this Confidential Settlement and Release Agreement (the "Settlement"), StaffScapes assigned its right to indemnification under the CSA against Train, Train and Train LLC, the Barking Goat Tavern, "and any other entities owned or controlled by Train[.]"[2] *Id.* The Settlement further provided that "in the event of any recovery by Claimants from Train, StaffScapes, Inc. shall be entitled to a pro rata recovery up to the sum of $15,000.00 of any such recovery Claimants may collect against Mr. Train or any of his companies." *Id.*

The Colorado Plaintiffs filed suit in the District Court for Douglas County, State of Colorado, against Train, TTI, Train & Train, LLC, and The Barking Goat on September 2, 2011. Doc. No. 42, ex. C; *see* Doc. No. 45, ex. C, p. 2 (providing date of lawsuit). The defendants filed a Motion for Partial Summary Judgment that was granted, dismissing the claim of violation of Title VII of the Civil Rights Act of 1964 as against TTI, as it had not been an employer for the requisite number of calendar weeks to be subject to Title VII. The case then proceeded to trial where the Colorado court came to the following conclusions:

- Leon committed the following unlawful and/or wrongful acts:
  - Battery against Diaz, "Jillian," and Courtney Ireland (pushing, grabbing)
  - Assault against Sander and Denny (blowing smoke in face, threatening physical force)
  - Violation of Colorado's Clean Indoor Air Act (smoking inside)
  - Violation of Colorado's Liquor Code (serving underage drinkers)
  - Violation of the Colorado Civil Rights Act in connection with the Colorado Plaintiffs and other employees he supervised (sexual harassment creating a hostile work environment)
- Leon was the agent and representative of Train and TTI
- Leon engaged in unlawful, wrongful and negligent conduct at the tavern

Doc. No. 42, ex. D.

The Douglas County court found that on or about February 6, 2010, Leon "assaulted the Tavern's seventeen-year-old hostess, Courtney Ireland, by ordering her repeatedly into the bathroom to do cleaning, then coming in behind her, blocking her exit, grabbing her, attempting to kiss her, and biting her on the ear. This particular assault was reported to the police, to StaffScapes and to Mr. Train." Doc. No. 42, ex D., ¶ 15. Thus, Train was advised of a further incident and that Leon was onsite with employees. The opinion does not state how Train was advised of the incident, but in her EEOC complaint, Denny stated that on February 8, 2010, she contacted StaffScapes "to report an interview conducted by the police in response to a female hostess because the Owner's brother-in-law had followed her into the restroom, caressed her hair,

[2] Train and Train LLC was likely named in error as it is a New Jersey company owned by Train. Doc. No. 45, ex. A, p. 27. The parties probably meant to name TTI (Train & Train Inc.), and named The Barking Goat (which likely was a d/b/a) as a precaution. It is not clear on what grounds the parties included "any other entities owned or controlled by Train," as the indemnification clause in the CSA only named TTI and the guaranty only named Train.

and bit her ear." Doc. No. 45-5, p. 6. So possibly StaffScapes then contacted Train, making the information third-hand.

The Douglas County court also found that on March 17, 2010, Leon confronted and threatened Denny and challenged her to a physical fight. Doc. No. 42, ex. D, ¶ 16. Her email to Train that only complained of management issues had been sent on March 9. There is no evidence in the record that Train was made aware of the March 17 incident, though Denny had given two-week notice in her March 9 message, thus might not have bothered.

At deposition, Train responded to these allegations as follows:

> A. I could tell him not to come back. I can do that. Right? I mean he takes direction from me. If I said, Leon, don't ever go to the bar again, then he would never go to the bar again.
>
> Q. He would listen to you?
>
> A. Sure, or I could call the police.
>
> Q. He didn't listen to you when you told him not to come back after January 21st.
>
> A. I don't know that that's true. I don't know that that's true. I know that that's what they say, but I don't know that that's true.

Doc. No. 45, ex. A, p. 97.

The Douglas County Court also held that:

- "StaffScapes acted in good faith and in a reasonable manner in settling the liabilities of plaintiffs since it was clear that it was potentially liable to them and the settlement amount was reasonably related to the liability exposure"
- The indemnification provision of the CSA was intended to cover when TTI "engages in sexual harassment or similar wrongful conduct causing StaffScapes to incur a liability, pay a settlement, and incur attorney's fees"[3]
- Since StaffScapes was entitled to recover the $50,000 settlement amount plus its $15,000 in attorney's fees from TTI, the plaintiffs likewise were entitled to recover that amount from TTI and Train[4]

[3] This conclusion is in tension with the preceding one finding that StaffScapes' settlement reflected *its* potential liability, not TTI's.

[4] The court further explained that though StaffScapes' insurance company paid the $65,000, this did not diminish the damages based on indemnification, citing the Collateral Source Rule. *Id.*, p. 8. In other words, had StaffScapes not assigned its indemnification right, it could recover the $65,000 from TTI even though its insurance company paid the Colorado Plaintiffs. But presumably the insurance company would then seek indemnification/reimbursement from StaffScapes. Stratton assumed the same. Doc. No. 49, Ex. D, p. 11. Thus, it is not clear that the Colorado Plaintiffs would end up with more money if they were able to collect on the assignment of indemnification right.

Doc. No. 42, ex. D. It thus interpreted the indemnification clauses as allowing StaffScapes to assign its right to indemnification from TTI to the plaintiffs. Doc. No. 42, ex. D. The court entered judgment in favor of the Colorado Plaintiffs and against TTI and Train, jointly and severally, in the amount of $65,000 plus statutory interest. *Id.*, p. 8.

Train and TTI apparently appealed the trial court's grant of summary judgment that held that the "no assignments" clause in the CSA did not prohibit StaffScapes from settling with the Colorado Plaintiffs and assigning its indemnification rights, as the record includes an appellate court's decision on the issue. *See* Doc. No. 45, ex. C. They lost. *Id.* In coming to its conclusions, the Colorado Court of Appeals explained that the Colorado Plaintiffs "had to prove that their losses related to unlawful, wrongful, or negligent behavior by [TTI's] representative in order to establish their right to indemnification." *Id.*, p. 12. The Appeals Court also stated that "Train [referring to TTI] was a wrongdoer[.]" *Id.*, p. 14. Notably, the Appeals Court found that "[b]ecause Oliver Train has personally guaranteed any liabilities of Train and Train, Inc. under the Client Service Agreement, the judgment for the $65,000 amount should be against both Train and Train, Inc. and Oliver Train." *Id.*, p. 11. Thus, Train was liable as a result of his guarantee. There was no specific finding of wrongdoing on the part of Train.

On October 16, 2015, Train filed a no asset chapter 7 case in this court. On March 29, 2016, Plaintiffs filed the instant adversary proceeding alleging that their claim against Train is nondischargeable as a willful and malicious injury, pursuant to 11 U.S.C. § 523(a)(6).[5]

The Plaintiffs alleged in their Complaint that Train willfully and maliciously failed to remedy the harassment, assault and battery occurring at The Barking Goat, leading to their injury. Train argued in his summary judgment motion that the facts that they alleged support only that he acted negligently, not willfully and maliciously. He also argued that his debt to them arose from vicarious liability, which cannot be considered willful within the meaning of 11 U.S.C. § 523(a)(6). He argued that the judgment they seek to enforce, based on the assigned indemnification claim, has nothing to do with his actions.

The Plaintiffs responded that there is no dispute that Train did not take reasonable steps to ensure Leon no longer harassed them and that he willfully and maliciously failed to provide Plaintiffs with a safe work environment. They assert that he did not supervise Leon, look at video footage of the tavern to confirm their allegations, or enforce restrictions that were placed on Leon. Plaintiffs believe that Train ignored all the complaints his staff made to him, that he did not try to control Leon because he did not believe the allegations that the Plaintiffs made against Leon. They point to the state court adjudication that found that Train was a wrongdoer[6] to support that they were injured, arguing that Train accordingly is estopped from arguing that he is only vicariously liable.

[5] Their proposed order incorrectly recites 11 U.S.C. § 523(a)(2).

[6] As set forth above, the Plaintiffs misread the Colorado court's findings.

V. DISCUSSION

Both parties seek summary judgment.

> Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As the Supreme Court has indicated, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citing Fed. R. Civ. P. 1). "In deciding a motion for summary judgment, the judge's function is to determine if there is a genuine issue for trial." *Josey v. John R. Hollingsworth Corp.,* 996 F.2d 632, 637 (3d Cir. 1993).

In re Moran-Hernandez, No. 15-17634, 2016 WL 423705, at *2 (Bankr. D.N.J. Feb. 2, 2016) (footnote omitted).

> [W]here the movant is the defendant, or the party that does not have the burden of proof on the underlying claim, it "has no obligation to produce evidence negating its opponent's case." *Id.* [*Nat'l State Bank v. Fed. Reserve Bank of New York,* 979 F.2d 1579, 1581 (3d Cir.1992).] Rather, the movant can simply "point to the lack of any evidence supporting the non-movant's claim." *Id.* Once the movant has carried its burden under Rule 56(c), the opposing party "may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(c); *Shields v. Zuccarini,* 254 F.3d 476, 481 (3d Cir. 2001). If the opposing party fails to do so, "summary judgment should, if appropriate, be entered against that party." Fed. R. Civ. P. 56(e).

Maiorano v. Thompson, No. CIV.A.04-2279(SDW), 2008 WL 304899, at *2 (D.N.J. Feb. 1, 2008).

Accordingly, the parties do not dispute the material facts as revealed through the exhibits attached to their motions, but debate the legal conclusions to be drawn from them.[7] Section 523(a)(6) of the Bankruptcy Code provides that individual debtors may not obtain discharge from 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). The creditor bears the burden of proving that a debt is nondischargeable under section 523(a) by a preponderance of the evidence. *Grogan v Garner*, 498 U.S. 279, 287-88 (1990); *In re Cohn*, 54 F.3d 1108, 1114 (3d Cir. 1995).

In *Kawaauhau v. Geiger*, 523 U.S. 57, 63-64 (1998), the Supreme Court held that only those acts performed with the intent to cause injury fall within the scope of § 523(a)(6). The Court explained that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional

[7] Indeed, at oral argument, the court asked what other information would be provided at a trial, and counsel conceded there would be none.

act that leads to injury." *Id.*, at 61. "[R]ecklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.*, at 64.

> The willful prong of 523(a)(6) "is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Carrillo v. Su (In re Su),* 290 F.3d 1140, 1142 (9th Cir. 2002). "The subjective standard correctly focuses on the debtor's state of mind and precludes application of 523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that the harm to the creditor was substantially certain." *Id.* at 1146. As the Debtor's actual intent may be difficult to glean, subjective intent may be ascertained by circumstantial evidence. *Id.* at 1146 ("In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action."). The malicious prong is separate and distinct from the willful prong and "[i]nvolves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich (In re Jercich),* 238 F.3d 1202, 1209 (9th Cir. 2001) (internal citations omitted). Malice can be inferred based on the nature of the wrongful act. *Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton),* 942 F.2d 551, 554 (9th Cir. 1991).

Pfeiffer v. Wulster, 09-13388 MBK, 2011 WL 1045355, at *3 (Bankr. D.N.J. Mar. 17, 2011), *aff'd sub nom. In re Wulster*, ADV 09-2015 MBK, 2012 WL 589564 (D.N.J. Feb. 22, 2012). *See In re Gotwald*, 488 B.R. 854, 866 (Bankr. E.D. Pa. 2013). *See In re Dietrich*, 595 B.R. 59, 63 (Bankr. E.D. Pa. 2018) ("Most of the courts in this Circuit that have considered the issue have held that *Conte* mandates application of the subjective standard."); *In re Reath*, 368 B.R. 415, 426 (Bankr. D.N.J. 2006) ("Under the subjective approach, an injury is willful and malicious if the debtor caused harm through a deliberate action *with the belief that there was a* substantial certainty of injury.") (emphasis in original) (quoting *Peterson,* 332 B.R. at 682–83 (citing *Conner,* 302 B.R. at 515 n. 4).

Malice "exceeds recklessness and "target[s] the creditor . . . at least in the sense that the conduct is certain or almost certain to cause harm." *In re Iberg*, 395 B.R. 83, 91 (Bankr. E.D. Ark. 2008). An action is malicious if it is done without cause or excuse. Ill will or spite is not necessary to prove that an action was malicious. *In re Conte*, 33 F.3d 303, 308 (3d Cir. 1994) citing *Collier on Bankruptcy* ¶ 523.16[1]. *See also In re Andrews*, No. 03 16226 GMB, 2006 WL 4452986, at *3 (Bankr. D.N.J. May 10, 2006); *In re Berlin*, 513 B.R. 430, 435 (Bankr. E.D.N.Y. 2014); and *In re Goidel*, 150 B.R. 885, 888 (Bankr. S.D.N.Y. 1993). "The term 'malicious' has been defined as a wrongful act done consciously and knowingly in the absence of just cause or excuse." *In re Winn*, No. 97-32749, 1998 WL 34069150, at *1 (Bankr. S.D. Ill. May 7, 1998).

In addition, the court in *Jersey Cent. Power & Light v. Breslow*, No. 12-CV-05425 FLW, 2013 WL 632124, at *2 (D.N.J. Feb. 20, 2013) noted:

> Injury is "willful and malicious" within the meaning of § 523(a)(6) when an actor purposefully inflicts the injury or acts in such a manner that he is substantially certain that injury will result. *In re Conte,* 33 F.3d 303, 307 (3d Cir. 1994). Further, non-dischargeability pursuant to § 523(a)(6) requires a deliberate or intentional

> injury, not merely a deliberate or intentional act that leads to injury. *See Kawaauhau v. Geiger,* 523 U.S. 57, 61, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998); *In re Conner,* 302 B.R. 509, 514 (Bankr. W.D. Pa. 2003) ("The phrase 'willful and malicious' modifies the word 'injury'. This implies that **§ 523(a)(6) requires a deliberate or intentional injury**, not a deliberate or intentional act that merely happens to result in injury." (citing *Kawaauhau,* supra, 523 U.S. at 61)). Put differently, "[d]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Kawaauhau,* supra, 523 U.S. at 64. I note further that in assessing whether a particular debt is non-dischargeable, courts must narrowly construe the discharge exceptions in § 523(a) in favor of the debtor, given that the underlying policy of the Code is to afford the debtor a "fresh start." *In re Miller,* 156 F.3d 598, 602 (5th Cir. 1998); *In re Hawkins,* 231 B.R. 222, 228 (D.N.J. 1999).

Breslow, 2013 WL 632124, at *2 (emphasis added).

Finally, the court notes that the Plaintiffs rely not on a deliberate act committed by Train but by a failure to act. Some courts have held that an omission can be willful and malicious for purposes of section 523(a)(6). *In re Wells*, 05-34432-BJH-7, 2006 WL 6508180, at *25 (Bankr. N.D. Tex. Mar. 9, 2006) (citing cases regarding failure to pay wages, failing to disclose diversion of progress payments to personal use). *See In re Gay*, 1:14-AP-00138-MDF, 2015 WL 6437375, at *2 (Bankr. M.D. Pa. Oct. 20, 2015) (relating cases where an omission, such as failure to pay and failure to obtain necessary building inspections, coupled with a volitional act constituted a willful and malicious injury); *In re McHugh*, 11-14612 GMB, 2012 WL 2930792, at *6 (Bankr. D.N.J. July 18, 2012) (in context of failing to prevent boyfriend's suicide, stating that an omission in certain circumstances might establish a willful and malicious act, but not finding so in that case). "Nevertheless, in order to prove a claim under section 523(a)(6) premised upon an omission, the creditor must meet a very high burden—*i.e.,* he must show that the failure to act was intentional, as opposed to merely negligent or reckless." *In re Wells*, 2006 WL 6508180, at *26.

A. Indemnification

Both parties mention the indemnification claim in their memorandums. It is not clear whether the Plaintiffs seek that debt to be nondischargeable or only that they cite the court ruling establishing that they have the right to pursue indemnification as supporting their claim of wrongful conduct by Train.[8] If the former, Train is correct that his liability there is only vicarious. StaffScapes had a right of indemnity against TTI for any claim or out-of-pocket loss or expense arising out of any unlawful, wrongful or negligent act of any representative of TTI. StaffScapes paid the Colorado Plaintiffs in settlement based on the wrongful conduct of Leon, an agent of TTI, thereby triggering the indemnification clause. Train was only made liable for this claim pursuant to the guaranty section of the CSA. His liability is based on contract, not tort or violation of the Colorado Civil Rights Act by him. "Vicarious liability, without more, cannot form the basis for a determination that [the defendant's] conduct was "willful" within the meaning of § 523(a)(6)." *In re Smith*, 537 B.R. 1, at 15 (Bankr. M.D. Ala. 2015). *See In re Sintobin*, 253 B.R. 826, 830 (Bankr.

[8] Questioning at oral argument did not entirely clarify the issue.

N.D. Ohio 2000) ("[I]t has been universally held that a person's willful and malicious actions cannot be imputed to another person for the purpose of holding that debt nondischargeable under § 523(a)(6).").[9] Accordingly, any nondischargeability finding cannot apply to the indemnification claim, which is an unsecured claim subject to discharge.[10]

In addition, to the extent that the Plaintiffs rely upon the Colorado judgment recognizing their right to indemnification from Train for establishing Train's wrongdoing, they misread the opinion. The Colorado appellate court did state that "Train was a wrongdoer[.]" Doc. No. 42, ex. C, p. 14. But it was referring to TTI, not Oliver Train.

Therefore, if this court finds that Train willfully and maliciously injured the Plaintiffs, the Plaintiffs will need to proceed to another court to fix that nondischargeable claim.

B. Retaliation

The Plaintiffs cited *In re Porter*, 363 B.R. 78 (Bankr. E.D. Ark. 2007), in their Cross-Motion/Opposition, as follows:

> *See In re Porter*, 363 B.R. 78, 91 (Bankr. E.D. Ark. 2007) ("While this Court found no reported cases specifically addressing whether liability for retaliation in a sexual harassment case constitutes malice for purposes of § 523(a)(6), the Court easily concludes that retaliation against an employee for complaining about sexual harassment is as deplorable as the sexual harassment itself.") *aff'd In re Porter*, 539 F.3d 889, 895 (8th Cir. 2008) ("The dearth of case law regarding judgment debts from retaliation cases in the context of § 523(a)(6) does not concern us. Sufficient case law exists that excepts from discharge judgment debts from sexual harassment cases, and here, Porter retaliated after Sells alleged sexual harassment. Although Porter did not harass Sells, he compounded her problems by first condoning Huffer's actions and then retaliating against her.").

Doc. No. 45, p. 13. At oral argument, counsel for Plaintiffs also argued *Porter's* application here.

The record supports that Woods resigned due to Leon's behavior but was not hired back by Train once Woods believed Leon had been fired. Imre believed that Leon fired her in retaliation for her complaints, and Train similarly cited Leon's reasons for not hiring Imre back once she believed Leon was gone. In deposition, Train expressed some animosity against Woods for "gather[ing] her conspiracy." Doc. No. 45, ex. A, p. 40. But despite these facts and the citation to

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[9] *Sintobin* explained that despite this principle, "any debtor who seeks or encourages another person to commit a willful and malicious act would not, for purposes of § 523(a)(6), be entitled to have any liability arising therefrom discharged in bankruptcy." *In re Sintobin*, at 830. But the Plaintiffs did not allege that Train encouraged Leon's behavior.

[10] Note also that there is not an identity of parties between the Plaintiffs and the Colorado Plaintiffs, and that the Settlement also provided that StaffScapes be paid a pro rata share of any indemnification paid. Thus, even if it were subject to a finding of nondischargeability, that could only have applied pro rata to the Plaintiffs appearing here.

Porter, the Plaintiffs did not separately argue either in their complaint or at oral argument that Train acted willfully and maliciously against Woods and Imre by retaliating against them. Thus, the court will not consider retaliation as a basis for nondischargeability.

C. Willful and Malicious

To be deemed willful for section 523(a)(6)'s purposes, Train had to intentionally injure the Plaintiffs. The record does not support this finding. Once he was informed about the problems with Leon, Train flew to Colorado to meet with the complainants, Leon, and StaffScapes. According to Woods, Train then "laid down the law" with Leon. Doc. No. 42, ex. H. When this did not suffice, he terminated Leon's supervisory role and restricted Leon's access to The Barking Goat to after business hours. That Leon did not comply with these directives cannot support that Train intended to injure the Plaintiffs. The Plaintiffs did not allege that Train's proposed solutions were futile—indeed, Woods and Imre asked for their jobs back assuming that Leon would not be there—just that they ended up ineffective because Leon did not obey them. Nor do they allege that Train meant for Leon to not comply with his directives because Train wanted to injure the Plaintiffs. Instead, the parties seem to agree that Train's actions did not go far enough to remedy the situation.

The email messages attached to Train's Motion for Summary Judgment show that Woods found him very responsive when she emailed him about problems, with her stating "Thank you very much for responding so quickly . . . ." Doc. No. 42, ex. G. When Diaz emailed him an explanation for her two-week notice, Train responded "Clearly you are right. Enough is enough. I can't commit to anything this second, but I will have a solution by tomorrow." Doc. No. 42, ex. I. The next day, he restricted Leon to outside business hours. Doc. No. 42, ex. J. He had already directed StaffScapes to perform an investigation and had met with Woods, Diaz and McBroome. Doc. No. 42, ex. L.

Plaintiffs complain that Train not only failed to take up the opportunity to check camera footage to see if the allegations were genuine, but Train also did not take any steps to ensure that Leon followed his new restrictions. Plaintiffs claim Train turned a blind eye. If they meant that he injured them by not doing anything after these steps, they did not explicitly allege this. The only information in the record regarding the tavern after January 21 (the date Train restricted Leon to after-hours work only), comes from Davidson on February 13, stating that the majority of the staff enjoys Leon and complaining about management issues, and from plaintiff Denny on March 9, also only complaining about management issues and giving two-week's notice on that basis. Woods and Imre no longer worked at the tavern at the time Train restricted Leon's access. Woods in fact quit before Train even flew out to Colorado to meet with her and others. ("I could go on, but I've been long-winded enough, and after Jan. 5th, it's not my problem. You, however still have one, and I'm glad I'm not in your shoes." Doc. No. 42, ex. E, Woods' December 29, 2009 email to Train).

The Plaintiffs also argued that they think Train did not do more because he did not believe their complaints. This weakens their argument that Train acted intentionally to injure. If he did not believe that Leon was harassing them, then he could not have intended to further injure them by not stopping Leon. Moreover, StaffScapes reported to him that the complaints were hearsay with none of the affected persons complaining. The record does not include the allegations of the other

two employees Train had met with when he travelled to Colorado, Diaz and McBroome, as they are not part of this action and the Plaintiffs did not include their EEOC complaints. Davidson and Denny advising Train of issues after Train restricted Leon did not include any problems with sexual harassment. That the state court later believed the Plaintiffs does not change that during the time period the Plaintiffs complain about, none of the persons directly sexually-harassed by Leon came forward (an allegation the Plaintiffs did not refute) and does not mean that Train willfully disbelieved them at the time.

It is true that Train could have done more, in particular, viewed the security footage to verify the claims, or, as he later admitted, call the police if Leon returned to the tavern during business hours. But he also flew out twice to talk with the complainants and twice acted to stop Leon without necessarily believing the complaints. The Plaintiffs do not allege that Train intended that the measures not remedy the situation or was substantially certain that they would not, just that they were injured by his failure.

The Plaintiffs' injury must have been committed maliciously. In order to prove malice, the action must be so reckless that it is certain to cause harm to the creditor. *In re Iberg*, 395 B.R. 83, 91 (Bankr. E.D. Ark. 2008). As mentioned above, Train's actions, or inactions, do not exceed recklessness where it would unquestionably cause harm to the Plaintiffs. Even though Train and Staffscapes did not find the allegations credible, Train not only opened an investigation with Staffscapes and met with the Plaintiffs, but he also tried to limit Leon's interaction with them. Moreover, when the Train realized that his initial action did not end Leon's alleged harassment, he terminated Leon's supervisory position at The Barking Goat.

The Plaintiffs did not prove by a preponderance of the evidence either that there is a genuine issue of material fact, or in that absence, that they are entitled to judgment as a matter of law. The evidence does not support a finding of a deliberate or intentional injury caused by Train nor does it show a failure to act was intentional and the court cannot find one. Though Train did not do all that he could have, the Plaintiffs did not prove that he did so to intentionally injure them and that's the standard. The record is devoid of any evidence, or allegation even, that Train was in cahoots with Leon, that Train did not intend for Leon to listen to him. Rather, Leon came across as uncontrollable. And since courts must narrowly construe discharge exceptions in favor of a debtor, given that the underlying policy of the Bankruptcy Code is to afford the debtor a "fresh start", Train's motion for summary judgment should be granted and the Plaintiffs' cross-motion denied.

VI. CONCLUSION

Accordingly, Train's Motion for Summary Judgment is granted, and Plaintiff's Cross-Motion for Summary Judgment is denied.

An appropriate judgment has been entered consistent with this decision.

The court reserves the right to revise its findings of fact and conclusions of law.

/s/ Andrew B. Altenburg, Jr.
United States Bankruptcy Judge

Dated: May 30, 2019