United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]
[aff'd, No. 92-C-117-S (W.D. Wis. May 21, 1992)]

Harold E. Pretasky, Jr., Plaintiff, v.
Kimberly Ann LeJeune and Hale, Skemp, Hanson &
Skemp Law Firm, Defendants)
(In re Harold E. Pretasky, Jr., Debtor)
Bankruptcy Case No. 91-01062-7, Adv. Case. No. A91-2108-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

October 18, 1991

Donald J. Harman, for the plaintiff.
David B. Russell, for the defendant.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This matter comes before the Court on two summary judgment motions pertaining to a counterclaim by the defendant Kimberly A. LeJeune against the plaintiff-debtor Harold E. Pretasky, Jr. The plaintiff-debtor in his complaint dated May 21, 1991, alleged that the defendant's garnishment of certain funds due him constitutes a preference. In her answer to the plaintiff's preference claim, the defendant alleged in a counterclaim that the plaintiff's debt to her is nondischargeable pursuant to 11 U.S.C. § 523(a)(6). The defendant is represented by David B. Russell and the plaintiff by Donald J. Harman.

The only issue currently before the Court is whether the debtor is collaterally estopped from relitigating the issue of whether his conduct toward the defendant was "willful and malicious" for purposes of § 523(a)(6), thus making his debt to the defendant non-dischargeable as a matter of law. Both the plaintiff and the defendant have filed motions for summary judgment on this issue.

Only a brief review of the facts is necessary here. The defendant filed a complaint against the plaintiff on January 30, 1984, with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations (DILHR). The defendant alleged that the plaintiff discriminated against her in her employment on the basis of sex, or more specifically, because she was pregnant. DILHR issued a decision on April 3, 1985, which concluded in part that "[r]espondent discriminated against Complainant on the basis of sex (maternity) in regard to conditions of employment and discharge in violation of the Wisconsin Fair Employment Act." The decision further ordered the plaintiff to pay Kimberly LeJeune "[a]ll lost wages which

the Complainant would have earned but for Respondent's discrimination between the date of her discharge, November 29, 1983 to June 22, 1984 at the rate of $188 per week."

The plaintiff-debtor filed a petition for review with the Wisconsin Labor and Industry Review Commission (LIRC). The commission affirmed the DILHR decision with minor changes on July 11, 1985. The defendant then commenced a suit in La Crosse County Circuit Court to enforce the DILHR order. The suit was dismissed pursuant to a stipulation in which the debtor agreed to make monthly payments to Kimberly LeJeune. The debtor later defaulted on the payments and a judgment was entered against him for $6,330.77 on September 4, 1986.

It is the unpaid balance or outstanding portion of this judgment which the defendant seeks to have declared nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

That provision provides:

> (a) [a] decision under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> . . .
>
> (6) 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) (West 1991).

Briefly summarized, the defendant Kimberly LeJeune cites numerous judicial interpretations of the "willful and malicious" language of this provision and then cites several cases in support of her assertion that "[c]ollateral estoppel is applicable when determining dischargeability under § 523(a)(6)." The defendant also cites Seventh Circuit precedent as to the four requirements for application of collateral estoppel in a given case:

> 1. The party against whom collateral estoppel is asserted must have been fully represented in the prior litigation;
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> 2. The issue sought to be precluded must be identical to the issue involved in the prior litigation;
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> 3. The issue must have been actually litigated and decided on the merits in the prior litigation; and,
>
> 4. The resolution of that issue must have been necessary to the prior judgment.

Gray v. Lacke, 885 F.2d 399, 406 (7th Cir. 1989), cert. denied 108 L. Ed. 2d 613 (1990).

The Court has examined the briefs of the parties and the judicial precedent cited in them and finds that the defendant's assertion that the debtor is collaterally estopped from "relitigating" the issue of whether his conduct was willful and malicious is in error. The Court reaches this result for several reasons.

First, the second of the four aforementioned requirements for collateral estoppel is clearly not met in this case. The issue of the willfulness and maliciousness of the

debtor's conduct is not identical to the issue involved in the prior litigation. As noted, the prior litigation involved a finding of discrimination based on sex in an employment setting. While the willfulness of a debtor's actions in a § 523(a)(6) case is seldom at issue, the maliciousness of his actions almost always is. The Court has examined the findings of fact and conclusions of law of DILHR and LIRC and has found no finding or conclusion addressing the maliciousness of the debtor's actions. As noted by the defendant here, the meaning of the term "malicious" has been the subject of a great deal of litigation in the past and has been given numerous specialized definitions which go beyond the dictionary definition of that term. The determinations of the state agencies here were made prior to the debtor's filing bankruptcy and thus the "willful and malicious" standard of § 523(a)(6) was not considered at all. To hold that a finding of sex discrimination by a state agency is identical to a finding of "willful and malicious" under § 523(a)(6) by a federal bankruptcy court would be patently unfair to the debtor here.

Second, all of the collateral estoppel cases under § 523(a)(6) cited by the defendant involved a specific finding by the first court that the debtor's conduct was willful and malicious, or they involved a claim of battery, one which frequently involves malice. In the present case, as mentioned previously, nothing pertaining to malice is to be found in the decisions of the state agencies. In addition, this is a case involving a claim of sex discrimination, not battery.

Third, this Court is mindful that "[t]he 'willful and malicious' exception of Section 523(a)(6) is subject to the general rule that 'the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor.'" Communications Workers of America, Local 11500, AFL-CIO v. Allen (In re Allen), 75 B.R. 742, 745 (Bankr. C.D. Cal. 1987), citing with approval 3 Collier on Bankruptcy, § 523.05(A) (15th ed. 1985). Applying collateral estoppel in this case where the prior agency determination didn't address the malice issue would violate this maxim.

Fourth, other courts faced with summary judgment motions in cases involving discrimination judgments in subsequent § 523(a)(6) adjudications have held that " [w]illful and malicious injury is not inherent in . . . discrimination; . . . ." See, e.g., In re Schwenn, 44 B.R. 746, 749 (Bankr. E.D. Wis. 1984). Other courts faced with the collateral estoppel issue in the same context -- discrimination judgments in subsequent § 523(a)(6) adjudications -- have reached the same result. See, e.g., Perino v. Cohen (In re Cohen), 92 B.R. 54, 73-74 (Bankr. S.D.N.Y. 1988).

For these reasons, then, the Court holds that the defendant's assertion that the debtor is collaterally estopped from "relitigating" the issue of whether his conduct was willful and malicious for purposes of § 523(a)(6) is without merit. Accordingly, issues of material fact remain outstanding in this matter and the defendant's motion for summary judgment is thus denied.

As to the plaintiff's motion for summary judgment, the Court denies it as well. Plaintiff's assertion that the defendant has the burden of proving nondischargeability is correct. This does not mean, however, that if the defendant does not meet this burden on a summary judgment motion, that the plaintiff is entitled to judgment as a matter of law. The Court's denial of the defendant's summary judgment motion simply means the willful and malicious issue must be litigated by the parties in this forum. Accordingly, the plaintiff's summary judgment motion is denied.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.