United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Tammy Hennager, Plaintiff, v.
Robert J. Affolter, Defendant
(In re Robert J. Affolter and Michelle A. Affolter, Debtors)
Bankruptcy Case No. 95-30311-7; Adv. Case No. 95-3065-7

United States Bankruptcy Court
W.D. Wisconsin

March 5, 1996

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Michael J. Rynes, Bankruptcy Law Services, Madison, WI, for defendant.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

Plaintiff Tammy Hennager won a money judgment for $10,312.87 against defendant Robert Affolter in September 1994. The Green County court found that Affolter had been unjustly enriched by retaining "benefits" conferred upon him by Hennager during nearly a year of cohabitation. Affolter never paid the judgment. Instead, on January 31, 1995, he and his wife filed for bankruptcy. On May 4, 1995, Hennager filed this adversary proceeding and alleged that the judgment should not be discharged because it was for property that Affolter willfully and maliciously converted to his own use. A trial was held on November 16, 1995, and the issues were taken under advisement. Hennager filed a post-trial brief in support of her position; Affolter did not.

By stipulation, the Green County decision was entered into evidence at the close of trial. That decision and the trial testimony support finding the following facts:

From late 1989 until October 1990, Hennager and Affolter lived together with the intent to marry. In December 1989, about the time Hennager and her daughter moved into Affolter's house, Hennager's mother died, and Hennager inherited an undisclosed sum. Of the inheritance, approximately $21,000 remained in a savings account on May 15, 1990, when Hennager added Affolter's name and created a joint account.

Hennager and Affolter opened a joint checking account using money Hennager transferred from savings. The purpose of the joint checking account was to commingle funds that either could use to make purchases to maintain their household.

On May 22, 1990, one week after opening the joint checking account, Hennager wrote out a check for $1,700 as part of a $2,500 down payment on a $6,000 used car. Though the car was titled in Affolter's name, the parties testified that the car was to be both of theirs for as long as their relationship lasted. Shortly thereafter, in early June 1990, they decided to buy a boat costing approximately $19,000. Hennager transferred $10,000

from the savings account to checking and then wrote a check for that amount as a down payment on the boat. The money retired Affolter's $1,231.59 debt for a boat which was given in trade and applied $8,768.41 toward the new boat.

The parties had no express understanding as to what would happen with the automobile and the boat should their relationship end. Hennager claims that Affolter promised to repay her the $1,700 she contributed to the car and $10,000 for the boat by reimbursing the savings account from his future earnings. Affolter denies making these promises. Neither party presented evidence regarding the monthly loan payments or insurance costs on the automobile, nor whether and to what degree Hennager contributed to those costs during their time together. Affolter testified that he made payments of $260 per month on the boat both during and after their time together.

On June 21, 1990, Hennager wrote out a check from the joint account for $476.16 for back property taxes owed on Affolter's house. Hennager claims that Affolter promised that Hennager would benefit from this payment, which prevented a tax lien from attaching to his property, but she did not in fact benefit. Affolter testified that he has since sold that home and lost money on the sale.

On July 13, 1990, the same day that Affolter made his first deposit into the joint checking account, Hennager wrote a check for the $444.93 down payment on a $1,500 paint sprayer that Affolter used in his painting business. Two days later, on July 16, she paid $656.25 toward the purchase of a trailer that Affolter used in his painting business. She alleges that he was to reimburse her for these specific expenditures, but failed to do so.

Hennager wrote all checks on the joint account and deposited $13,270.34 before Affolter made his first deposit. In all, Hennager deposited $18,893.23 and Affolter $10,662.33 into the checking account between May 15, 1990, and mid-fall of that year, when it was closed.

By September 1990, the parties' relationship had deteriorated, and Hennager moved out of Affolter's house in October 1990. About that time, Hennager asked that Affolter turnover the boat to her and let her assume the loan. She also demanded that he repay her for the other items he retained and for her contributions to his previous boat debt and real estate taxes. She received neither money nor property in response to her demand. In September of 1991, Hennager hired a lawyer to pursue Affolter. Finally, in June of 1992, Hennager commenced the state court action against him. Thereafter, she refused his offer to turnover the boat as well as several offers of partial cash reimbursement apparently made through his lawyer (the first offer was $2,800, and subsequent offers dropped in price).

In September 1994, after a trial at which both parties testified, the Green County court concluded that Affolter had been unjustly enriched by Hennager's contributions to property retained by Affolter, as follows:

1.	Retirement of previous boat debt	$1,231.59
2.	Proceeds from sale of boat	5,051.84
3.	Car down payment	1,700.00
4.	Real estate taxes	470.16
5.	Trailer purchased	656.25
6.	Sprayer down payment	444.93
Total		$9,554.77

The Green County court denied Hennager prejudgment interest but assessed costs and

disbursements against Affolter and interest at 12% per annum. The judgment totaled $10,312.87, and after Affolter filed this bankruptcy, Hennager filed a claim for that amount.

Hennager asserts that her claim should not be discharged pursuant to 11 U.S.C. § 523(a)(6). Section 523(a)(6) provides:

(a) A discharge 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[.]

The bankruptcy court has exclusive jurisdiction to determine the extent to which a debt is nondischargeable under § 523(a)(6). 11 U.S.C. § 523(c); see In re Anderson, 49 B.R. 655, 657 (Bkrtcy. W.D. Wis. 1985). Only the part of the debt caused by willful and malicious injury is nondischargeable under § 523(a)(6). In re Ries, 22 B.R. 343, 348 (Bkrtcy. W.D. Wis. 1982). Hennager has the burden to show, by a preponderance of the evidence, that Affolter's actions satisfy both elements of § 523(a)(6). Grogan v. Garner, 498 U.S. 279, 291 (1991); In re Hallahan, 936 F.2d 1496, 1500 n.3 (7th Cir. 1991).

The parties stipulated to the Green County court's determination that Affolter was unjustly enriched. Affolter has not disputed that court's conclusions of law, and the decision was entered into evidence without objection. Although state court judgments have no *res judicata* effect on § 523 dischargeability proceedings, Brown v. Felson, 442 U.S. 127, 138, 99 S.Ct. 2205, 2212, 60 L.Ed.2d 767 (1979), this court will grant the Green County decision full faith and credit because, under Wisconsin law, the prior judgment is valid and final on its merits and the issue of unjust enrichment was fully and fairly litigated by the same parties in state court under the same burden of proof applicable to dischargeability proceedings. In re Wagner, 79 B.R. 1016, 1018-21 (Bkrtcy. W.D. Wis. 1987) (discussing collateral estoppel in bankruptcy); see also Klingman v. Levinson, 831 F.2d 1292, 1295 (7th Cir. 1987) (same).

Affolter raised the issue of the relative contributions of the parties to daily living expenses, which the Green County decision does not address, in an attempt to establish some right of offset. The parties had no specific arrangement regarding relative contributions to living expenses, and Hennager's contribution was probably less than half. She earned between $3.50 and just over $5.00 an hour during the first six months of their cohabitation, and nothing from May through August. She made only nominal contributions to rent totaling about $600, and occasionally contributed to food and utilities. She also provided full-time child care to Affolter's two children during the summer and part-time child care before that.

Unfortunately, Affolter's own testimony provides no basis to compare contributions. He offered no evidence of his own earnings other than on the "Camp Douglas job." He paid $260 per month on the boat beginning in July 1990, but he presented no evidence regarding his house payments, insurance costs, utility bills, food bills, gasoline bills, medical bills, or the sundry other items that make up normal living expenses. There was no testimony regarding the closing balance of either joint account or how they were divided between the parties upon closing.

Approximately $5,500 of Hennager's money and $10,000 of Affolter's is not accounted for by the evidence. On the record presented, there can be no inferences that Affolter is due anything which could offset the judgment.

Section 523(a)(6) applies to conversion of property. In re Donny, 19 B.R. 354, 357 n.3

(Bkrtcy. W.D. Wis. 1982). The Green County judgment was based on unjust enrichment and contained no mention of conversion. Nonetheless, Hennager claims that the facts that led the state court to find unjust enrichment should lead this court to find that Affolter converted her property. The elements of conversion are well settled under Wisconsin state law: "Conversion is often defined as the wrongful exercise of dominion or control over a chattel. Conversion may result from a wrongful taking or a wrongful refusal to surrender property originally lawfully obtained." Production Credit Association v. Nowatzski, 90 Wis.2d 344, 353-54, 280 N.W.2d 118 (1979). The conversion occurs at the time the demand is refused, and a later attempt to ameliorate damages does not negate the tort. In re Donny, 19 B.R. at 359.

As a threshold matter, "the plaintiff in a conversion action must be the rightful owner of the asset." Kerrigan v. American Orthodontics Corp., 960 F.2d 43, 48 (7th Cir. 1992). The Green County court did not expressly address the issue of property rights, but referred only to "benefits" conferred, finding that Affolter had acquired "benefits" from Hennager, had knowledge that he had acquired those benefits, and had accepted and retained those benefits for his use after the end of their relationship even though it was inequitable for him to do so.

Is a "benefit" that can be adjusted in equity akin to a property right? Watts v. Watts, 137 Wis.2d 506 (1987) states that "unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the *property* acquired through the efforts of both." Watts, 137 Wis.2d at 532-33 (emphasis added). Watts defines unjust enrichment as an equitable doctrine founded on the principle that one should not benefit from the wrongful retention of another's *property,* whether personalty, money, land, or some other form that is legally cognizable. This equitable doctrine is a mirror image of the legal doctrine of conversion. While equity focuses on what was gained, law seeks to redress what was lost. Affolter's refusal to return "property" created the inequity because he benefitted, and also satisfied the principal elements of conversion because it injured Hennager.

Wisconsin law recognizes that a property right can be manifest in a number of ways. Rather than focus on possession of "bare legal" or paper title, Wisconsin law focuses on "beneficial interest" in property. Wall v. Dept. of Revenue, 157 Wis.2d 1, 458 N.W.2d (1990); City of Milwaukee v. Greenberg, 163 Wis. 2d 28, 471 N.W. 2d 33 (1991). "What combination of rights ... will constitute ownership is a question which must be determined in each case in the context of the purpose of the determination." Id., citing Mitchell Aero, Inc. v. Milwaukee, 42 Wis.2d 656, 662, 168 N.W.2d 183 (1969). The principle of looking beyond documents of title occurs in statutes as well as case law. See e.g. Wis. Stat. § 893.24 et seq. (property may be acquired by adverse possession); Wis. Stat. §§ 766.31, 766.51 (property titled and managed by one spouse is nevertheless marital property); Wis. Stat. § 767.255 (at divorce, property is divided between parties regardless of how titled).

Watts establishes that unmarried couples in Wisconsin who form relationships similar to or in anticipation of marriage can demonstrate their intention regarding property in a number of ways. "Joint acts of a financial nature," such as opening joint bank accounts and making joint purchases, are evidence of an intent to participate in a "joint enterprise." Watts, 137 Wis.2d at 529. Affolter and Hennager planned to marry and, to that end, opened joint bank accounts. Their actions and testimony support the conclusion that they intended to participate in a joint enterprise, and an element of that enterprise was co-ownership of the property purchased together. However, co-ownership in a "marriage-like" relationship does not necessarily lead to equal ownership interest.

Unless a statute specifies a property split (e.g., a marital property statute), disputes over real and personal property interests are usually settled by partition. See Wis. Stats. § 820.01 (partition of personal property); § 842.02 (partition of real property). For unmarried cohabitants, partition is a reasonable approach to division of all property at the end of the cohabitation relationship. Watts, 137 Wis.2d at 534-35; see also Jezo v. Jezo, 19 Wis.2d 78, 81, 119 N.W.2d 471 (1964) (partition is used to divide property of divorcing couple where the governing property division does not apply). In Smith v. Smith, 255 Wis. 96, 38 N.W.2d 96 (1949), the Wisconsin Supreme Court identified principles to apply in dividing property among unmarried cohabitants:

Where the facts warrant it, the court may determine rights of the parties to the property acquired during their relationship as though they were partners or were engaged in a joint enterprise. Thus, where a man and woman cohabit under an agreement to pool their earnings and share in their accumulations, the law will recognize and enforce their agreement. Where property is acquired through the joint contributions or efforts of the parties with the intention that both should share in its benefits, it has been held that, even in the absence of an agreement, the law will apportion their interests in the property in accordance with their respective contributions and efforts.

Smith, 255 Wis. at 99, quoting 55 C.J.S. Marriage, p. 875, § 35. The Smith court did not apply these principles to the case before it because, at the time, Wisconsin law deemed unmarried cohabitants to be parties to an illegal contract and denied plaintiffs (inevitably women, as was the case in Smith) recovery as a matter of law. Watts expressly approved the principles cited, but not used, in Smith, to division of property among parties to unmarried cohabitation. Watts, 137 Wis.2d at 527.

Hennager and Affolter acquired the property interests at issue here between May and July 1990. Hennager's contributions to the purchases were substantial, yet she received the benefit of her contributions for a very short time. Affolter's specific contributions, other than four $260 monthly payments on the boat up to the time their relationship ended, are not in evidence. Applying the principles of Smith to the evidence as presented, a calculation of Hennager's property interest, as acquired through her contributions, substantially accords with the Green County court's calculation of the amount that Affolter was unjustly enriched.

Two issues remain: Whether Affolter's conversion rises to the level of "willful and malicious injury," and if so, whether Affolter's non-dischargeable debt is the same as the judgment entered in the Green County court. "'The word 'willful' means 'deliberate or intentional,' a deliberate and intentional act which necessarily leads to injury.'" Wagner, 79 B.R. at 1020 (citations omitted). Willfulness does not require that one intend to commit injury, merely that one intend to do the wrongful act--in this case, to keep the property--in disregard of its apparent consequences. In re Donny, 19 B.R. 354, 359 n.5 (Bkrtcy. W.D. Wis. 1982) (citations omitted). Under this standard, there is no question that Affolter's retention of the property Hennager demanded was willful.

Was it malicious? This court has framed the standard in a variety of ways. "[A]n injury may be malicious 'if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite or ill-will.'" Id. "For a debtor's acts to be malicious, all that is required is that the debtor know that his act will harm another and proceed in the face of that knowledge." In re Cullen, 71 B.R. 274, 282 (Bkrtcy. W.D. Wis. 1987). "The law implies malice if anyone of reasonable intelligence knows that the act in question is contrary to commonly accepted duties in the ordinary relationships between people and injurious to another." In re Donny, 19 B.R. at 359 n.5 (citation omitted). Maliciousness, then, has a scienter element--one must know that the action causes injury to another--and, as well, a duty element.

Here, the duties owed by the parties to each other are not so clearly marked as those in Donny, nor was their relationship as lengthy as that in Watts, where the couple spent twelve years together. Yet nothing in Watts suggests that there is a minimum time below which unmarried couples owe no more to each other than mere roommates. Even in their short time together, Hennager and Affolter were, at the very least, engaged in the type of economic joint venture that creates heightened duties between the parties. Their express intent to marry supports their recognition of having duties to each other. Given the nature of their relationship, Affolter could not reasonably believe that Hennager had no ownership interest in those items he retained. Nor could he reasonably believe that her ownership interest had evaporated when she moved out. She immediately began asserting her interest. He knew and intended that his refusal to return either property or money to her would cause her injury. Affolter's refusal to return her property or to make any attempt at repayment appears to be "contrary to commonly accepted duties in the ordinary relationships between people," In re Donny, 19 B.R. at 359 n.5, and warrants inclusion in a definition of malicious under § 523(a)(6).

The complaint in this proceeding is based on the state court judgment, which calculated damages based on unjust enrichment; that is, the state court calculated damages in the amount Affolter benefitted. However, under § 523(a)(6), the nondischargeable amount must be calculated on the loss to Hennager by dint of the conversion. See e.g., Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 196 Wis.2d 578, 599-600, 539 N.W.2d 111 (Wis. App. 1995). Thus, the nondischargeable claim is the value of Hennager's interest in each item at the time of conversion, or sometime in October 1990, when she first demanded return of her property or payment in lieu thereof. A fair and reasonable estimate of that value is all the law requires. Cutler Cranberry Co. v. Oakdale Elec. Coop., 78 Wis.2d 222, 233, 254 N.W.2d 234, 240 (1977). Except for the boat, the value of converted property fairly corresponds to the beneficial interest values found by the Green County court. When calculating the benefit to Affolter for retaining the boat, the Green County court looked to his sale of the boat in 1992 rather than the value of Hennager's interest at the time of conversion in 1990. This calculation may be assumed to have exaggerated the depreciation that would have taken place in the four months of joint possession.

Because the computation of damages for the conversion would render no less than Hennager's claim based on unjust enrichment, judgment may be entered determining that Affolter's debt to Hennager is nondischargeable in the amount demanded in the complaint. It may be so ordered.