UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:	)	Bankr. No. 99-10196
GARY R. HALBERT Soc. Sec. No. 503-86-8282	)	Chapter 7
Debtor.	)	
NANCY LEE McCASLIN	)	Adv. No. 99-1020
Plaintiff,	)	
-vs-	)	DECISION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
GARY R. HALBERT	)	
Defendant.	)	

The matter before the Court is Plaintiff's Motion for Summary Judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2). This decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Plaintiff's Motion must be denied.

I.

On January 29, 1998, Nancy L. McCaslin obtained a default judgment against Julie R. Halbert and Gary R. Halbert in a Texas state court. The default judgment was based on McCaslin's complaint seeking damages for defamatory and libelous statements made by the Halberts. McCaslin's complaint sought actual damages of not less than $50,000, exemplary damages of not less than $100,000, pre and post judgment interest, and costs. The default judgment was for $80,000, no prejudgment interest, attorney fees of $1,500, post-judgment interest, and costs of $200.

Gary Halbert ("Debtor") filed a Chapter 7 petition on August 4, 1999 before this Court. In his schedules, he included McCaslin as an unsecured judgment creditor for $81,500.

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McCaslin timely filed a non dischargeability complaint against Debtor. She claimed that her default judgment was non dischargeable under 11 U.S.C. § 523(a)(6) as a debt arising from willful and malicious injury. Debtor timely answered, contrary to his schedules, that McCaslin was a disputed creditor. He stated that the Texas defamation lawsuit had been settled before the default judgment was entered. He also argued that the default judgment had been fraudulently entered against him.

McCaslin moved for summary judgment before this Court and argued that Debtor is collaterally estopped from re-litigating the issues resolved by the default judgment. She also argued that Texas law on collateral estoppel applied.

In his response, Debtor conceded that Texas law on collateral estoppel applies. He addressed the allegations in McCaslin's state court complaint and he set forth why he believed that McCaslin's state court defamation suit had been dismissed as part of a settlement of a related child custody matter. Debtor also alleged that he had no knowledge that the default judgment had been entered until July 1999, over one year after it was entered. He argued that collateral estoppel does not apply because the default judgment was not a product of a full and fair litigation and that Texas law requires actual litigation where a party has "substantially participated" in the action and had an opportunity to "defend on the merits."

Debtor also argued that even if the default judgment is deemed the product of a full and fair litigation, it did not resolve the issue of whether he acted with intentional willfulness and malice

as required by 11 U.S.C. § 523(a)(6) since Texas law does not require a culpable mental state for libel to be actionable.

II.

The parties do not dispute the standards for entry of summary judgment, *Sunquist v. Kaupp (In re Kaupp)*, Adv. No. 98-3014, Bankr. No. 98-30047 (Bankr. D.S.D. Dec. 29, 1998), or the elements for an application of collateral estoppel under Texas law. *Hobson Mould Works, Inc. v. Madsen (In re Madsen)*, 195 F.3d 988, 989-90 (8th Cir. 1999)(application of collateral estoppel in § 523(a)(6) proceeding), and *Miller v. J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598, 601-02 (5th Cir. 1998)(application of collateral estoppel under Texas law). Whether the Texas default judgment meets the standards for a willful and malicious injury under § 523(a)(6), however, is determined under federal bankruptcy law.

Like all statutory exceptions to discharge, the exception under § 523(a)(6) is to be construed narrowly. *Barclays American/Business Credit, Inc. v. Long (In re Long)*, 774 F.2d 875, 879 (8th Cir. 1985). The creditor has the burden to establish that the debt falls within the exception. *Werner v. Hoffman*, 5 F.3d 1170, 1172 (8th Cir. 1993). The creditor's burden of proof is by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *United States v. Foust (In re Foust)*, 52 F.3d 766, 768 (8th Cir. 1995).

The question of what constitutes a "willful" injury has been answered by the Supreme Court:

> The word "willful" in [§ 523](a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, *i.e.*, "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the [§ 523](a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences* of an act," not simply "the act itself." RESTATEMENT (SECOND) OF TORTS § 8A, comment *a*, p. 15 (1964) (emphasis added).

Kawaauhau v. Geiger, 523 U.S. 57, 61-62, 118 S.Ct. 974, 977 (1998).

"Malicious" conduct is something more than a reckless disregard for the creditor's economic interests and expectancies. *Long*, 774 F.2d at 881. Absent some additional aggravated circumstances, establishing that a debtor knowingly violated the creditor's legal rights is insufficient to establish malice. *Id.* Instead, the expected harm to the creditor must be known by the debtor to be certain or substantially certain to occur. *Id.*; *Madsen*, 195 F.3d at 989; *Waugh v. Elderidge (In re Waugh)*, 95 F.3d 706, 711 (8th Cir. 1996). Injuries inflicted by a reckless or negligent act are not excepted from discharge under § 523(a)(6). *Kawaauhau*, 118 S.Ct. at 978 (cites therein). The debtor must have acted with the intent of harming the creditor, rather than merely acting intentionally in a way that resulted in harm to the creditor. *Fischer v. Scarborough (In re Scarborough)*, 171 F.3d 638, 641 (8th Cir. 1999)(citing *Kawaauhau*, 118 S.Ct. at 977).

Intent is a fact question. *Waugh*, 95 F.3d at 710. Evidence of the surrounding circumstances may be presented from which intent may be inferred. *Caspers v. Van Horne (In re Van Horne)*, 823 F.2d 1285, 1287 (8th Cir. 1987)(cites therein). The debtor may be required to overcome the circumstantial evidence with more than unsupported assertions of honest intent. *Id.* at 1287-88 (cites therein).

Merely because a tort is classified as an intentional tort does not mean that an injury that results from it was caused wilfully under § 523(a)(6). *Miller v. J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598, 604 (5th Cir. 1998). There must still be a finding that the debtor deliberately took action that necessarily caused harm or was substantially certain to cause the injury. *Id.* (cites therein).

III.

Upon application of Texas law, it is clear that collateral estoppel does not arise from the judgment rendered by the Texas state court. First, the judgment entered was by default. Under Texas law, a default judgment generally does not meet the requirement for "actually litigated" for the application of collateral estoppel. *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1204 (5th Cir. 1996); *Pancake v. Reliance Ins. Co. (In re Pancake)*, 199 B.R. 350, 354 (N.D. Tex. 1996), *aff'd*, 106 F3d 1242 (5th Cir. 1997). This is especially true where, as here, the debtor did not file an answer and apparently did not have the

opportunity to participate in an evidentiary hearing.[1] *Gober*, 100 F.3d at 1204-05 (collateral estoppel applied where the debtor's answer had been struck as a sanction and where the debtor had the opportunity to participate in a post-default evidentiary hearing on damages); *Pancake*, 199 B.R. at 355 ("actually litigated" prong of collateral estoppel test requires that some evidence underlie the state court judgment).

Second, it is difficult for this Court to find that the Texas state court's default judgment included a specific conclusion that Debtor intended to injure McCaslin, a requirement for finding of willfulness under § 523(a)(6). At most, the state court's default judgment, premised solely on a general allegation in McCaslin's state court complaint, concluded that Debtor admitted he acted with specific intent by not answering the complaint.[2] There is little more. While the state court also found that Debtor's statements constituted "statutory libel" and "defamation *per se*," neither of those terms under Texas law encompassed the required "intent to

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[1] The default judgment only indicated that the Texas court received the pleadings, some "papers," and the argument of McCaslin's counsel. From that limited basis, this Court cannot conclude that an evidentiary hearing was held or that Debtor was given an opportunity to participate.

[2] In her state court complaint, McCaslin generally alleged, "Both JULIE RENEE HALBERT and GARY ROGER HALBERT acted with a specific intent to cause injury to [McCaslin]. In particular, GARY ROGER HALBERT attempted to file a criminal complaint against [McCaslin] when he specifically knew that his children were with [McCaslin] and that [McCaslin] had been given authority by [Julie Halbert] to act as guardian of the children." [Capitalized names in the original.] The second sentence does little to support the general allegation in the first sentence because the second states, at most, only that Debtor knowingly made a false statement.

injure" conclusion. Libel is

> a defamation in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Tex. Civ. Code Ann. § 73.001 (West 1999); *Knox v. Taylor*, 992 S.W.2d 40, 50 (Tex.App.-Houston [14th dist.] 1999, no writ). The definition does not include a willful injury element. Defamation *per se* arises if a statement unambiguously and falsely imputes criminal conduct to the plaintiff. *Mitre v. Brooks Fashion Stores, Inc.*, 840 S.W.2d 612, 619-20 (Tex.App.-Corpus Christi 1992)(cite therein), *abrogated on unrelated issue*, *Cain v. Hearst Corp.*, 878 S.W.2d 577, 585-86 (Tex. 1994). Again, it does not appear that a willful injury element is present in this definition that fulfills the definition of "willful" in § 523(a)(6) as interpreted by the Supreme Court in *Kawaauhau*.

Further, no specific finding of willfulness or maliciousness can be presumed from the Texas court's award of damages. Under Texas law, conduct sufficient to warrant punitive damages is not regarded as admitted by default. *Gober*, 100 F.3d at 1205. Further, the Texas court did not identify the type of damages awarded. While McCaslin requested actual damages of "not less than $50,000" and exemplary damages of "not less than $100,000," the court awarded a nonspecific amount of $80,000. Since that amount could have encompassed all actual damages and no exemplary damages,

this Court cannot conclude that the Texas court made the requisite findings for an award of exemplary damages.

This Court does not reach the question of whether Debtor had a full and fair opportunity to litigate the defamation action where Debtor claims he and McCaslin had resolved the matter before the default judgment was entered. If Debtor and McCaslin in fact did settle the matter as part of a child custody litigation, then Debtor needs to seek appropriate equitable relief from the Texas court to have the default judgment vacated or modified. An "undoing" of the default judgment by this Court because of any alleged misconduct by McCaslin is not appropriate. *Western Surety Co. v. Lamphere (In re Lamphere)*, Adv. No. 96-5015, Bankr. No. 96-50074, slip op. at 4-5 (Bankr. D.S.D. March 12, 1997)(several cites therein).

An order denying McCaslin's motion will be entered. A final pre-trial conference will be scheduled so that a trial date may be set.

Dated this 17 day of March, 2000.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

Deputy Clerk
(SEAL)

UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
MAR 17 2000
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

MAR 17 2000

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U.S. Bankruptcy Court, District of South Dakota
By

Case: 99-01020 Form id: 122 Ntc Date: 03/17/2000 Off: 3 Page : 1
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