

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: MARK ANDREWS CASE NO. 01-14885

GINGER ANDREWS PLAINTIFF

VERSUS ADV. PROC. NO. 01-1252

MARK ANDREWS DEFENDANT

OPINION

On consideration before the court is a motion for summary judgment filed by the Plaintiff, Ginger Andrews (hereinafter “plaintiff”); a response thereto having been filed by the Defendant, Mark Andrews (hereinafter “debtor” or “defendant”); and the court, having considered same, hereby finds as follows, to-wit:

I.

The court has jurisdiction of the subject matter of and the parties to this adversary proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(I).

II.

The plaintiff and defendant filed for divorce in the Circuit Court of Baldwin County, Alabama. A divorce decree was entered on August 13, 1999, in which a determination was made that the main assets accumulated during the marriage should be divided as nearly equally as possible. The trial judge placed a total value of \$795,498.45, on the marital assets which entitled each party to receive approximately \$471,748.45. In order to facilitate the equitable distribution of the marital assets, the decree provided the following in Paragraphs 10 and 13:

10. The husband is ordered to execute and deliver to the wife the promissory note in the sum of \$204,251.55 within thirty days from the date of the entry of this decree. In

addition, the husband shall execute and deliver to the wife any and all necessary papers necessary to create a valid security interest in the equipment and inventory of the fixed based operations, the Barrin 58, the Navaho Chieftan, and the Piper Warrior aircraft. Said note shall not contain any prepayment penalty and shall contain a provision that in the event sells [sic] any item of personal property that is security for said note, the husband shall pay to the wife one-half and [sic] the net sales proceeds immediately. The note shall carry interest at the rate of 8% per annum and is to be paid in monthly installment [sic] over a period of ten years of \$1,213.28, with the first payment being due thirty days after the date of this decree.

....

13. The husband shall pay to the wife, in addition to the promissory note decreed above, the sum of \$7,000.00 per year within ten days of receipt of the annual payment on the note from Southern Truck and Equipment Company beginning in 1999 and continue [sic] in each year until the debt is extinguished in 2003.

Based on the defendant's failure to comply with the above referenced paragraphs, the plaintiff submitted a petition for Rule Nisi in the Circuit Court of Baldwin County approximately one year after the entry of the divorce decree. A hearing was scheduled at which the plaintiff and her attorney, as well as, the attorney for the defendant appeared. The defendant failed to appear. After allowing his attorney to withdraw, an evidentiary hearing was conducted in the defendant's absence. A decree, referred to as the "contempt decree" by the parties herein, was issued wherein the trial judge found as follows:

2. That the Husband willfully failed and refused to execute the promissory note as mandated by Paragraph 10 of the original divorce decree, and that the husband similarly failed to pay the sum due from the Southern Trucking Equipment Co. note as mandated by Paragraph 13 of said decree. Further, that the husband willfully and contumaciously ignored those provisions of the decree wherein and whereby he was ordered to provide the wife with security interests in the property enumerated in said decree, and, in blatant disregard of said provisions, conveyed the same to third parties before and after the Supreme Court of Alabama affirmed said decree.

3. The wife is granted a judgment against the husband in the amount of \$273,774.75, together with post-judgment interest thereon, plus attorney's fees in the amount of \$2,500.00 for the prosecuting of the Rule Nisi.

4. Having determined that the conduct of the husband in failing to comply with the terms of the court's previous decree is willful, gross and contumacious, and therefore punishable as a contempt, the court orders that he be immediately arrested and incarcerated in the Baldwin County jail until he purges himself of said contempt by either paying the total sum due or executing the necessary documents and bringing the

payments current to the point where they would have been had he executed the documents and made the payments as required by the decree.

The contempt decree, dated August 1, 2001, was entered by the clerk of the Circuit Court of Baldwin County on August 6, 2001. The defendant filed a voluntary Chapter 7 petition for relief in this court on August 20, 2001. The plaintiff subsequently filed a complaint seeking to have all of the defendant's obligations, established in the original divorce decree and in the contempt decree, deemed non-dischargeable pursuant to 11 U.S.C. §523(a)(2), (5), (6), and (15), as well as, to have his discharge denied pursuant to 11 U.S.C. §727(a)¹. The plaintiff then filed a motion for partial summary judgment seeking to have the judgment awarded by the contempt decree adjudicated as non-dischargeable pursuant to §523(a)(6). This motion is now before the court.

III.

For reference purposes, §523(a)(6) provides as follows:

(a) A discharge under §727... 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.

Prior to 1998, the term "willful and malicious" was defined by the Fifth Circuit to mean "without just cause or excuse." In re Garner, 56 F.3d 677 (5th Cir. 1995). However, this definition was refined by the Supreme Court's opinion in Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed. 2d 90 (1998). The most recent Fifth Circuit definition of "willful and malicious," was articulated in In re Miller, 156 F.3d 598 (5th Cir. 1998), where the court stated that an injury is willful and malicious when there is either an objective substantial certainty of harm or a subjective motive to cause harm. Id., at 603. See also, In re Caton, 157 F.3d 1026, 1029 (5th Cir. 1998).

¹ All further statutory citations are to the United States Bankruptcy Code unless otherwise indicated.

In the present motion for summary judgment, the plaintiff is requesting the court to apply collateral estoppel effect to the findings contained in the contempt decree. Specifically, the plaintiff cites the following language from Paragraph 2 of the decree:

That the husband willfully failed and refused to execute the promissory note..., and...similarly failed to pay the sums due from the Southern Trucking and Equipment Co. note...willfully and contumaciously ignored those provisions of the decree..., and, in blatant disregard...conveyed the same to third parties before and after the Supreme Court of Alabama affirmed said decree.

In addition, the plaintiff cites the following language from Paragraph 4 of the contempt decree:

“[T]he conduct of the husband in failing to comply with the terms of the court’s previous decree is willful, gross, and contumacious...”

The plaintiff argues that the cited language is identical to the standard required for a finding of non-dischargeability in bankruptcy and that this court should therefore apply res judicata or collateral estoppel effect to the contempt decree.

IV.

The United States Supreme Court has stated that “collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to §523(a).” Grogan v. Garner, 498 U.S. 279, 284 (n. 11), 111 S. Ct. 654, 658 (n. 11), 112 L.Ed. 2d 755 (1991). In addition, the Supreme Court has held that, “(a) federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier stay judgment bars subsequent litigation.” Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 382, 105 S. Ct. 1327, 1332, 84 L.Ed. 2d 274 (1985), *reh’g denied*, 471 U.S. 1062 (1985). In an earlier decision, the Supreme Court held that “[i]f, in the course of adjudicating a state law question, a state court should determine factual issues using standards identical to those of [§523 of the present Bankruptcy Code] then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in bankruptcy court.” Brown v. Felsen, 442 U.S. 127, 139 (n. 10), 99 S. Ct. 2205, 2213 (n. 10), 62 L.Ed. 2d 767 (1979).

Because the contempt decree was entered by the Circuit Court of Baldwin County, Alabama, this court must apply the rules of res judicata and/or collateral estoppel as they exist under Alabama law. The elements required for application of res judicata in Alabama are as follows: (1) a prior judgment on the merits; (2) rendered by a court of competent jurisdiction; (3) with a substantial identity of the parties; and (4) with the same cause of action presented in both actions. Parmater v. Amcord, Inc., 699 So.2d 1238, 1240-41, (Ala. 1997). The Alabama court had before it a contempt action for the failure to abide by an earlier court order. This court has before it a complaint seeking a determination of the nondischargeability of a debt pursuant to §523(a) of the Bankruptcy Code. Clearly, the same cause of action is not presented in both actions, and, therefore, res judicata does not apply.

One seeking to invoke the doctrine of collateral estoppel under Alabama law must show the following: “(1) that an issue in a prior action was identical to the issue litigated in the present action; (2) that the issue was actually litigated in the prior action; (3) that resolution of the issue was necessary to the prior judgment; and (4) that the same parties are involved in the two actions.” Smith v. Union Bank and Trust Co., 653 So. 2d 933, 934 (Ala. 1995).

Under Alabama law, the issue in the prior action must be identical to the issue being litigated in the present action in order for collateral estoppel to apply. In the prior action, the trial judge determined that the defendant was in contempt of a prior court order. By asserting that collateral estoppel is applicable, the plaintiff necessarily posits that the issue of contempt of a prior court order is identical to the issue of nondischargeability of a debt under the Bankruptcy Code. This court does not agree with this premise. The identity of issues requirement necessary for the application of collateral estoppel is not present.

Accordingly, the court is of the opinion that neither res judicata nor collateral estoppel apply to this proceeding. The court also notes that neither res judicata nor collateral estoppel operate to bar a bankruptcy court from receiving evidence “as to facts by which that court may determine the character, and, ultimately, the dischargeability of the debt.” In re Shuller, 727 F.2d 1253, 1255 (5th Cir. 1984).

V.

Summary judgment is properly granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056; Uniform Local Bankruptcy Rule 18. The court must examine each issue in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Phillips v. OKC Corp., 812 F.2d 265 (5th Cir. 1987); Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). The moving party must demonstrate to the court the basis on which it believes that summary judgment is justified. The nonmoving party must then show that a genuine issue of material fact arises as to that issue. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987); Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). An issue is genuine if “there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party.” Phillips, 812 F.2d at 273. A fact is material if it would “affect the outcome of the lawsuit under the governing substantive law.” Phillips, 812 F.2d at 272.

VI.

In his response to the motion for summary judgment and in his memorandum, the defendant alleges that the property which he allegedly “sold,” was, in fact, repossessed by lien holders. He also asserts that he did not execute and deliver the promissory note to the plaintiff, as required by the divorce decree, because he knew that he could not pay it. These allegations raise genuine issues of material fact regarding the defendant’s subjective state of mind in relation to the “willful and malicious” cause of action asserted by the plaintiff. Accordingly, summary judgment must be denied. In so doing, the court notes that it has the discretion to deny a motion for summary judgment and allow the parties to proceed to trial in order to more fully develop the record for the trier of fact. Butler v. CMC Mississippi, Inc. Butler v. CMC Mississippi, Inc.,

1998 WL 173233 (N.D. Miss.) (citing, Kunin V. Feofanov, 69 F.3d 59, 61 (5th Cir. 1995); Black v J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994); Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir. 1989)).

Based on the foregoing, the court finds that genuine issues of material fact exist in this proceeding, and, therefore, the plaintiff is not entitled to judgment as a matter of law. The plaintiff's motion for summary judgment shall be denied by a separate order to be entered contemporaneously herewith.

This the 29th day of October, 2002.

/s/

DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE