

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

DENNIS MITCHELL,

CASE NO. 05-11315-NPO

DEBTOR.

CHAPTER 7

EDMOND WILKES, JR.

PLAINTIFF

VS.

ADVERSARY NO. 05-01133

DENNIS MITCHELL

DEFENDANT

**MEMORANDUM OPINION DENYING
COMPLAINT TO DETERMINE DISCHARGEABILITY OF A DEBT**

On November 8, 2006, there came on for trial (the “Trial”) the Complaint to Determine Dischargeability of a Debt (Adv. Dk. No. 1) (the “Complaint”) filed by Edmond Wilkes, Jr. (“Wilkes”) and the Answer (Adv. Dk. No. 6) thereto filed by Dennis Mitchell (the “Debtor”) in the above-styled adversary proceeding. Allison Kelly represented Wilkes, and W.M. Sanders represented the Debtor. The Court, having considered the pleadings and the testimony, exhibits and arguments of counsel presented at trial, finds that the Complaint is not well taken and should be denied. Specifically, the Court finds as follows:¹

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding. This matter is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I). Notice of the Complaint was

¹ The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

proper under the circumstances.

Facts

On or about December 9, 1990, at approximately 10:00 p.m., the Debtor, a police officer with the Grenada Police Department, attempted to arrest Wilkes in connection with an alleged assault on Rosie Lee Berry. The testimony at the Trial established that the Debtor was placing handcuffs on Wilkes' left wrist when Wilkes reached into his jacket pocket with his right hand and pulled out a revolver. Wilkes maintained that, although he had made no announcement regarding his intention, he merely wanted to hand the gun to the Debtor. The Debtor testified that he was standing behind Wilkes and could see over Wilkes's left shoulder. The Debtor observed that when removing the gun from his jacket, Wilkes had his finger on the trigger, seemingly intending to shoot the Debtor. A struggle for the gun ensued, and the parties fell wrestling to the ground. Wilkes contended that he tried to get up and run away, while the Debtor testified that Wilkes, who was still holding the gun, shoved the gun into the Debtor's stomach and pulled the trigger though no bullet was chambered. The Debtor wrested the gun away from Wilkes as Wilkes managed to escape and flee some three or four blocks down the street.

The Debtor explained that for a few moments he lost sight of Wilkes but that he continued chasing him while pulling out a flashlight, calling for backup officers, pocketing Wilkes' gun, and drawing his own service revolver. The Debtor soon located Wilkes hiding behind a house. Wilkes contended that he saw the Debtor approaching, decided to surrender, fell to his knees, and threw his hands up in the air. The Debtor testified that he cornered Wilkes, aiming his flashlight and his service revolver at Wilkes. The Debtor stated that Wilkes did lift his hands but rather than surrender, Wilkes lunged toward the Debtor in yet another attempt to injure the Debtor or to escape.

The Debtor further explained that although he was trained to shoot in that situation, he instead struck Wilkes in the head with the flashlight, causing an injury to Wilkes. Wilkes was then subdued and arrested by the Debtor. Subsequently, Wilkes was convicted of simple assault on a police officer and was sentenced to serve a term of five years in prison.

While in prison, Wilkes obtained a default judgment against the Debtor based on the head injury Wilkes sustained when he was hit with the flashlight.² After Wilkes attempted to collect on the default judgment, the Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code. Thereafter, Wilkes initiated this adversary proceeding against the Debtor by filing this Complaint wherein he contends that the Debtor is precluded from discharging the debt established by the default judgment because he committed a willful and malicious injury against Wilkes in the context of 11 U.S.C. § 523(a)(6).³

Discussion

Section 523(a)(6) of the Bankruptcy Code provides:

(a) A discharge under section 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. . . .

² The parties acknowledged at the Trial that the district court did not hold a hearing nor litigate in any manner Wilkes' claim that the Debtor "did with malice strike the Plaintiff with a flashlight, without just cause, causing the Plaintiff to be knocked-out, and requiring the Plaintiff to have to be transported to the hospital and treated for head injury, which required (8) stitches." (United States District Court Complaint, Statement of Claim). Accordingly, this Court does not afford the default judgment any type of preclusive effect. See Pancake v. Reliance Ins. Co. (In re Pancake), 106 F.3d 1242 (5th Cir. 1997) (default judgment not given preclusive effect absent showing that state court conducted hearing in which creditor met its evidentiary burden).

³ Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code, unless otherwise noted.

11 U.S.C. § 523(a)(6). A creditor seeking to deny a debtor the discharge of a debt pursuant to § 523(a)(6) must prove by a preponderance of the evidence that the debt is non-dischargeable. Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991); RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1292 (5th Cir. 1995).

In Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d. 90 (1998), the United States Supreme Court concluded that “nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.” Kawaauhau v. Geiger, 118 S.Ct. at 977. The Geiger court further held that “debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6).” Kawaauhau v. Geiger, 118 S.Ct. at 978.

The Court of Appeals for the Fifth Circuit subsequently determined in Miller v. J.D. Abrams, Inc. (In re Miller), 156 F.3d 598, 604 (5th Cir. 1998), that an injury is ‘willful and malicious’ where the debtor’s conduct would cause injury according to an objective substantial certainty of harm standard or upon a showing that the debtor had a subjective motive to cause harm. Id. at 606; Structured Inv. Co. v. Smith (In re Smith), 302 B.R. 530, 534 (Bankr. N.D. Miss. 2003). Based on the Geiger and Miller cases, a willful and malicious injury under § 523(a)(6) cannot be one that is recklessly or negligently inflicted and must be one in which the debtor’s conduct evinces either an objective substantial certainty of harm or a subjective motive to do harm.

Application of the above standards to the facts of this case leads the Court to the conclusion that the Debtor’s conduct does not constitute a willful and malicious injury pursuant to § 523(a)(6). As an initial matter, the Court found the Debtor’s testimony to be the more

credible version of the events surrounding the arrest. Moreover, while it is undisputed that the Debtor caused Wilkes' injury, the Court is persuaded by the evidence presented at the Trial that the Debtor's intention, both objectively and subjectively, was to prevent Wilkes from obtaining a weapon and attempting to shoot or otherwise injure the Debtor. In the process of trying to subdue Wilkes, the Debtor used the flashlight to defend himself. Yet, in this Court's view, the Debtor did not intend the injury to Wilkes, although one occurred. Thus, as discussed in the Geiger case, while the Debtor committed the intentional act of hitting Wilkes with the flashlight, he did not intend for that act to cause an injury to Wilkes.⁴

Based on the foregoing, the Court finds that Wilkes has failed to establish by a preponderance of the evidence that, objectively, the Debtor's conduct was substantially certain to cause harm or that the Debtor's conduct was borne of a subjective motive to cause harm. Accordingly, the Complaint is not well taken and should be denied.⁵

A separate final judgment consistent with this Memorandum Opinion will be entered by this Court in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

DATED this the 5th day of December, 2006.



NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

⁴ Compare with the actions of Jones (the debtor) in the Memorandum Opinion Granting Complaint to Determine Dischargeability of a Debt in Denton v. Jones, Adv. No. 05-1294 (Bankr. N.D. Miss. filed Dec. 5, 2006), issued contemporaneously with this Memorandum Opinion. In that case, Jones repeatedly hit and kicked the Plaintiff during a fight. The Court, found from the facts presented in that case, that Jones intended, both objectively and subjectively, to cause the injuries sustained by the Plaintiff.

⁵ The Court further notes that Wilkes' conviction on the charge of assaulting a police officer as a result of this incident indicates that the State of Mississippi convinced a separate criminal trial jury that Wilkes was guilty of perpetrating an assault on the Debtor beyond a reasonable doubt, a higher standard than this Court is required to utilize.