IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN THE MATTER OF:

FREDDIE JONES, DEBTOR — CHAPTER 7 NO. 90-1986-JC

AETNA CASUALTY & SURETY COMPANY — PLAINTIFF

VS. — ADVERSARY PROCEEDING NO. 910059JC

FREDDIE JONES — DEFENDANT

MEMORANDUM OPINION AND ORDER

On June 17, 1991, the plaintiff, Aetna Casualty & Surety Company ("Aetna"), filed a Motion for Summary Judgment on its Complaint against the defendant, Freddie Jones ("Jones"). Aetna seeks a judgment in its favor adjudicating that Jones' debt to Aetna in the amount of $51,263.46 plus post-judgment interest at the rate of 7.28% per annum is non-dischargeable, on the grounds that: (1) the debt is for willful and malicious injury by Jones to another entity or to the property of another entity, and is therefore non-dischargeable pursuant to 11 U.S.C. § 523(a)(6); and (2) the debt is for money, property, or services obtained by false pretenses, a false representation, or actual fraud, and is therefore non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

On July 15, 1991, Jones filed a Reply to Aetna's Motion for Summary Judgment. Although Jones, through his counsel, denied causing a willful or malicious injury, and denied that he obtained money, property, or services by false pretenses, false representation, or actual fraud, he further stated that he is "unopposed" to Aetna's Motion, and prayed for "an instant resolution of the matter by Order of this Court."

The following facts are undisputed:

1. On August 31, 1988, Aetna filed a Complaint for Declaratory Relief in the United States District Court for the Southern District of Mississippi against Jones, alleging that Jones burned his house located at 535 Elmwood Street in McComb, Mississippi in an attempt to collect the proceeds of the homeowners policy Aetna issued to him.

2. On June 20, 1990, Jones filed this Chapter 7 bankruptcy case. Jones did not declare anywhere in his Statements of Financial Affairs or his Schedules of Assets and Liabilities that he was engaged in litigation with Aetna or that Aetna was a creditor. Jones' Chapter 7 case was subsequently dismissed by Order of this Court dated October 26, 1990.

3. The four-day trial on Aetna's suit against Jones was held before United States District Judge William H. Barbour, Jr. on July 20 and 23 and August 2 and 3, 1990. At no time before or during the four-day trial before Judge Barbour did Jones or his attorney inform Judge Barbour or Aetna of the filing of Jones' June 1990 bankruptcy petition or of the then-pending Chapter 7 case. Instead, Jones took the position during the trial that he was financially solvent at the time of the fire and therefore had no economic motive to commit arson in order to collect the insurance proceeds.

4. On August 14, 1990, Judge Barbour entered a Judgment in favor of Aetna and against Jones in the amount of $9,895.06 plus post-judgment interest. The damages awarded to Aetna included $2,500.00 paid by Aetna to Jones on August 31, 1987, for living expenses, and $7,395.06 paid by Aetna to Jones' mortgagee, Meritor

Credit Corporation, on January 11, 1988, to retire the first mortgage on Jones' house. Judge Barbour found that Jones committed arson fraud by intentionally burning his house and seeking coverage for the damages caused by his intentional act under the homeowners policy issued to him by Aetna.

5. On August 17, 1990, Aetna filed a Motion to Amend Judgment to Include Attorneys' Fees and Prejudgment Interest, which was granted in part pursuant to Judge Barbour's Memorandum Opinion and Order, and Judgment dated November 29, 1990, and the Amended Memorandum Opinion and Order dated December 4, 1990.

6. In the Judgment dated November 29, 1990, Judge Barbour granted judgment in favor of Aetna and against Jones in the amount of $51,263.46, which included the $9,895.06 in compensatory damages awarded to Aetna in Judge Barbour's initial judgment of August 14, 1990; attorneys' fees in the amount of $34,930.02; expenses of $4,670.93; and pre-judgment interest; the Judgment also awarded post-judgment interest at the rate of 7.28% per annum.

7. The awards of attorneys' fees, costs, and pre-judgment interest were based upon Jones' intentional commission of arson fraud by burning his home and then denying that he had committed arson in order to collect the Aetna policy's proceeds, the same conduct upon which the award of compensatory damages was based.

8. Aetna first learned of Jones' June 1990 bankruptcy petition when Aetna received a copy of Jones' Motion to Reopen, which was filed on or about November 21, 1990. The Motion to Reopen was granted by Order of this Court entered January 3, 1991.

9. On March 11, 1991, Aetna filed its Complaint in this Court, seeking a judgment against Jones and in favor of Aetna, adjudicating that Jones' debt to Aetna in the amount of $51,263.46 plus post-judgment interest at the rate of 7.28% per annum is non-dischargeable. On March 12, 1991, Aetna filed a Motion to Retroactively Lift and Annul the Automatic Stay. This Court's Final Judgment Retroactively Lifting and Annulling the Automatic Stay and Discharge Injunction was entered on March 26, 1991.

10. Jones filed an Answer to Aetna's Complaint on or about April 11, 1991. In his Answer, Jones conceded that the compensatory damages awarded to Aetna by Judge Barbour, in the amount of $9,895.06, are non-dischargeable.

11. The subsidiary factual issues necessary for this Court's determination of whether Jones' debt is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2) and 523(a)(6) are identical to the issues involved in the declaratory judgment action tried before Judge Barbour, were actually litigated in that action, and the determinations of those issues were necessary to Judge Barbour's Judgment.

CONCLUSIONS OF LAW

A.

Principles of collateral estoppel apply in discharge exception proceedings pursuant to 11 U.S.C. § 523(a). Grogan v. Garner, __ U.S. __, 111 S. Ct. 654, 658 (1991). In bankruptcy dischargeability proceedings, the Fifth Circuit has held that "collateral estoppel may apply to subsidiary facts actually litigated and necessarily

decided" in a prior suit. Matter of Shuler, 722 F.2d 1253, 1256 (5th Cir. 1984).

> [T]he three traditional requirements for the application of the doctrine of collateral estoppel are: (i) the issue to be precluded must be identical to that involved in the prior action, (ii) in the prior action the issue must have been actually litigated, and (iii) the determination made of the issue in the prior action must have been necessary to the resulting judgment.

Id. at 1256 n.2 (quoting White v. World Finance of Meridian, Inc., 653 F.2d 147, 151 (5th Cir. 1981)). All three of the requirements for application of the doctrine of collateral estoppel are satisfied in this case: (1) Jones' debt to Aetna arose out of his intentional and deceptive acts of burning his house and then denying that he did so in an attempt to collect the proceeds of Aetna's policy of insurance; (2) the nature of Jones' conduct was fully litigated in the four-day trial before Judge Barbour; and (3) the determination that Jones committed arson fraud was necessary to the judgment in favor of Aetna.

B.

Pursuant to 11 U.S.C. § 523(a)(6), "[a] discharge under section 727 . . . does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." "'Willful' means intentional and 'malicious' means without just cause or excuse." Chrysler Credit Corp. v. Perry Chrysler Plymouth, Inc., 783 F.2d 480, 486 (5th Cir. 1986). However, proof of a specific intent to injure is not required for conduct to fall within the "willful and malicious" standard. In re Hendry, 77 B.R. 85, 90 (Bankr. S.D. Miss. 1987).

Aetna has the burden of proving the applicability of this dischargeability exception by a preponderance of the evidence. Grogan v. Garner, 111 S. Ct. at 661.

Jones' debt to Aetna is based upon the Judgment entered in favor of Aetna in the declaratory judgment action, and is for $51,263.46, plus post-judgment interest at the rate of 7.28% per annum. The debt is made up of the following components:

Compensatory damages		
Living expenses paid by Aetna to Jones on 8/31/87	$ 2,500.00	
Retirement of first mortgage on Jones home, paid by Aetna to Meritor Credit Corporation on 1/11/88	7,395.06	$ 9,895.06
Prejudgment Interest		
On $2,500.00 from 8/31/87 through 11/29/90	$ 487.40	
On $7,395.06 from 1/11/88 through 11/29/90	1,280.05	1,767.45
Attorney's Fees		34,930.02
Expenses		4,670.93
TOTAL		$ 51,263.46

Although Jones' Reply to Aetna's Motion for Summary Judgment contains the conclusory statement that he did not cause a willful or malicious injury to Aetna, that statement, even if it were under oath, is insufficient to create a genuine issue of material fact that would preclude the entry of summary judgment against Jones. Moreover, Jones stated that he is unopposed to Aetna's Motion for Summary Judgment. Accordingly, this Court finds that the portions of Jones' debt comprising the attorneys' fees, interest, and expenses all were based upon the same willful and malicious conduct that formed the basis of the award of compensatory damages;

therefore, the entire debt is non-dischargeable under 11 U.S.C. § 523(a)(6).

1. Attorneys' Fees and Expenses

In the prior action, Judge Barbour, applying Mississippi law, concluded that an award of attorneys' fees and expenses to Aetna as part of the substantive relief to which it was entitled was proper because Jones "intentionally set[] his house on fire for the malevolent purpose of deceptively procuring the proceeds from insurance policies covering that house." As Judge Barbour stated in his Memorandum Opinion and Order, Mississippi law permits a party to recover attorneys' fees in situations in which an award of punitive damages would have been proper:

> Under Mississippi law, attorney's fees are recoverable as part of the substantive relief to which a party is entitled only if such a recovery is permitted by statute or contract provision, or if the court determines that an award of punitive damages would have been justified under the facts of the case. Hamilton v. Bradford, 502 F. Supp. 822, 836 (S.D. Miss. 1980).

Under Mississippi law, one who has suffered a willful and intentional wrong may recover punitive damages from the wrongdoer. Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 525-26 (5th Cir. 1984). Judge Barbour found that, because of Jones' intentional commission of arson fraud, an award of punitive damages to Aetna would have been appropriate under the facts of the case; therefore, he concluded that an award of attorneys' fees to Aetna was proper as part of the substantive relief to which it was entitled. Judge Barbour further noted that Mississippi courts have awarded

attorney's fees to defrauded parties in cases alleging intentionally deceptive acts.

The basis for the award of attorneys' fees and expenses was an intentional act, committed by Jones without just cause or excuse, that resulted in damage to the insured property and pecuniary loss to Aetna. The conduct of Jones forming the basis for the award of compensatory damages is clearly identical to the conduct supporting Judge Barbour's award of attorneys' fees and expenses. Obviously, if Jones had not intentionally set his house on fire and then attempted to collect the proceeds of Aetna's insurance policy, it would have been unnecessary for Aetna to incur attorneys' fees and litigation expenses in an effort to recover the sums it advanced to Jones, and to obtain a declaration that the arson damage was not covered by its policy.

Jones' debt for attorneys' fees and expenses, which is ancillary to his debt for compensatory damages, and based upon the same conduct as the award for compensatory damages, is non-dischargeable under 11 U.S.C. § 523(a)(6). Matter of Jordan, 927 F.2d 221, 227-28 (5th Cir. 1991); Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987) (holding that attorneys' fees awarded in a state court consent judgment were non-dischargeable where underlying judgment was non-dischargeable because debtor committed fraud or defalcation while acting in fiduciary capacity, pursuant to 11 U.S.C. § 523(a)(4)); In re Hunter, 771 F.2d 1126, 1131 (8th Cir. 1985)) ("Ancillary obligations such as attorneys' fees and interest may attach to the primary debt; consequently, their status depends on that of the primary debt."). As the Fifth Circuit

recently noted in Jordan, a case involving the dischargeability of attorneys' fees awarded to a creditor who successfully contested the dischargeability of a debt incurred by the use of a fraudulent financial statement pursuant to 11 U.S.C. § 523(a)(2)(B), allowing the discharge of attorney's fees on an otherwise non-dischargeable debt "would leave dishonest debtors better off under the Code than under state law without furthering a bankruptcy policy . . . [and] would impede the Code purpose of discharging only the honest debtor from his debts." Jordan, 927 F.2d at 227-28.

An illustrative case is In re Orrick, 51 B.R. 92 (Bankr. N.D. Okla. 1985). In that case, Safeco Insurance Company moved for summary judgment on its claim that the judgment debt owed to it by the debtor, Orrick, was non-dischargeable pursuant to 11 U.S.C. § 523(a)(6). The debt owed to Safeco was based upon a judgment entered against Orrick in a prior suit filed by Orrick against Safeco in federal district court, in which Orrick alleged that Safeco wrongfully breached its insurance contract by refusing to recompense him for the loss of his automobile, which was destroyed by fire. 51 B.R. at 93-94. In the prior suit, the jury, having been instructed on Safeco's defense that the fire which destroyed Orrick's car was intentionally set by Orrick and therefore outside the policy's coverage, rendered a verdict in favor of Safeco. 51 B.R. at 94. The district court then entered judgment for attorneys' fees and costs in favor of Safeco. Id. Applying the doctrine of collateral estoppel, the bankruptcy court concluded that Orrick's intentional destruction of his automobile was willful and malicious. Id. at 96. It further held that the judgment debt for attorneys'

fees and costs was non-dischargeable pursuant to § 523(a)(6), because the attorneys' fees and costs were "a direct consequence of Orrick's suit brought against Safeco for breach of insurance contract" in the prior suit. Id.

The attorneys' fees and expenses awarded to Aetna by Judge Barbour in the declaratory judgment action were a direct consequence of Jones' intentional, deceptive acts of burning his house and then denying that he did so in an attempt to collect the proceeds of Aetna's insurance policy. Therefore, Jones' debt to Aetna for attorneys' fees and expenses is a debt for willful and malicious injury and is non-dischargeable under 11 U.S.C. § 523(a)(6).

2. Interest

Jones' judgment debt to Aetna includes pre-judgment interest on the $9,895.06 compensatory damages award representing the amounts of money paid by Aetna to Jones and to Jones' mortgagee. The basis for Judge Barbour's award of pre-judgment interest was his finding that "Aetna was unaware of the arson fraud at the time of payment and [that] such amounts would never ha[ve] been paid by Aetna but for Jones[']s intentionally deceptive act of burning his own home." Judge Barbour also awarded post-judgment interest at the rate of 7.28% per annum to Aetna on Jones' entire judgment debt of $51,263.46.

Jones does not dispute that the payments made by Aetna to him and to his mortgagee, upon which interest was awarded, constitute a non-dischargeable debt. Clearly, the award of interest arises from the same "willful and malicious injury" by Jones that formed the basis of Judge Barbour's award of compensatory damages, and is

likewise non-dischargeable. Jordan, 927 F.2d at 228 (interest to which creditor is entitled under state law is non-dischargeable, since it is clearly part of the debt for money obtained by the Debtor's false representations).

C.

Pursuant to 11 U.S.C. § 523(a)(2)(A), "[a] discharge under section 727 . . . does not discharge an individual debtor from any debt . . . (2) for money, property, [or] services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud." Section 523(a)(2) is applicable to such money, property, or services only "to the extent obtained by" the fraudulent conduct. However, it is not necessary that the money, property, or services be actually procured by the debtor himself. Collier on Bankruptcy, ¶ 523.08, at 523-41 - 523-42. Rather, all that is required is that the creditor suffer some loss or injury as a result of the debtor's fraudulent conduct. In re Weitzel, 85 B.R. 753, 755 (Bankr. N.D. Ohio 1988).

In his Reply to Aetna's Motion for Summary Judgment, Jones, through his counsel, denied that he obtained money, property, or services by false pretenses, false representation, or actual fraud. This conclusory statement, however, is insufficient, even if given under oath, to preclude the entry of summary judgment against him if summary judgment is otherwise appropriate. In any event, Jones also stated in his Reply that he did not oppose Aetna's Motion.

A debt is non-dischargeable for "actual fraud" if the following elements are shown: (1) the debtor made a false representation, (2) with the purpose and intention of deceiving the creditor, (3) the

creditor reasonably relied on the representation, and (4) the creditor sustained a loss as a result of such reliance. E.g., In re Lacey, 85 B.R. 908 (Bankr. S.D. Fla. 1988). Judge Barbour found each of those elements in the prior declaratory judgment action: (1) Jones made a false representation, by intentionally burning his house and then denying that he did so in an attempt to collect the proceeds of Aetna's insurance policy; (2) Jones intended to deceive Aetna; (3) Aetna relied on Jones' false representation in making payments to Jones and his mortgagee; and (4) Aetna sustained a loss as a result of Jones' false representation.

Judge Barbour awarded Aetna $9,895.06 in compensatory damages to compensate Aetna for the loss it sustained as a result of Jones' fraudulent conduct. As Jones admits, that portion of his debt is non-dischargeable. In addition, the portions of Jones' debt to Aetna for attorneys' fees, expenses, and interest also represent losses sustained by Aetna as a result of Jones' fraudulent conduct and are likewise non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

If Jones had not burned his house and then denied doing so in an attempt to collect the Aetna policy's proceeds, Aetna would not have made payments totaling $9,895.06 to Jones and his mortgagee, nor would it have been forced to incur attorneys' fees and expenses to recover those payments made by it in reliance upon Jones' fraudulent representation. Aetna was entitled to recover attorneys' fees, expenses, and interest under Mississippi law. As the Fifth Circuit pointed out in Matter of Jordan, allowing the discharge of attorneys' fees and interest on an otherwise non-dischargeable debt

"would violate the Code's underlying principle that, unless a bankruptcy reason demands it, debtors and creditors should not be treated one way under state law and another way under federal bankruptcy law." 927 F.2d at 228. The portions of Jones' debt for attorneys' fees, expenses, and interest are all part of the debt for money obtained by his fraudulent conduct, and the entire judgment debt represents losses sustained by Aetna as a direct consequence of Jones' commission of arson fraud. No bankruptcy reason supports the discharge of any portion of that debt. Therefore, the entire debt, including attorneys' fees, expenses, and interest, is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

CONCLUSION

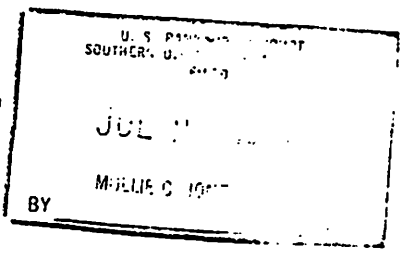
This Court concludes that there is no genuine issue as to any material fact, and that Aetna is entitled to judgment in its favor as a matter of law, because the debt owed Aetna by Jones is for (a) willful and malicious injury by Jones to another entity or to the property of another entity, and is therefore non-dischargeable pursuant to 11 U.S.C. § 523(a)(6); and (b) money, property, or services obtained by false pretenses, a false representation, or actual fraud, and is therefore non-dischargeable pursuant to 11 U.S.C. § 523(a)(2).

IT IS, THEREFORE, ORDERED that Aetna's Motion for Summary Judgment be, and the same hereby is, GRANTED.

This, the 24 day of July, 1991.

EDWARD ELLINGTON
CHIEF JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN THE MATTER OF:

FREDDIE JONES, DEBTOR — CHAPTER 7
NO. 90-1986-JC

AETNA CASUALTY & SURETY COMPANY — PLAINTIFF

VS. — ADVERSARY PROCEEDING NO. 910059JC

FREDDIE JONES — DEFENDANT

FINAL JUDGMENT

This cause came on for hearing on the Motion of the Plaintiff, Aetna Casualty & Surety Company ("Aetna") for Summary Judgment on its Complaint against the defendant, Freddie Jones ("Jones"). Through counsel, Jones filed a Reply to Aetna's Motion, in which he stated that he was unopposed to the relief sought by Aetna. In accordance with this Court's Memorandum Opinion and Order entered this day in the above styled and numbered cause, summary judgment should be entered in favor of Aetna pursuant to Bankruptcy Rule 9021 and Federal Rule of Civil Procedure 58.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Freddie Jones' debt to Aetna in the amount of $51,263.46 plus post-judgment interest at the rate of 7.28% per annum until paid be, and it hereby is, declared non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(6) and 523(a)(2)(A).

SO ORDERED, ADJUDGED, AND DECREED this, the 24 day of July, 1991.

EDWARD ELLLINGTON
CHIEF JUDGE