IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

IN RE: CHARLES D. HOWINGTON AND JUNE CLAIRENE HOWINGTON — CASE NO. 93-04081MEE

JACQUELINE HARRIS — PLAINTIFF

VS. — ADVERSARY NO. 9400077MEE

CHARLES D. HOWINGTON AND JUNE CLAIRENE HOWINGTON — DEFENDANTS

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding is before the Court on the *Complaint to Determine Dischargeability of Debt* filed by the Plaintiff, Jacqueline Harris, against the Defendants, Charles D. Howington and June Clairene Howington. In her complaint, Ms. Harris seeks a determination that her claim against the Howingtons is nondischargeable pursuant to either Bankruptcy Code § 523(a)(4) or § 523(a)(6).[1] By agreed order, the parties have consented to

[1] Hereinafter all code sections refer to the Bankruptcy Code found at title 11 of the United States Code unless specifically noted otherwise.

a decision in this case based upon the stipulation of facts submitted by the parties along with memorandum briefs in support of their respective positions. After considering the evidence before the Court, the arguments of counsel and being otherwise advised in the premises, the Court holds that the complaint is not well taken and should be dismissed. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Since the Court makes its findings of fact based upon the stipulation of the parties filed with the Court, the material facts are not in dispute. The Defendants, Charles and June Howington, were the sole shareholders of a corporation known as American Cab Company, Inc. until the sale of the company in 1992. Mr. Howington was the President and General Manager of the company from 1986 until 1992.

In 1988, the Plaintiff, Jacqueline Harris, was employed by the company as a taxicab driver. Contending that Ms. Harris was an independent contractor, the Howingtons did not obtain workers' compensation insurance coverage on her. While driving a cab for the cab company in March of 1990, Ms. Harris was attacked and beaten by a stranger.

As a result of her injuries, Ms. Harris filed a workers' compensation claim under Mississippi law against the American Cab Company, Inc. and the Howingtons. On December 14, 1993, an order of judgment was entered by an administrative judge on the

Mississippi Workers' Compensation Commission against American Cab Company, Inc., Charles Howington and June Howington for workers' compensation benefits due Ms. Harris in the amount of $ 166.67 per week beginning March 16, 1990, and continuing for a period not to exceed 450 weeks, plus all medical expenses related to her injury and a 10% penalty on unpaid installments of compensation.

On December 15, 1993, Charles and June Howington filed a petition for relief under Chapter 7 of the Bankruptcy Code, listing Ms. Harris as an unsecured creditor. In March of 1994, this adversary proceeding was commenced by Ms. Harris seeking a determination that her claim against the Howingtons arising out of the December 1993 workers' compensation judgment is nondischargeable pursuant to Bankruptcy Code § 523(a)(4) and § 523(a)(6).

CONCLUSIONS OF LAW

Ms. Harris contends that the wrongful act committed by the Howingtons was their failure to carry workers' compensation insurance coverage as required by Mississippi law. It is her position that the Howingtons' failure to provide insurance renders her claim against them nondischargeable under both § 523(a)(4), as a defalcation while acting in a fiduciary capacity, and under § 523(a)(6), as a willful and malicious injury committed by the Howingtons.

In order to prevail in a § 523 action, Ms. Harris must prove her case by a preponderance of the evidence. Grogan v.

Garner, 498 U.S. 279 (1991). While Ms. Harris holds a judgment against the Howingtons pursuant to state law, the issue of whether this particular debt is nondischargeable under the Bankruptcy Code is a matter of federal law. Id.; Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992).

11 U.S.C. § 523(a)(4)

Bankruptcy Code § 523(a)(4) excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny". Ms. Harris does not contend that the Howingtons committed embezzlement or larceny. Instead, she argues that their failure to carry workers' compensation insurance amounts to a defalcation while acting in a fiduciary capacity.

In order for a debt to be nondischargeable based on the exception pertaining to "fraud or defalcation while acting in a fiduciary capacity", there must be a fiduciary relationship arising out of an express trust. An implied trust is insufficient to render a debt nondischargeable under § 523(a)(4). Furthermore, the trust must have been in existence prior to the act of wrongdoing. Boyle v. Abilene Lumber, Inc.(Matter of Boyle), 819 F.2d 583, 588 (5th Cir. 1987); Murphy & Robinson Investment Co. v. Cross (Matter of Cross), 666 F.2d 873, 881 (5th Cir. 1982); Carey Lumber Co. v. Bell, 615 F.2d 370, 374 (5th Cir. 1980); Angelle v. Reed (Matter of Angelle), 610 F.2d 1335, 1341 (5th Cir. 1980).

Although recognizing that no express trust exists between Ms. Harris and the Howingtons, Ms. Harris asserts that a fiduciary relationship is created by the Mississippi statutes requiring workers' compensation coverage. The Court finds this argument unpersuasive.

While the Fifth Circuit Court of Appeals has recognized that a trust may arise within the meaning of § 523(a)(4) by virtue of statute in Coburn Co. of Beaumont v. Nicholas (Matter of Nicholas), 956 F.2d 110 (5th Cir. 1992), that case involved a statute pertaining to specific funds in the possession of a contractor.

Those cases dealing directly with the issue of whether an employer's statutory duty to carry workers' compensation coverage creates a trust within the meaning of § 523(a)(4) hold that an employer is not a fiduciary for the purposes of nondischargeability. Parker v. Grzywacz (In re Grzywacz), 182 B.R. 176, 177 (Bankr. E.D. Mich. 1995); Hilliard v. Peel (In re Peel), 166 B.R. 735, 738 (Bankr. W.D. Ok. 1994); Holt v. France (In re France), 138 B.R. 968, 971 (D. Co. 1992); Workers' Compensation Trust Fund v. Collins (In re Collins), 109 B.R. 541, 543 (Bankr. D. Mass. 1989); Hamilton v. Brower (In re Brower), 24 B.R. 246, 247 (Bankr. D. N.M. 1982); Carter v. Verhelst (In re Verhelst), 170 B.R. 661 (Bankr. W.D. Ark. 1993).

The Court is of the opinion that there has been no showing of a fiduciary relationship between Ms. Harris and the

Howingtons and, therefore, Ms. Harris has not proved her claim under § 523(a)(4).

11 U.S.C. § 523(a)(6)

Ms. Harris also claims that the Howington's failure to provide workers' compensation insurance is sufficient to render her claim nondischargeable under § 523(a)(6), which provides in pertinent part as follows:

> **11 USC § 523**
>
> **§ 523. Exceptions to discharge.**
>
> (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 ...

"Section 523(a)(6) is based on tort principles rather than contract. It is designed to compensate the injured party for the injury suffered while not allowing the debtor to escape liability for a 'willfull [sic] and malicious' injury by resort to the bankruptcy laws." Friendly Finance Service v. Modicue (In re Modicue), 926 F.2d 452 (5th Cir. 1991)(citations omitted).

The controlling standard for determining whether the Howingtons' failure to obtain workers' compensation insurance caused "willful and malicious" injury within the meaning of § 523(a)(6) is the interpretation of the term contained in Collier

on Bankruptcy which has been adopted by the United States Fifth Circuit Court of Appeals:

> In order to fall within the exception of section 523(a)(6), the injury to an entity or property must have been willful and malicious. An injury of an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will. The word 'willful' means 'deliberate or intentional,' a deliberate and intentional act which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

3 Collier on Bankruptcy, 523.16 at 523-128 (15th ed. 1983); Kelt v. Quezada (Matter of Quezada), 718 F.2d 121,123 (5th Cir. 1983) cert. denied, 467 U.S. 1217 (1984); Seven Elves, Inc. v. Eskenazi, 704 F.2d 241, 245 (5th Cir. 1983); Petty v. Dardar (Matter of Dardar), 620 F.2d 39, 40 (5th Cir. 1980); Vickers v. Home Indemnity Co., 546 F.2d 1149, 1150 (5th Cir. 1977). See also Federal Deposit Insurance Corp. v. Lefeve (In re Lefeve), 131 B.R. 588, 602 (Bankr. S.D. Miss. 1991); Guaranty Corp. v. Fondren (In re Fondren), 119 B.R. 101, 105 (Bankr. S.D. Miss. 1990); Meridian Production Ass'n. v. Hendry (In re Hendry), 77 B.R. 85 (Bankr. S.D. Miss. 1987); Berry v. McLemore (In re McLemore), 94 B.R. 903, 906 (Bankr. N.D. Miss. 1988).

A substantial number of cases have dealt with the issue of whether an employer's failure to obtain statutorily mandated workers' compensation insurance constitutes a willful and malicious injury under § 523(a)(6). These cases have resulted in two divergent lines of authority.

The majority of cases hold that an employer's failure to obtain workers' compensation insurance does not fall under the § 523(a)(6) exception to discharge. The reasoning behind these decisions is that while the employers decision not to carry workers' compensation insurance may have been a deliberate decision, the employer's failure to carry insurance was not the direct cause of the injury to the employee. Bailey v. Chatham (Matter of Bailey), 171 B.R. 703, 705 (Bankr. N.D. Ga. 1994).

> Under this reasoning, an employer's failure to provide workers' compensation insurance, no matter how deplorable, is only part of the causative chain. A further, independent act causing physical injury to the worker is necessary before actual financial loss is caused due to lack of proper insurance coverage. Thus, if the employer intended to do the act subject to complaint, but did not intend to cause the resulting injury or unleash an unbroken chain of events which led to such a result, "willful and malicious injury" under Section 523(a)(6) has not been established.

Walters v. Betts (In re Betts), 174 B.R. 636, 649 (Bankr. N.D. Ga. 1994). See also Hope v. Walker (In re Walker), 48 F.3d 1161, 1165 (11th Cir. 1995); Parker v. Grzywacz (In re Grzywacz), 182 B.R. 176, 178 (Bankr. E.D. Mich. 1995); Herndon v. Brock (In re Brock); 186 B.R. 293, 296 (Bankr. N.D. Ga. 1995); Eaves v. Hampel (In re Hampel), 110 B.R. 88, 93 (Bankr. M.D. Ga. 1990); Tiberi v. Annan (In re Annan), 161 B.R. 872, 873 (Bankr. D. R.I. 1993); Silva v. Frias (In re Frias), 153 B.R. 6, 8 (Bankr. D. R.I. 1993); Morton v. Kemmerer (In re Kemmerer), 156 B.R. 806, 809 (Bankr. S.D. Ind. 1993); Holt v. France (In re France), 138 B.R. 968, 973 (D. Co. 1992); Wood Peek v. Mazander (In re Mazander), 130 B.R. 534, 537

(Bankr. E.D. Mo. 1991); Denehy v. Zalowski (In re Zalowski), 107 B.R. 431, 434 (Bankr. D. Mass. 1989); Workers' Compensation Trust Fund v. Collins (In re Collins), 109 B.R. 541, 543 (Bankr. D. Mass. 1989); Hamilton v. Brower (In re Brower), 24 B.R. 246, 248 (Bankr. D. N.M. 1982); Aldridge v. Scott (In re Scott), 13 B.R. 25, 27 (Bankr. C.D. Ill. 1981).

In following the majority position that failure to carry insurance was not the proximate cause of the employee's injury, one court has stated, "[f]ailure to provide such insurance deprives an employee of one avenue of compensation should an [sic] work related injury occur, and the possibility of such an injury is foreseeable. However, possibility is not substantial certainty, and substantial certainty of harm is necessary under § 523(a)(6)." Morton v. Kemmerer (In re Kemmerer), 156 B.R. 806, 809-10 (Bankr. S.D. Ind. 1993).

On the other hand, a minority of cases hold that an employer's decision not to provide mandatory workers' compensation insurance does result in a willful and malicious injury to the employee's statutory right to workers' compensation coverage. In these cases the courts have reasoned that the proper inquiry is not whether the failure to provide insurance is the proximate cause of the work related injury, but whether the failure to provide insurance was substantially certain to cause injury to the employee's right to insurance coverage. See Carter v. Verhelst (In re Verhelst), 170 B.R. 657 (Bankr. W.D. Ark. 1993); Hester v. Saturday (Matter of Saturday), 138 B.R. 132, 136 (Bankr. S.D. Ga.

1991); Strauss v. Zielinski (In re Strauss), 99 B.R. 396, 400 (N.D. Ill. 1989); Vig v. Erickson (In re Erickson), 89 B.R. 850, 853 (Bankr. D. Idaho 1988); Juliano v. Holmes (Matter of Holmes), 53 B.R. 268, 270 (Bankr. W.D. Penn. 1985).

This Court will follow the majority position holding that an employer's failure to obtain workers' compensation coverage does not amount to a willful and malicious injury to the employee within the meaning of Bankruptcy Code § 523(a)(6). In this case, Ms. Harris was attacked and beaten by an unrelated third party. It is this act that would appear to be nondischargeable pursuant to § 523(a)(6). To the contrary, while the Howingtons' decision not to carry workers' compensation insurance may not have been in keeping with state law, this Court does not believe that § 523(a)(6) is to be so broadly construed as to except from discharge debts of this nature.

CONCLUSION

The Court holds that Ms. Harris has failed to show by a preponderance of the evidence that the Howingtons' failure to obtain workers' compensation insurance should be excepted from discharge under either Bankruptcy Code § 523(a)(4) or § 523(a)(6). Therefore, a separate judgment of dismissal will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

Dated this the 29th day of March, 1996.

UNITED STATES BANKRUPTCY JUDGE

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FINAL JUDGMENT

Consistent with the Court's memorandum opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the Complaint of Jacqueline Harris against Charles D. Howington and June Clairene Howington in the above styled adversary proceeding shall be, and hereby is, dismissed with prejudice.

This judgment is a final judgment for the purposes of Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

SO ORDERED this the 29th day of March, 1996.

UNITED STATES BANKRUPTCY JUDGE