

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
HAROLD SCHULZ,)	CASE NO. BK85-980
)	
DEBTOR)	A86-257
)	
FARMERS & MERCHANTS NATIONAL BANK,)	
)	
Plaintiff)	
)	
vs.)	
)	
HAROLD SCHULZ,)	
)	
Defendant)	

MEMORANDUM OPINION

This matter came on for hearing on February 2, 1987, upon defendant's motion for summary judgment. Daniel Kaplan of Perry, Perry, Witthoff, Guthery, Haase & Gessford, Lincoln, Nebraska, represented the plaintiff, and C.G. Wallace of Thompson, Crouse, Pieper, Wallace & Eggers, Omaha, Nebraska, represented the debtor/defendant.

Facts

The debtor, Harold Schulz, filed for relief under Chapter 11 on May 1, 1985. Prior to filing bankruptcy, the debtor borrowed money from the plaintiff, Farmers & Merchants National Bank (the "Bank") and pledged certain collateral as security. Later, the defendant transferred to his wife and others a substantial portion of that collateral. In earlier adversary proceedings filed by the Bank against the debtor, this Court found that the debtor had apparently segregated the secured property in good faith, and the Court declined to grant the Bank's objection to the debtor's discharge. The Court also found that the Bank had a valid security interest in the collateral. The Bank has brought suit to determine the dischargeability of the debt owed to it by the defendant. The defendant has filed a motion for summary judgment, alleging that the plaintiff is collaterally estopped from litigating the issue of the debtor's intent because said issue was fully litigated in the prior adversary proceedings concerning the debtor's discharge.

Issue

Does the theory of collateral estoppel bar the litigation of the issue of the debtor's intent under 11 U.S.C. § 523 once the issue of intent has already been litigated under 11 U.S.C. § 727?

Decision

Collateral estoppel bars relitigation of an issue that was determined in a prior proceeding. 11 U.S.C. § 523 and 11 U.S.C. § 727 contemplate different standards of conduct with regard to intent. Therefore, the litigation of the debtor's intent in a prior Section 727 proceeding does not bar the raising of that issue in a subsequent proceeding under Section 523. A factual issue remains, and the debtor's motion for summary judgment must be overruled.

Conclusions of Law

11 U.S.C. § 523(a)(6) provides as follows:

"A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this Title 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."

"Section 727. Discharge.

(a) the court shall grant the debtor a discharge, unless--

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this Title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, as of the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including

books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or connection with the case--

(A) made a false oath or account;

(B) presented or used a false claim;"

The Eighth Circuit has defined the concept of collateral estoppel in Lovell vs. Mixon, 719 F.2d 1373 (8th Cir. 1983), as follows:

"Under the doctrine of collateral estoppel, four criteria must be met before a determination is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment." (citation omitted) Id. at 1376.

It is this Court's opinion that the issue of intent that was litigated in Farmers & Merchants National Bank, West Point, Nebraska vs. Harold D. Schulz & Marilyn Schulz, Memorandum Opinion (Bkrptcy. D. Neb. April 1, 1986) was not the same as that which is raised in the instant case under section 523, specifically section 523(a)(6). In the prior proceeding, this Court found that the debtor had transferred assets in good faith while believing that his wife had a valid ownership interest in the collateral and stated, "The debtor's activities, although arguably a violation of the Code, do not rise to such a level of odiousness that his discharge should be denied." Id. at 3. The debtor did not make the transfers with actual intent to defraud. However, actual intent is distinguishable from constructive intent, 4 Collier on Bankruptcy, 15th Ed. ¶ 727.02 [3], p. 727-14, and this Court believes that section 523(a)(6) contemplates constructive intent when nondischargeability is at issue.

The Eighth Circuit outlined the "willful and malicious injury" requirement of section 523(a)(6) in In re Long, 774 F.2d 875 (8th Cir. 1985):

"When transfers in breach of security agreements are in issue, we believe nondischargeability turns on whether the

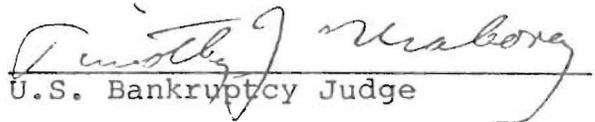
conduct is (1) headstrong and knowing ('willful') and, (2) targeted at the creditor ('malicious'), at least in the sense that the conduct is certain or almost certain to cause financial harm. . .While intentional harm may be very difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent." Id. at 881. (footnote omitted)

Although the issue of the debtor's actual intent has been determined, the issue of whether his actions were "willful and malicious" so as to preclude dischargeability of his debt has not, and, therefore, a factual issue remains. Collateral estoppel does not bar litigation on the issue of the debtor's intent under section 523, and, therefore, the debtor's motion for summary judgment is overruled.

Separate Journal Entry shall be filed.

DATED: March 17, 1987.

BY THE COURT:


U.S. Bankruptcy Judge

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