IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

(24)

Central Division

COUNTER COPY - DO NOT REMOVE - [redacted]

THOMAS M. TEBBS, aka T.M. TEBBS COMPANY, MARCIE TEBBS, T.M. AGENCIES Bankrupts	)	Bankruptcy No. 79-00965
ROBERT E. CUTLER and JEWEL J. CUTLER Plaintiffs	)	MEMORANDUM OPINION AND ORDER
V. THOMAS M. TEBBS Defendants.	)	

Suzanne M. Dallimore representing the plaintiffs, Robert E. Cutler and Jewel J. Cutler. David E. Halliday representing the defendant, Thomas M. Tebbs.

A complaint was filed by the plaintiffs, Robert E. Cutler and Jewel J. Cutler (the Cutlers) in Utah state court on February 25, 1979, alleging that the defendant, Thomas M. Tebbs (Tebbs), had intentionally, willfully and maliciously encroached upon the plaintiffs' property in the form of landscaping and excavations. After trial, a judgment was rendered in favor of the plaintiffs for the sum of $1,600.00 as compensation for damage to the property, $100.00 as punitive damages and $50.00 in attorney's fees.

On August 21, 1979, Tebbs filed bankruptcy, and the Cutlers filed a complaint objecting to the discharge of their debt under Section 17a(8) of the Bankruptcy Act, former 11 U.S.C. §35a(8). The issue before the Court, raised on a motion for summary judgment, is whether the state court's judgment is conclusive in determining the dischargeability of the debt under Section 17a(8), or whether this Court may look beyond the state court's record and consider extrinsic evidence in making its decision.

Some bankruptcy courts have ruled that when the nature of a defendant's actions was determined in a prior lawsuit, the decision of that court is conclusive and inquiry respecting dischargeability of the debt is limited to the prior judgment and record. Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946). Other courts have held that the bankruptcy court may look beyond a state court's decision to consider any pertinent extrinsic evidence. Hovermale v. Pigge, 539 F.2d 369 (4th Cir. 1976). The division was addressed in Brown v. Felson, 442 U.S. 127 (1979).

In Brown, the defendant was accused in state court of misrepresentation and nondisclosure of material facts upon entering into a loan agreement. The suit was settled by stipulation a short time before the defendant filed bankruptcy. Later, the creditor sought to establish that the debt was nondischargeable under sections 17a(2) and (4) of the Bankruptcy Act, former 11 U.S.C. §35a(2) and (4). However, neither the prior stipulation nor the resulting judgment in the state court indicated the cause of action, and the petitioner's sworn deposition had never been made part of the court record. The district court limited its consideration of dischargeability to the prior record and judgment, declining to consider the petitioner's deposition or any further evidence of misrepresentation. The Tenth Circuit affirmed this application of res judicata. The United States Supreme Court reversed, holding that "the bankruptcy court is not confined to a review of the judgment and record in the prior state court proceedings when considering the dischargeability" of a debt. Id at 138.

Res judicata ensures the finality of decisions and encourages consolidation of an entire dispute. However, the policies behind the application of the doctrine in a nondischargeability action in bankruptcy differ from those present in its application in tort or other cases, including ordinary collection proceedings. Affording res judicata effect to

state court decisions in bankruptcy court would "force an otherwise unwilling party to try Section 17 questions to the hilt (in state court) in order to protect himself against the mere possibility that a debtor might take bankruptcy in the future." Brown v. Felson, supra, at 135. Further, "if a state court should expressly rule on Section 17 questions, then giving finality to those rulings would undercut Congress' intention to commit Section 17 issues to the jurisdiction of the bankruptcy court." Id at 135. Clearly, under the Brown rationale, the previous state court judgment in question is not entitled to res judicata effect in this court.

Unlike Brown, who never went to trial, Tebbs, in the case before this Court, had a chance to present his defense to an impartial factfinder who rendered a well-considered decision. Therefore, although the prior judgment cannot be characterized as res judicata, the principles of collateral estoppel still apply to give finality to issues raised here which were actually decided in the prior suit. As stated in Brown:

> If in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of Section 17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court.

Brown v. Felson, supra at 139, n. 10. This principle, however, must be carefully applied, for as noted in Brown, "if an issue similar to those created by Section 17 should arise, the state-law concept is likely to differ from that adopted in the federal statute." Id at 135.

In the case before the Court, the state court rendered a judgment in favor of the Cutlers upon the finding that "the acts of intrusion of defendant Thomas M. Tebbs were willful, intentional and malicious." Findings of Fact and Conclusions of Law, No. C-240911 (Jan. 30, 1979). The elements of a Section 17a(8) action also include the necessity of

finding a "willful and malicious" injury to the property before a debt arising from that injury will be determined to be nondischargeable. Although the terms by which Tebbs' actions must be judged are identical in both courts, the standard embodied by those terms may differ as they represent elements of separate state and federal causes of action. Therefore, before the principle of collateral estoppel can be applied to prevent further inquiry into these seemingly identical issues, an investigation must be made to determine whether, substantively, the two standards are in fact the same. Only if the substance given to the terms are the same in both forums can the state court's findings be afforded collateral estoppel effect in this Court. See In re Williams, 6 B.C.D. 341 (N.D. Ga. 1980) (bankruptcy court does not accept as collaterally estopped by state court decision inquiry into what is alimony, maintenance and support under 11 U.S.C. §523(a)(5)(b)); In re Warner (D. Utah Aug. 7, 1980).

The leading case which defines "willful and malicious" as used in Section 17a(8) is Tinker v. Colwell, 193 U.S. 473 (1904), a criminal conversation action. The Supreme Court found that a willful act is "intentional and voluntary," and defined malice as when any man of reasonable intelligence knew the act to be contrary to his duty and purposely prejudicial to another, yet carried that act out with an injurious result. Id at 485. Collier defines Section 17a(8) "willful and malicious" in the following manner:

> An injury to person 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 nothing more than intentionally doing an act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

Collier on Bankruptcy ¶17.17(1), at 1650.4, 1652 (14th ed. 1978). The Tenth Circuit, when examining the dischargeability of a judgment which arose from the bankrupt's guilty

plea to manslaughter, stated, "A willful disregard of that which one knows to be his duty, or an act which is wrongful in and of itself, and which necessarily causes injury, if done intentionally, is done willfully and maliciously. Den Haerynck v. Thompson, 228 F.2d 72, 74 (10th Cir. 1955). Although rendered in a non-federal forum, previous to the 1970 nondischargeability amendments, the definition of malicious given by the Utah Supreme Court in considering the dischargeability of a previously rendered judgment in Panagopulos v. Manning, 93 Utah 198, 69 P.2d 614 (1937), is helpful. The court there explained maliciousness as existing when the injurious consequences of an act are expected and the actor is presumed to have them in mind when he committed the offense. Thus, no finding of hatred or ill will is required to establish the maliciousness of an act for Section 17a(8). Under Section 17a(8), then, an act done with malice and willfulness is an act, intentionally carried out, which is wrongful and necessarily causes injury, lacking just cause or excuse.

In a tort context, many of the same factors are considered. Morgan v. Veach, 59 C.A.2d 682, 139 P.2d 976 (1943), involved an action for damages for wrongful encroachment on a neighbor's property. The defendant had been notified when he began construction that he was building on property owned by another, but he ignored the warning and completed the structure. The court ruled that the defendant's actions were willful, in that he proceeded with the violation of the restriction after warnings from the complainant. In a similar factual situation, the California Supreme Court stated that continuation of construction after a clear warning was intentional, willful, and suggested a lack of good faith. Brown Derby Hollywood Corp. v. Hatton, 61 C.2d 855, 395 P.2d 896 (1964). 74 AM.JUR.2d Torts §21 (1974) adds: "A willful act is one done intentionally, or on purpose, and

not accidentally, and willfulness implies intentional wrongdoing."

An act determined to be malicious in state court tort actions is not only intentional, but requires that the act be contrary to the actor's duty, or prejudicial and injurious to another as well. "'Malice' in civil cases does not mean merely ill will, but means the intentional doing of an injurious act without justification or excuse." Bliss v. Southern Pacific Co., 212 Ore. 634, 321 P.2d 324, 328, (1957). See Jones v. Citizens Bank of Clovis, 58 N.M. 48, 265 P.2d 366, 368 (1954); Panagopulos v. Manning, supra. The defendant need not be actuated by hatred or revenge toward the plaintiff, "nevertheless, if he acted wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice." 52 AM.JUR. 2d Malice §2 (1970).

The standards for malicious and willful in the tort and bankruptcy contexts are, therefore, substantially the same, if not identical. Since a state court has held a trial and found that these elements were present in the defendant Tebbs' actions, for which damages were awarded to the plaintiff, the inequities sought to be remedied in Brown v. Felson, supra are not present. A careful reading of Brown shows that the import of the opinion is to prevent requiring every litigant to try bankruptcy issues in state court just because a defendant may file bankruptcy in the future, and to preserve the authority of the bankruptcy courts to decide these issues. It did not intend, however, to abrogate the finality afforded by application of collateral estoppel if, in fact, identical issues were previously litigated and were necessary to the prior judgment.

A review of the Finding of Fact and Conclusions of Law indicates that the state court fully litigated the issues

now before the Court, and that the standards actually applied in the state court action, are the same as the federal standards which must be applied in a Section 17a(8) action. Accordingly, it is

ORDERED:

That the plaintiff's motion for summary judgment be granted. Plaintiff shall prepare judgment.

DATED this 19 day of August, 1980.

Ralph R. Mabey
United States Bankruptcy Judge

RRM/nef

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing to the following:

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DATED: August 19, 1980,

Deputy Clerk