FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 8, 1998
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE MERWYN LEE SIMPSON, doing business as Special Svcs Co., doing business as ACJB Investments, doing business as Video Audio Recovery Tech., doing business as Special Video Systems, doing business as Special Technologies, Debtor.	BAP No. EO-97-050
ASPECT TECHNOLOGY OF PLANO, TEXAS, Plaintiff — Appellee, v. MERWYN LEE SIMPSON, Defendant — Appellant.	Bankr. No. 96-71952 Adv. No. 97-7009 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before PEARSON, ROBINSON, and MATHESON, Bankruptcy Judges.

PEARSON, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

This Court has before it for review the order of the United States Bankruptcy Court for the Eastern District of Oklahoma determining a conversion claim and punitive damages to be nondischargeable. For the reasons set forth below, we conclude the decision of the bankruptcy court must be affirmed in part, reversed in part, and remanded for further proceedings.

JURISDICTION AND STANDARD OF REVIEW

A Bankruptcy Appellate Panel, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). As neither party has opted to have the appeal heard by the District Court for the District of Oklahoma, they are deemed to have consented to jurisdiction. 10th Cir. BAP L. R. 8001-1(d).

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013. *See also Job v. Calder (In re Calder)*, 907 F.2d 953, 956 (10th Cir. 1990); *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 791-92 (10th Cir. BAP 1997). Conclusions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

FACTS

The debtor, Merwyn Lee Simpson ("Simpson" or "debtor"), appeals from the determination by the bankruptcy court that parts of the claim of Aspect Technology and Equipment, Inc. ("Aspect Technology"), are nondischargeable under 11 U.S.C. § 523. The debtor was the plaintiff in a civil action in federal court in Texas.[1] The case was tried to a jury on Simpson's claims and Aspect

[1] *Merwyn Simpson v. Mike Flores, Gus Colmenero, and Aspect Technology and Equipment, Inc.*, Case No. 4:93 CV 263, in the United States District Court

(continued...)

Technology's counterclaims. The jury awarded Aspect Technology compensatory damages for breach of contract and conversion, as well as punitive damages.[2] No appeals were taken.

Twenty-one months later, Simpson filed the bankruptcy case out of which this appeal arises. Aspect Technology timely filed an adversary action to determine the dischargeability of the compensatory and punitive damage awards in the Texas case.

The bankruptcy court granted in part Aspect Technology's motion for summary judgment, holding the punitive damage award was nondischargeable as a matter of law. The court denied summary judgment on the conversion and breach of contract awards and conducted a trial on those issues. After trial, the court held that the conversion award was nondischargeable and the breach of contract award was dischargeable. Simpson appealed the rulings that the conversion claim and punitive damages were nondischargeable. Aspect Technology's untimely appeal of the breach of contract decision was dismissed.

DISCUSSION

At the outset, we note that the posture in which this case reaches us is unusual in that only the debtor properly perfected his appeal. Thus, this Court is reviewing only the bankruptcy court's determinations that the jury awards for conversion and punitive damages were nondischargeable. We hold that the bankruptcy court was not clearly erroneous in ruling that the award of damages for conversion was nondischargeable, but erred in holding that an award of punitive damages was nondischargeable without considering the dischargeability of the underlying compensatory damages.

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[1] (...continued)
for the Eastern District of Texas, Sherman Division.

[2] The jury also awarded Simpson compensatory and punitive damages of $10,000.00, which are not at issue before this court.

A. The Dischargeability of the Conversion Damages.

After overruling Aspect Technology's motion for summary judgment on the conversion and breach of contract claims, the bankruptcy court conducted a trial. Upon concluding that the debtor had intentionally deprived Aspect Technology of its customer lists, the bankruptcy court held that the $10,000.00 jury award in the civil action was nondischargeable under § 523(a)(6).

Section 523(a)(6) provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is nondischargeable. "Willful" and "malicious" are two independent terms that must be given different meanings in interpreting § 523(a)(6). *Barclays Am./Bus. Credit, Inc. v. Long (In re Long)*, 774 F.2d 875 (8th Cir. 1985).

One authority describes the elements of § 523(a)(6) as follows:

> The word "willful" means "deliberate or intentional," referring to a deliberate and intentional act that necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm or which has a substantial certainty of causing harm and is without just cause or excuse, may be a willful and malicious injury. While something more than a mere voluntary act is necessary to satisfy the scienter requirement of section 523(a)(6), specific intent to injure is not necessary.
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> The malice element of section 523(a)(6) requires an intent to cause the harm, and if the injury was caused through negligence or recklessness, that standard of proof is not satisfied. An injury inflicted willfully and with malice under section 523(a)(6) is one inflicted intentionally and deliberately, and either with the intent to cause the harm complained of, or in circumstances in which the harm was certain or almost certain to result from the debtor's act.

4 COLLIER ON BANKRUPTCY ¶ 523.12[2] (Lawrence P. King ed., 15th ed. rev. 1998) (footnotes omitted).

In *Kawaauhau v. Geiger*, 118 S. Ct. 974 (1998), the court held that an intent to injure is required and that mere reckless disregard is insufficient. Prior caselaw in the Tenth Circuit is consistent with *Geiger*. For instance, in *Farmers Ins. Group v. Compos (In re Compos)*, 768 F.2d 1155 (10th Cir. 1985), the court stated:

> We hold that the legislative history of § 523(a)(6) of the Code expressly establishes Congress's intent to render obsolete [*Tinker v. Colwell,* 193 U.S. 473 (1904)] and its progeny and to make the "reckless disregard" standard applied by some courts under the Act inapplicable under § 523(a)(6) of the Code. In short, it was the express intent of Congress to define "willful" for purposes of § 523(a)(6) to mean "deliberate or intentional."
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> . . . .
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> . . . "Willful" modifies "injury." Section 523(a)(6) does not except from discharge intentional acts which cause injury; it requires instead an intentional or deliberate injury.

Id. at 1158 (citing *Impulsora Del Territoria Sur, S.A. v. Cecchini (In re Cecchini)*, 37 B.R. 671, 674-75 (9th Cir. BAP 1984)), *rev'd*, 772 F.2d 1493 (9th Cir. 1985).

Here, the bankruptcy court concluded that the debtor intended to harm Aspect Technology by depriving it of the customer list. A determination of intent is a question of fact. *Wells Fargo Bank v. Beltran (In re Beltran)*, 182 B.R. 820 (9th Cir. BAP 1995). We may not disturb the bankruptcy court's finding of fact unless it is clearly erroneous. Fed. R. Bankr. P. 8013. *See Job v. Calder (In re Calder)*, 907 F.2d 953, 956 (10th Cir. 1990); *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 791-92 (10th Cir. BAP 1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co*., 333 U.S. 364, 395 (1948), *cited in Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Upon an independent review of the record, we do not have a "definite and firm conviction" that the bankruptcy court erred in holding the conversion claim nondischargeable.

B. The Dischargeability of Punitive Damages.

Punitive damages frequently have been found to be nondischargeable. *Placer U.S., Inc. v. Dahlstrom (In re Dahlstrom)*, 129 B.R. 240, 243 (Bankr. D. Utah 1991) ("[T]he majority of courts that have specifically addressed the issue of the dischargeability of punitive damage awards have held that they may be

nondischargeable."). *See, e.g., Pacific Energy and Minerals, Ltd. v. Austin (In re Austin)*, 93 B.R. 723 (Bankr. D. Colo. 1988) (holding punitive damages and the underlying claims awarded by the state court against the debtor in an action for fraud, embezzlement, and larceny were nondischargeable under § 523(a)(4) and (6)); *Dahlstrom*, 129 B.R. at 247 (ruling punitive damages nondischargeable on basis that debtor was collaterally estopped from relitigating the issue of whether the state court punitive damages award was for a "willful and malicious injury").

However, punitive damages are not *per se* nondischargeable. *See Combs v. Richardson*, 838 F.2d 112, 117 (4th Cir. 1988) ("We do not imply that every punitive award in a prior tort suit automatically renders the judgment debt nondischargeable in bankruptcy."). *See also Klemens v. Wallace (In re Wallace)*, 840 F.2d 762 (10th Cir. 1988) (suggesting that punitive damages may be discharged in some situations, but under the facts of the case punitive damages were nondischargeable under § 523(a)(4)); *Clarks Delivery, Inc. v. Moultrie (In re Moultrie)*, 51 B.R. 368 (Bankr. W.D. Wash. 1985). In fact, numerous cases have held that punitive damages are dischargeable, particularly under § 523(a)(2)(A).[3] *See, e.g., Ellwanger v. McBroom Estate (In re Ellwanger)*, 105 B.R. 551 (9th Cir. BAP 1989) (holding under § 523(a)(2) and (7) that punitive damages to private individual were dischargeable), *overruled by Bugna v. McArthur (In re Bugna)*, 33 F.3d 1054 (9th Cir. 1994); *Evans v. Dunston (In re Dunston)*, 117 B.R. 632, 641 (Bankr. D. Colo. 1990) (holding that punitive damages awarded in a state

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[3] Courts that have held punitive damages dischargeable under § 523(a)(2) frequently reasoned that the language of that section limits the nondischargeable debt to the amount actually obtained by false pretenses, a false representation, actual fraud, or a materially false writing respecting the debtor's or an insider's financial condition. *Dahlstrom*, 129 B.R. at 246. Punitive damages awarded to punish the debtor were not "obtained" by the debtor. *See Devoe v. Cheatham (In re Cheatham)*, 44 B.R. 4 (Bankr. N.D. Ala. 1984) (finding punitive damages dischargeable because they do not arise out of actual fraud); *The Record Co. v. Bummbusiness, Inc. (In re The Record Co.)*, 8 B.R. 57 (Bankr. S.D. Ind. 1980) (holding nondischargeable only those monies actually obtained by a false representation).

court default judgment were dischargeable under § 523(a)(2)(A), even though a portion of the underlying debt for fraud was nondischargeable), *modified,* 146 B.R. 269 (D. Colo. 1992); *Sutherland v. Brown (In re Brown)*, 66 B.R. 13 (Bankr. D. Utah 1986) (holding in an action under § 523(a)(2)(A) & (B) that punitive damages were dischargeable).

However, cases that have held punitive damages dischargeable under § 523(a)(2), while holding the underlying compensatory damages were nondischargeable, are no longer viable in light of a recent decision, *Cohen v. de la Cruz*, 118 S. Ct. 1212 (1998). The Court in *Cohen* held that punitive-type damages[4] and the underlying compensatory damages were encompassed in the definition of the term "debt." For purposes of determining nondischargeability under § 523(a)(2), the Court concluded that a "debt" included treble damages, attorney's fees, and costs awarded pursuant to a state statute.[5]

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[4] In *Cohen*, the Supreme Court stated:

> The Bankruptcy Court characterized an award of treble damages under the New Jersey Consumer Fraud Act as punitive in nature, and the Court of Appeals assumed as much without deciding the question. That issue does not affect our analysis, and we have no occasion to revisit it here.

Cohen, 118 S. Ct. at 1215 n. * (citations omitted).

[5] In *Cohen,* a rent control administrator in New Jersey ordered a landlord to refund approximately $31,000.00 of excessive rents that he had charged his tenants. The landlord filed a bankruptcy petition under Chapter 7. The tenants filed an adversary proceeding under the New Jersey Consumer Fraud Act seeking a refund of the rent; treble damages; attorney's fees; costs; and, under § 523(a)(2)(A), a determination that the total award was excepted from discharge as a "debt . . . for money, property, [or] services . . . to the extent obtained by . . . actual fraud." Following a bench trial, the bankruptcy court found that the debtor had committed "actual fraud" and ordered the refund of the rent together with treble damages, attorney's fees and costs. It further held the entire award to be nondischargeable under § 523(a)(2)(A). The district court and the Third Circuit both affirmed. *Cohen*, 118 S. Ct. at 1215.

On appeal to the Supreme Court, the landlord argued that the term "debt" in § 523(a)(2)(A) excepts from discharge only the amount actually obtained by fraud. The Supreme Court rejected that argument, concluding that the "any debt"

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The holding in *Cohen* implies that, while the two types of damages may be distinguishable in other areas of the law, under the Bankruptcy Code, compensatory and punitive damages are both included in the term "debt." By holding that all of the damages awarded, whether compensatory or punitive, were nondischargeable, the Court suggests that the reverse is also true: treble or punitive damages are dischargeable if the underlying compensatory damages are dischargeable.

The result we reach is consistent with prior authority under both the Bankruptcy Act and the Bankruptcy Code that punitive damages are only nondischargeable if the underlying compensatory damages are nondischargeable. For instance, in *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672 (11th Cir. 1993), the court noted the "practice of holding debts for punitive damages nondischargeable . . . *if the compensatory damages that 'flow[ed] from one and the same course of conduct' were themselves nondischargeable*." *Id*. at 679 (emphasis supplied).

Likewise, in *Coen v. Zick (In re Coen)*, 458 F.2d 326 (9th Cir. 1972), a jury had awarded compensatory and punitive damages for a wrongful eviction. The bankruptcy court held the compensatory damages dischargeable, but the punitive damages nondischargeable under § 17 of the Bankruptcy Act. The district court affirmed. On further appeal, the Ninth Circuit held that the judgment awarding compensatory and punitive damages arose from the same course of conduct and, therefore, both the punitive and compensatory damages were nondischargeable. *Id*. at 329.

In the present case, the bankruptcy court denied Aspect Technology's motion for summary judgment on the conversion and breach of contract awards

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[5] (...continued)
language of § 523(a)(2)(A) includes the treble damages, attorney's fees and costs awarded under the state statute. *Id*., 118 S. Ct. at 1216-18.

and ruled that a trial was necessary. However, the court granted summary judgment on the punitive damage claim, holding the punitive damages nondischargeable. It is unclear whether the court concluded that punitive damages were *per se* nondischargeable as a matter of law, or that collateral estoppel precluded it from reconsidering the punitive damage issue that had already been determined in the Texas civil proceeding. Regardless of the basis for the ruling, the bankruptcy court erred in holding the punitive damage award nondischargeable prior to determining whether the punitive damages were tied to the conversion or the breach of contract claim, and prior to determining whether the underlying claim was nondischargeable.

C. The Clean Hands Doctrine.

Since the jury in the Texas civil action awarded compensatory and punitive damages for conversion to both sides, Simpson argues that the bankruptcy court, acting as a court in equity, erred by failing to apply the "clean hands" doctrine to bar Aspect Technology from recovery. Bankruptcy courts generally are governed by equitable principles, such as the clean hands doctrine. *Devon Energy Corp. v. Utica Nat'l Bank and Trust Co. (In re Project 5 Drilling Program-1980)*, 30 B.R. 670, 674 (Bankr. W.D. Okla. 1983). Although the bankruptcy court did not specifically address the "clean hands" doctrine, by holding the conversion award nondischargeable, the bankruptcy court implicitly concluded that the doctrine was inapplicable.

Under the "clean hands" doctrine, "he who comes into equity must come with clean hands." *Id.* One court explained the "clean hands" doctrine as follows:

> This doctrine, fundamental in equity jurisprudence, means that equity will not in any manner aid a party whose conduct in relation to the litigation matter has been unlawful, unconscionable, or inequitable. But the doctrine does not exclude all wrongdoers from a court of equity nor should it be applied in every case where the conduct of a party may be considered unconscionable or inequitable. The maxim

> admits of the free exercise of judicial discretion in the furtherance of justice.

Houston Oilers, Inc. v. Neely, 361 F.2d 36. 42 (10th Cir. 1966) (citations omitted).

The application of the "clean hands" doctrine raises a question of fact that is subject to the clearly erroneous standard of review. *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc*., 890 F.2d 165, 173 (9th Cir. 1989). We conclude that the bankruptcy court was not clearly erroneous in implicitly rejecting the debtor's request to apply the "clean hands" doctrine as a bar to Aspect Technology's recovery.

CONCLUSION

Since we conclude that the bankruptcy court's finding that the conversion of the customer list was intentional is not clearly erroneous, we affirm that decision. However, we conclude that the bankruptcy court erred in holding the punitive damages nondischargeable before considering the dischargeability of the associated compensatory damage award. It is impossible to determine from the record whether the punitive damage award in the Texas civil proceeding was tied to the breach of contract claim or the conversion claim. The punitive damages are nondischargeable only if the underlying compensatory damages are nondischargeable. Accordingly, we reverse this portion of the decision, and remand for further proceedings as to the dischargeability of the punitive damages.