

NOT FOR PUBLICATION

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NOV 06 2013

UNITED STATES BANKRUPTCY COURT CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez DEPUTY CLERK
CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

BO DUWAIN McCARTHY,

Debtor.

DR. CARL KING,

Plaintiff,

v.

BO DUWAIN McCARTHY,

Defendant.

Case No. 2:12-bk-40506 ER

Chapter 7

Adv. No. 2:12-ap-02542 ER

MEMORANDUM OF DECISION AFTER
TRIAL

Date: October 7, 2013

Time: 9:00 a.m.

Place: Courtroom 1568

On October 7, 2013, the Court conducted a trial in this adversary proceeding. Appearances were as set forth on the record. For the reasons set forth fully below, the Court awards judgment in favor of Debtor.

I FACTUAL BACKGROUND

Plaintiff is a clinical psychologist and a contract employee with Valley College. Plaintiff's spouse is a Deputy

1 Attorney General for the State of California. Plaintiff and his
2 spouse retained Debtor to assist in the building of a house.¹
3 Plaintiff's spouse testified at trial that when she and
4 Plaintiff fell behind in payments to Debtor, they executed a
5 promissory note ("Note") in favor of Debtor. Although no party
6 testified regarding the date of the execution of the Note, and
7 no copy of the Note was identified, it appears that the Note was
8 executed in 2003. Plaintiff's Trial Brief at 2. Both Plaintiff
9 and his spouse testified that the Note was payable upon the
10 issuance of a certificate of occupancy. Such a certificate was
11 necessary in order to obtain a loan to pay off the Note.
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14 On January 13, 2011, Plaintiff and his spouse met with
15 Debtor and his spouse at a Denny's restaurant upon Debtor's
16 request. Plaintiff and his spouse testified that after
17 approximately twenty-five minutes of pleasantries:
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- 19 • Debtor showed them a copy of a receipt indicating that
20 Debtor had pawned certain jewelry, which he wanted to
retrieve;
- 21 • Debtor stated that he knew that Plaintiff and his spouse
22 had the money to pay him, and Debtor demanded a \$6,000
payment;
- 23 • Debtor showed them a document which included a copy of a
24 check from Plaintiff to Debtor in the amount of \$500 dated
25 November 23, 2010, and which had the handwritten notations:
26

27 ¹ The Court notes that the record is sparse as to exact dates of
28 certain underlying events, such as when Debtor was first
retained by Plaintiff and his spouse, and when Plaintiff (and
presumably his spouse) executed a promissory note.

1 balance \$19,000.00, and a figure for an average daily
2 balance;

- 3 • Debtor further stated that he had a contact at Plaintiff's
4 bank, JPMorgan Chase Bank ("Chase"), and knew Plaintiff had
5 a fourteen year relationship with Chase and had the ability
6 to obtain a loan to pay Debtor;
- 7 • Debtor further stated that he had connections in the media
8 through which he could obtain media coverage that Plaintiff
9 and his spouse were rich, but were not paying him; and
- 10 • Debtor finally stated that if he was not paid, he would
11 picket Plaintiff's home, Valley College and the State
12 Attorney General's Office with messages that Plaintiff and
13 his spouse were dishonest liars and were rich but would not
14 pay him.

15 Both Plaintiff and his spouse further testified that they saw
16 the document which had the copy of the check and the balance
17 information, but that Debtor kept this document and did not
18 produce it in discovery. Neither Plaintiff nor his spouse have
19 seen this document since the meeting at Denny's. In addition,
20 they testified that Debtor's demeanor was hostile and outside
21 the bounds of professionalism. After the meeting, Plaintiff and
22 his spouse waited in the parking lot for Debtor and his spouse
23 to leave, because Plaintiff's spouse did not want Debtor to see
24 that she was going to pick up their children.

25 Following the meeting at Denny's, Plaintiff went online to
26 confirm the balance figures which Debtor showed him. Plaintiff
27 checked the balance information for the period from the date of
28 the check and several days thereafter, and found that the

1 balance amount which Debtor showed them was "pretty close" to
2 those online.

3 Plaintiff also contacted Chase and learned that a branch
4 manager, Lori Marchalk ("Marchalk"), had accessed his account,
5 but that she was no longer with the bank. Plaintiff was not
6 told, however, that Marchalk accessed his account on her last
7 day with the bank. Marilyn Harris, an employee of and custodian
8 of records for Chase, testified at trial that Chase's records
9 show that Marchalk accessed Plaintiff's account on November 30,
10 2010. See Plaintiff's Exhibits 6 and 7. Blair Feivou, a
11 District Manager for Chase, testified at trial that pursuant to
12 Chase's privacy policy, customers and non-customers of Chase
13 cannot access an average daily balance without the account
14 holder's authorization.
15
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17 Subsequent to the meeting at Denny's, Debtor sent Plaintiff
18 emails to which Plaintiff responded. The emails from Debtor
19 continued to refer to media disclosure, picketing and
20 Plaintiff's banking relationship and information, and also
21 continued to ask for money. Plaintiff's Exhibits 2 and 3.
22 Plaintiff eventually paid Debtor \$3,000.00, even though
23 Plaintiff believed that the event triggering payment of the Note
24 (i.e., the issuance of a certificate of occupancy) had not yet
25 occurred.
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1 Plaintiff testified that he felt threatened by Debtor's
2 statements made at the meeting at Denny's and in the subsequent
3 emails. Plaintiff contacted an attorney through his employee
4 assistance program, and stated that he was constantly anxious.
5 In addition, Plaintiff's employment contract with Valley College
6 was "coming up" presumably for renewal. He had difficulty
7 sleeping, bad dreams, a hard time concentrating, an upset
8 stomach and was grinding his teeth. However, Plaintiff further
9 testified that he did not seek any treatment for the foregoing,
10 which subsided after a couple of months.
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13 **II**
14 **DISCUSSION**

15 Plaintiff seeks a nondischargeability judgment pursuant to 11
16 U.S.C. § 523(a)(6) based on claims against Debtor for invasion
17 of privacy and civil extortion. Prior to deciding the
18 nondischargeability issue, the Court must first determine the
19 validity of Plaintiff's privacy and extortion claims against
20 Debtor and his damages, if any. See, Gill Distribution Centers,
21 Inc. v. Banks (In re Banks), 225 B.R. 738, 745 (Bankr. C.D.Cal.
22 1998) (In determining the dischargeability of a debt, a court
23 must consider two distinct issues: (1) the establishment of the
24 debt itself, and (2) the nondischargeable nature of such debt.).

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1 **A. Plaintiff has not established a claim for invasion of**
2 **privacy.**

3 In order to prevail in an invasion of privacy action based on
4 intrusion into private matters, a plaintiff must prove:

5 (1) intrusion into a private place, conversation or
6 matter, (2) in a manner highly offensive to a
7 reasonable person. 'To prove actionable intrusion,
8 the plaintiff must show the defendant penetrated some
9 zone of physical or sensory privacy surrounding, or
10 *obtained unwanted access to data about*, the plaintiff.
The tort is proven only if the plaintiff had an
objectively reasonable expectation of seclusion or
solitude in the place, conversation or data source.'

11 Folgelstrom v. Lamps Plus, Inc., 195 Cal.App.4th 986, 992
12 (2011) (citations omitted)

13 In the instant case, Plaintiff alleges that Debtor invaded
14 his privacy when Debtor allegedly obtained information regarding
15 the balance and average daily balance in Plaintiff's bank
16 account with Chase. However, the following is the only
17 evidence submitted by Plaintiff in support of this claim:

- 18
- 19 • Plaintiff and his spouse's testimony that Debtor showed
20 them a paper which purportedly had written figures
21 representing the balance and average daily balance of one
of Plaintiff's bank accounts at Chase;
 - 22 • Plaintiff's testimony that after the meeting at Denny's,
23 he checked the account balance online around the date of
24 the copy of the check (November 23, 2010), which was also
25 on the paper containing the balance amounts, to several
days after, and confirmed that the balance amount on the
paper was "pretty close" to the actual balance amount;
 - 26 • Plaintiff and his spouse's testimony that Debtor told them
27 at the meeting at Denny's that Debtor had a contact at
28 Chase who gave Debtor the account information, and told
Debtor that Plaintiff could get a loan to repay Debtor
based on Plaintiff's long term relationship with Chase;

- Debtor's deemed admissions that at the meeting at Denny's, he told Plaintiff the following: that Plaintiff had sufficient funds in his account to pay Debtor, that one of the figures on the paper represented Plaintiff's bank account balance when Debtor accessed the information, that the other figure represented the average daily balance, and that Debtor knew someone at Chase who gave him the account information.
- Testimony of a Chase representative (Marilyn Harris) that an investigation disclosed that Marchalk, a Chase branch manager, had accessed Plaintiff's account on November 30, 2010, which was also Marchalk's last day with Chase.

The foregoing only indicates that Plaintiff claims that Debtor showed him and his spouse a paper, which was not produced at trial and which neither Plaintiff nor his wife has seen since the meeting with Debtor on January 13, 2011. This paper allegedly had figures for the balance and average daily balance of Plaintiff's account at Chase, which Plaintiff testified that he did not write down. Notwithstanding, Plaintiff testified that he remembered these alleged balance amounts, confirmed them online and found that they were "pretty close" to the balances for the period from date of the check (November 23, 2010) to several days later. It is unclear, however, how Plaintiff knew to check the balance information for the period stated, especially since there is no evidence of the dates of the balance figures allegedly on the paper.

In addition, the Chase representative testified that a branch manager, Marchalk, accessed Plaintiff's account on November 30,

1 2010, which was her last day with Chase. However, Plaintiff did
2 not prove any connection between Debtor and Marchalk. Moreover,
3 Debtor's deemed admissions establish only that Debtor *told*
4 Plaintiff that the figures on the paper represented the balance
5 and average daily balance of his bank account, and that Debtor
6 knew some unidentified person at Chase who gave him this
7 information.
8

9 The foregoing does not establish that Debtor actually
10 gained access to Plaintiff's bank account, and thereby intruded
11 into Plaintiff's privacy. There is no evidence that Debtor
12 contacted an identified Chase representative, who gave him
13 access to Plaintiff's account and/or balance information for a
14 specified period. At best, the record only indicates that
15 Debtor *may* have had Plaintiff's balance information,² but it does
16 not establish how Debtor *may* have obtained such information
17 and/or that Debtor invaded Plaintiff's privacy. Consequently,
18 the Court finds that Plaintiff has not established an invasion
19 of privacy claim.
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22 **B. Plaintiff has not established a claim for civil extortion.**

23 Courts have acknowledged that "California has recognized a
24 civil cause of action for the recovery of money obtained by the
25 wrongful threat of criminal or civil prosecution, whether the
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28 ² The Court, however, makes no such finding.

1 claim is denominated as 'extortion, menace or duress.'" Monex
2 Deposit Co. v. Gilliam, 666 F.Supp.2d 1135, 1136 (C.D.Cal.
3 2006); TaiMed Biologics v. Numoda Corp., 2011 WL 1630041 *5
4 (N.D.Cal. 2011); Padgett v. City of Monte Sereno, 2007 WL
5 7758396 *19 (N.D.Cal.). In the instant case, there are no
6 allegations and/or evidence that Debtor threatened Plaintiff
7 with civil or criminal prosecution. Rather, Plaintiff claims
8 that Debtor threatened to picket his home and his and his
9 spouse's respective workplaces, and to obtain media coverage of
10 Plaintiff's non-payment of the amounts due Debtor.
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12 The court in Padgett found no extortion where there was no
13 threat of civil or criminal prosecution, even though there was a
14 threat of disclosure of criminal history. The court noted that
15 the plaintiffs therein had been criminally prosecuted *prior* to
16 the threat. Id. Moreover, the Supreme Court of California has
17 emphasized that not all "rude, aggressive, or even belligerent
18 prelitigation negotiations, . . . that may include threats to .
19 . . publicize allegations of wrongdoing, necessarily constitute
20 extortion." Flatley v. Mauro, 39 Cal.4th 299, 332 (2006).
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22 Consequently, because the Plaintiff has not established that
23 Debtor threatened him with prosecution of any kind, the Court
24 finds that Plaintiff has no claim based on Debtor's alleged
25 civil extortion under California law.
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1 Since Plaintiff has not established a claim against Debtor
2 based on an invasion of privacy or civil extortion, it is not
3 necessary for this Court to determine the issue of
4 nondischargeability pursuant to 11 U.S.C. § 523(a)(6).

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6 **III**
CONCLUSION

7 Based on the foregoing, the Court awards judgment in favor
8 of Debtor in this adversary proceeding. The Court shall prepare
9 a judgment consistent with this Memorandum of Decision.
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24 Date: November 6, 2013



Ernest M. Robles
United States Bankruptcy Judge

1 **NOTICE OF ENTERED ORDER AND SERVICE LIST**

2 Notice is given by the court that a judgment or order entitled (*specify*) MEMORANDUM OF
3 DECISION AFTER TRIAL as entered on the date indicated as "Entered" on the first page of this
4 judgment or order and will be served in the manner indicated below:

5 **I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** Pursuant to controlling
6 General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the
7 following person(s) by the court via NEF and hyperlink to the judgment or order. As of
8 November 6, 2013 the following person(s) are currently on the Electronic Mail Notice List for
9 this bankruptcy case or adversary proceeding to receive NEF transmission at the email
10 address(es) indicated below.

11 Richard G Flanagan flanhint@socal.rr.com

12 Alison R Kalinski akalinski@pldlawyers.com

13 Sam S Leslie (TR) sleslie@trusteeleslie.com,
14 sleslie@ecf.epiqsystems.com;trustee@trusteeleslie.com

15 United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

16 Service information continued on attached page

17 **II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or
18 order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es)
19 indicated below:

20 Bo Duwain McCarthy
21 909 W. Suffolk Ave.
22 Montebello, CA 91016

23 Service information continued on attached page

24 **III. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this
25 judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will
26 serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile
27 transmission or email and file a proof of service of the entered order on the following person(s) and/or
28 entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated
below:

Service information continued on attached page