

FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION

In re)	
DANIEL PAUL DEREBERY, JR.)	Case No. RS 04-18812 MJ
)	Adv. No. RS 04-2076 MJ
Debtor.)	Chapter 7
_____)	
CARL BRANDSTETTER)	MEMORANDUM OF DECISION RE
Plaintiff.)	PLAINTIFF'S MOTION FOR SUMMARY
)	JUDGMENT
v.)	
DANIEL PAUL DEREBERY, JR.)	DATE: March 24, 2005
Defendant.)	TIME: 1:30 P.M.
_____)	CTRM: 302

The plaintiff's motion for summary judgment came on regularly for hearing on March 24, 2004, in Courtroom 302 of the above-entitled court, the Honorable Meredith A. Jury, presiding, with Reid & Hellyer by Mark Schnitzer appearing on behalf of plaintiff/movant and Pagter & Miller by R. Gibson Pagter appearing on behalf of defendant/respondent/debtor. The matter was argued and submitted for further briefing. The court having read and considered the further briefs, and good cause appearing therefor, issues the following Memorandum of Decision, which shall serve as the Court's Findings of Fact and Conclusions of Law, to the extent necessary to

1 support a decision on a summary judgment motion.

2 I.

3 INTRODUCTION

4 Plaintiff's motion for summary judgment, relying on the principles of issue preclusion,
5 seeks summary judgment against defendant/debtor Daniel Derebery based on a state court
6 judgment after a jury trial. Plaintiff's argument rests on the jury's answer to a special verdict
7 question that supported an award of punitive damages: "Do you find by clear and convincing
8 evidence that the defendants acted with oppression or malice in the conduct on which you base
9 your finding of liability for nuisance?" to which the jury answered: "Yes". Plaintiff asserts that
10 this verdict answer renders plaintiff's judgment against Derebery non-dischargeable under the
11 provisions of 11 U.S.C. §523(a)(6). In essence, plaintiff asks this court to find under issue
12 preclusion that an award of punitive damages --based on a finding under California Civil Code
13 §3294 that a defendant acted with oppression or malice -- is sufficient for the debt to be non-
14 dischargeable as one for "willful and malicious injury by debtor to another entity."

15 This court holds that under the principles enunciated in *In re Su*, 290 F3d 1140 (9th
16 Circuit 2002), as it clarified the holding in *In re Jercich*, 238 F3d 1202 (9th Circuit 2001), a jury
17 award of punitive damages based on action with oppression or malice is insufficient, standing
18 alone, to support non-dischargeability under 523(a)(6).

19 II.

20 STATEMENT OF CASE¹

21 On approximately February 15, 1996, plaintiff purchased property located at 32250
22 Circle Terrace Drive ("property") at a tax sale. At that time, Mary Stille ("Stille") was a tenant
23 on the property. On May 1, 1997, plaintiff announced his ownership of the property to Stille and
24

25 ¹ This summary of facts is taken from plaintiff's moving papers. Defendent did not
26 challenge this summary for the purpose of the summary judgment motion.

1 executed a new rental agreement with her. Defendant was the president of Holiday Retreats, Inc.
2 (“Holiday”), the sole provider of water in the immediate locality of the property. Due to setback
3 requirements and the position of the septic tank on the property, plaintiff could not dig his own
4 well for the property. The only source of water for the property was the water source owned by
5 Holiday. On approximately May 31, 1997, defendant discontinued the water service and capped
6 the water pipe running to the property. As a result, Stille was forced to immediately move out,
7 since there was no other water service available.

8 Holiday was the owner and controller of a water source supply identified in a contract
9 entered into with the original owner of the water supply, Daniel Gerster (“Gerster contract”).
10 The Gerster contract provided that the property would be supplied with water from Gerster’s
11 water supply for valuable consideration. Holiday was the successor to the Gerster contract as the
12 owner of the water supply and therefore bound to supply water to the property. The Gerster
13 contract, recorded November 20, 1925, created a license or profit to the benefit of the property in
14 the water source now owned and controlled by Holiday. The Gerster contract created an
15 easement of access to the water source, pertinent to the property.

16 Aggrieved by Holiday and defendant blocking access to the water source, on November,
17 2000, plaintiff filed, a complaint for declaratory relief, injunction, unfair business practices,
18 breach of contract, and intentional interference with contractual relations (“complaint”) in state
19 court, Riverside Superior Court case no. RIC350482, against defendant and Holiday. After
20 trial, on February 14, 2002, the Riverside Superior Court entered a judgment on jury verdict in
21 favor of plaintiff for \$200,000.00 against defendant (“judgment”). The judgment found that the
22 defendant was liable for nuisance based on the jury’s “yes” answer to special verdict Question
23 No.7: “The defendant’s act or failure to act, wrongfully interfered with the plaintiff’s
24 comfortable enjoyment of plaintiff’s real property.” The judgment also found, in the answer to
25 the jury Question No. 9, that defendant acted with oppression or malice. The judgment held
26 defendant and Holiday jointly and severally liable for the sum of \$125,000.00 and awarded

1 punitive damages against defendant in the sum of \$75,000.00. Subsequent to entry of the
2 judgment, the court also awarded plaintiff \$64,065.77 in attorney fees and costs. Defendant's
3 appeal of the judgment was upheld by the Court of Appeals on October 21, 2003.

4 On July 8, 2004, defendant filed a petition under Chapter 7 of the Bankruptcy Code.
5 Plaintiff timely filed its adversary proceeding for non-dischargeability under 523(a)(6), leading
6 to this motion for summary judgment.

7 III.

8 PLAINTIFF ASSERTS ISSUE PRECLUSION AS GROUNDS FOR SUMMARY
9 JUDGMENT²

10 Issue preclusion bars re-litigation of an issue decided previously in a judicial or
11 administrative proceeding, provided that the party to whom the prior decision was rendered
12 enjoyed a full and fair opportunity to litigate the issues in the earlier proceeding. See, Allen v.
13 McCurry, 449 U.S. 90, 96 (1980); *In re Elder*, 262 B.R. 799, 806(C.D. CA. 2001). The
14 principles of issue preclusion apply in dischargeability proceedings in bankruptcy. *Grogan v.*
15 *Garner*, 498 U.S. 279, 284 (1991); *In re Elder*, supra at 806. In determining the preclusive
16 effect of a state court judgment, federal courts must, as a matter of full faith and credit, apply the
17 forum state's law of issue preclusion. *In re Nourbakhsh*, 67 F3d 798, 800 (9th Circuit 1995; *In*
18 *re Bugna*, 33 F3d 1054, 1057 (9th Circuit 1994).

19 Under California law, the application of issue preclusion requires that the following
20 elements be met:

21 “(1) The issue sought to be precluded from re-litigation must be
22 identical to that decided in a former proceeding; (2) The issue must
23 have been actually litigated in the former proceeding; (3) It must

24 ² Plaintiff's brief uses the old style term *collateral estoppel* as the basis for its summary judgment
25 argument. Recent Ninth Circuit authority has discarded the terms *res judicata* and *collateral estoppel* and replaced
26 them with the more modern terms *claim preclusion* and *issue preclusion*, which are the terms this court will adopt in
issuing this Memorandum of Decision.

1 have been necessarily decided in the former proceeding; (4) The
2 decision in the former proceeding must be final and on the merits;
3 and (5) The party against whom preclusion is sought must be the
4 same as, or in privity with, the party to the former proceeding.” *In*
5 *re Younie*, 211 B.R. 367, 373 (9th Circuit BAP 1997), affirmed, 163
6 F3d 609 (9th Cir. 1998).

7 The party seeking to apply issue preclusion has the burden of proving that each element
8 is satisfied. *In re Kelly*, 182 B.R. 255, 258 (9th Circuit BAP 1995). To sustain this burden, a
9 party must introduce a record sufficient to reveal the controlling facts and the exact issues
10 litigated in the prior action. Any reasonable doubt as to what was decided in the prior action will
11 weigh against applying issue preclusion. *Kelly*, *supra* at 258.

12 In the instant case, plaintiff argues that the jury’s answer to the special verdict question
13 stated above meets all the elements of issue preclusion, asserting that the issue (§523(a)(6) non-
14 dischargeability) for this court to decide was identical to an issue in the jury trial in the state
15 court, that the issue was actually litigated and necessarily decided, that the decision was final,
16 and that the defendant Derebery was the same party in the former proceeding. The last four
17 criteria of the five part test are met in this case. However, this court finds that the jury decision
18 that the defendant acted with oppression or malice is not identical to the issue required for
19 finding non-dischargeability under §523(a)(6), that the debtor caused a willful and malicious
20 injury.

21 IV.

22 A CALIFORNIA JURY FINDING THAT THE DEFENDANT ACTED WITH OPPRESSION 23 OR MALICE IS NOT, ALONE, SUFFICIENT TO MEET THE STANDARD FOR NON- 24 DISCHARGEABILITY UNDER §523(a)(6)

25 Section 523(a)(6) of the Bankruptcy Code provides:

26 “A discharge under Section 727, 1141, 1228(a), 1228(b), or

1 1328(b) of this title does not discharge an individual debtor from
2 any debt. . . (6) for willful and malicious injury by the debtor to
3 another entity or to the property of another entity.”

4 The party seeking to establish non-dischargeability of the debt shoulders the burden of
5 proof. *In re Hicks*, 184 B.R. 954, 959 (Bankr. C.D. Cal. 1995). The burden of proof required for
6 establishing an exception to discharge is a preponderance of evidence. *Grogan v. Garner*, supra.
7 at 686-87.

8 The United States Supreme Court recently clarified the scope of “willful and malicious
9 injury” in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). In that case, a patient sued her doctor for
10 malpractice and obtained a jury verdict of approximately \$355,000.00 in damages. The doctor
11 subsequently filed for bankruptcy, and the patient challenged the dischargeability of the damage
12 award on the ground that under §523(a)(6), a debt incurred for “willful and malicious injury” by
13 the debtor cannot be discharged. The patient argued that the doctor “intentionally rendered
14 inadequate medical care” to her and that it “necessarily led to her injury.” *Geiger*, supra, at 61.
15 The court, however, held that for a debt to be non-dischargeable, the party challenging the
16 discharge must demonstrate that the debt was the result of an act involving an intentional or
17 deliberate injury, not merely a reckless, deliberate, or intentional act that led to injury. *Geiger*,
18 supra, at 61. It is not enough that the act itself was intentional. Rather, the act must have been
19 carried out with the actual intent to cause injury. In reaching this conclusion, the court
20 specifically indicated that this standard corresponds to the traditional category of intentional
21 torts. *Geiger*, supra, at 61 (stating that “the (a)(6) formulation triggers in the lawyer’s mind the
22 category ‘intentional torts’ as distinguished from negligent or reckless torts”).

23 Subsequent to the Supreme Court’s ruling in *Geiger*, two Ninth Circuit cases have
24 explicitly set the standard for non-dischargeability under §523(a)(6). In *In re Jercich*, 238 F3d
25 1202 (9th Circuit 2001) the court stated that the proponent of a §523 non-dischargeability action
26 must establish both that the debtor acted willfully and that the debtor acted maliciously. In so

1 holding, the court ruled that it is insufficient under §523(a)(6) to show that the debtor acted
2 willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not
3 only that the debtor acted willfully but also that the debtor inflicted the injury willfully and
4 maliciously rather than recklessly or negligently. *Jercich, supra*. The *Jercich* court went on to
5 say “In *Geiger*, the court did not answer the question before us today - the precise state of mind
6 required to satisfy §523(a)(6)’s ‘willful’ standard.” *Jercich, supra*, at 1207.

7 The Ninth Circuit answered this question, but implied that its answer was consistent with
8 both Fifth and Sixth Circuit cases.³ The Court defined the willful injury standard:

9 “We hold, consistent with the approaches taken by the Fifth and
10 Sixth Circuits, that under *Geiger*, the willful injury requirement of
11 §523(a)(6) is met when it is shown either that the debtor had a
12 subjective motive to inflict the injury or that the debtor believed
13 that injury was substantially certain to occur as a result of his
14 conduct.” *Jercich, supra*, at 1208.

15 The *Jercich* court then analyzed the separate standard of maliciousness:

16 “A ‘malicious’ injury involves (1) a wrongful act, (2) done
17 intentionally, (3) which necessarily causes injury, and (4) is done
18 without just cause or excuse. ...Moreover, *Jercich*’s deliberate and
19 willful failure to pay was found by the state trial court to constitute
20 substantial oppression under California Civil Code §3294, which
21 by definition is ‘despicable conduct that subjects a person to cruel
22 and unjust hardship in conscience disregard of that person’s
23 rights.’ We hold that these state court findings are sufficient to
24 show that the injury inflicted by *Jercich* was malicious under

25
26 ³*In re Markowitz* 190 F3d 455 (6th Circuit 1999) and *In re Miller* 156 F3d 598 (5th Circuit 1998).

1 §523(a)(6).” *Jercich*, supra, at 1209.

2 *Jercich*, therefore, establishes that a state court finding of substantial oppression, one of
3 the grounds for punitive damages under California Civil Code § 3294, is sufficient for the
4 “malicious” element of §523(a)(6). However, it does not establish the “willful” element.

5 The *Su* court clarified that the willful standard adopted in *Jercich* required a subjective
6 intent to cause injury, relying on Restatement (Second) of Torts, section 8A (1964).

7 “Both parties agreed that a ‘deliberate or intentional injury’ is
8 required for §523(a)(6) to render a debt non-dischargeable. The
9 question we must decide is the state of mind that is required to
10 satisfy §523(a)(6)’s willful injury requirement. According to the
11 Restatement, an action is intentional if an actor subjectively
12 ‘desires to cause consequences of his act, or ... believes that the
13 consequences are substantially certain to result from it.’

14 RESTATEMENT (SECOND) OF TORTS, §8A (1964).

15 ...

16 The Sixth Circuit’s interpretation of §523(a)(6) exemplifies the
17 strict subjective approach, in which a debt is non-dischargeable
18 under §523(a)(6) only if the debtor intended to cause harm or knew
19 that harm was a substantially certain consequence of his or her
20 behavior

21 ...

22 Conversely, the Fifth Circuit’s interpretation of §523(a)(6)
23 exemplifies the objective approach, in which debt is non-
24 dischargeable under §523(a)(6) either if there is a subjective intent
25 to cause an injury or if there is an objective substantial certainty of
26 harm.

1 ...

2 While this difference between the objective approach taken by the
3 Fifth Circuit and the subjective approach taken by the Sixth Circuit
4 is evident from *In re Miller* and *In re Markowitz*, this difference
5 has been overlooked by courts in the Ninth Circuit when
6 evaluating §523(a)(6) claims.” *Su, supra*, at 1143-1144.

7 The *Su* court then held that to the extent the *Jercich* holding implied that either the
8 subjective test of the Sixth Circuit or the objective test of the Fifth Circuit was sufficient to meet
9 the standard, the Ninth Circuit test was the subjective intent to cause harm only, based on the
10 Restatement:

11 “‘We believe, further, that failure to adhere strictly to the limitation
12 expressly laid down by *In re Jercich* [subjective intent] will
13 expand the scope of non-dischargeable debt under §523(a)(6) far
14 beyond what Congress intended. By its very terms, the objective
15 standard disregards the particular debtor’s state of mind and
16 considers whether an objective, reasonable person would have
17 known that the actions in question were substantially certain to
18 injure the creditor. In its application, this standard looks very
19 much like the ‘reckless disregard’ standard used in negligence.
20 (footnote omitted) That the Bankruptcy Code’s legislative history
21 makes it clear that Congress did not intend §523(a)(6)’s willful
22 injury requirement to be applied so as to render non-dischargeable
23 any debt incurred by reckless behavior (footnote omitted),
24 reinforces application of the subjective standard. The subjective
25 standard correctly focuses on the debtor’s state of mind and
26 precludes application of §523(a)(6)’s non-dischargeability

1 provision short of the debtor's actual knowledge that harm to the
2 creditor was substantially certain." *Su, supra*, at 1145-1146.⁴

3 The Ninth Circuit in *Su* reaffirms that the willful inquiry is separate and apart from the
4 malicious inquiry and that both tests must be met.

5 In the instant case, the only jury finding which would support non-dischargeability under
6 the willful and malicious standard -- that defendant acted with oppression or malice -- was taken
7 from California Civil Code §3294, which defines those terms:

8 "(c) (1) 'Malice' means conduct which is intended by defendant to
9 cause injury to the plaintiff or despicable conduct which is carried
10 on by the defendant with a willful and conscience disregard of the
11 rights or safety of others.

12 (2) 'Oppression' means despicable conduct that subjects a person
13 to cruel and unjust hardship in conscience disregard of that
14 person's rights."

15 In answering that jury question "yes", the jury could have found any one of three things:

16 (1) Defendant's conduct was intended to cause injury to plaintiff;

17 or

18 (2) Defendant's conduct was despicable with a willful and
19 conscience disregard of the rights or safety of others; or

20 (3) Defendant's conduct was despicable and subjected a person to
21 cruel and unjust hardship in conscience disregard of that person's
22

23 ⁴ Recklessness is defined in the Restatement as follows: "Recklessness may consist of either of two
24 different types of conduct. In one the actor knows, or has reason to know... of facts which create a high degree of
25 risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscience disregard of, or
26 indifference to, that risk. In the other, the actor has such knowledge, or reason to know, of the facts, but does not
realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An
objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man
in his place would have, although he does not himself have it." Restatement (Second) of Torts, section 500 (1977).

1 rights.

2 The first of these three options meets the willful standard set by *Su* and *Jercich*. Neither
3 (2) or (3) meets the standard. Despicable conduct with a conscience disregard of the rights of
4 others was the type of reckless behavior specifically found insufficient in *Su* and the definition of
5 recklessness which *Su* quotes from the Restatement of Torts. Whether conduct is despicable is
6 determined by an objective standard as defined in California Jury Instructions, Civil, Book of
7 Approved Jury Instruction, 9th Ed., BAJI 14.72.1 as “Conduct which is so vile, base,
8 contemptible, miserable, wretched, or loathsome that it would be looked upon and despised by
9 ordinary decent people”- an objective standard.” Consequently, neither the jury’s second nor
10 third option met the subjective standard for willfulness required by *Su*. Therefore, neither of
11 them compelled non-dischargeability under §523(a)(6). Since this court is unable to know which
12 of the three the jury found, issue preclusion must fail.

13 Additionally, the underlying jury instructions in this case reflect that the type of conduct
14 referred to in jury question number 9 might have been a failure to act rather than an intentional
15 deliberate act as required by §523(a)(6). Jury question number 7, which dealt with nuisance,
16 read: “[D]id the defendant’s act, or failure to act, wrongfully interfere with plaintiff’s
17 comfortable enjoyment of plaintiff’s real property?” This is the conduct referred to in question
18 number 9: “[D]o you find by clear and convincing evidence that the defendants acted with
19 oppression or malice ***in the conduct on which you base your finding of liability for nuisance?***”
20 [emphasis added] Therefore, the jury’s finding of oppression or malice may have been based on
21 a failure to act, not intentional harm at all. Inaction may not be the basis for a finding of non-
22 dischargeability based on willful conduct.

23 Plaintiff cites two cases which appear to be inconsistent with this court’s interpretation of
24 willful and malicious. *In re Krishnamurthy*, 209 B.R. 714 (9th Circuit BAP 1997) specifically
25 concluded that punitive damages awarded under California law necessarily established that a
26 jury found oppression, fraud or malice, satisfying the §523(a)(6) standard. *Krishnamurthy* was

1 decided prior to *Geiger* and prior to the *Su* and *Jercich* two-pronged test for §523(a)(6). As a
2 result, it did not address the subjective test for willfulness and is not viable precedent for this
3 court's ruling.

4 The second case cited in the supplemental brief of plaintiff was an unpublished
5 disposition from the Ninth Circuit *In re Elder*, 40 Fed. Appx. 576 (9th Circuit 2002) which states
6 that the award of punitive damages under California law meant that "defendant's behavior was
7 found to be malicious or oppressive which further demonstrated that his actions were willful and
8 malicious under §523(a)(6)." Because this is an unpublished disposition and may not be cited to
9 any court under the Ninth Circuit rules, this bald statement is made without underlying analysis.
10 Moreover, *Elder* was affirmed by the Ninth Circuit on June 25, 2002, less than a month after the
11 May 20, 2002, filing of the *Su* decision. It is apparent that the *Elder* panel was unaware of the
12 *Su* published opinion.

13 Finally, plaintiff cites *Hangarter v. Provident Life and Accident Insurance Company*, 373
14 F3d 998 (9th Circuit 2004), a non-bankruptcy case, as support for its argument that the finding
15 necessary for punitive damages was sufficient to support §523(a)(6) non-dischargeability.
16 Contrary to plaintiff's arguments, this court finds that the language in *Hangarter* supports only
17 what must be found to award punitive damages under California law, insufficient to meet the
18 federal standard:

19 "Finally, California courts have held that punitive damages are
20 warranted where the cumulative evidence 'supports a finding of
21 intent to injure, since evidence establishing 'conscience disregard
22 of another's rights' is evidence indicating that the defendant was
23 aware of the probably consequences of his or her acts and willfully
24 and deliberately failed to avoid those consequences.' *Notrica v.*
25 *State Comp. Ins. Fund*, 70 Cal. App. 4th 911" *Hangarter*, supra, at
26 1013.

Dated: May 5, 2005

/S/

MEREDITH A. JURY
United States Bankruptcy Judge

1 NOTICE OF ENTRY OF JUDGEMENT OR ORDER

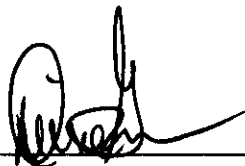
2 AND CERTIFICATE OF MAILING

3
4 TO ALL PARTIES IN INTEREST LISTED BELOW:

5
6 1. You are hereby notified that a judgement or order entitled:
7 MEMORANDUM OF DECISION RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
8 was entered on MAY - 6 2005.

9
10 2. I hereby certify that I mailed a true copy of the order or judgement to the persons and entities
11 listed below on MAY - 6 2005.

12
13
14
15 Dated: MAY - 6 2005



, Deputy Clerk

16
17 Office of the U.S. Trustee
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18 Riverside, CA 92501

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