UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

In Re: CHRISTINA MICHELLE MOORE, Debtor	)	Chapter 7 Case No. 04-01012-RWK-7
ROCKINGHAM MEMORIAL HOSPITAL, Plaintiff,	)	
v.	)	Adversary Proceeding No. 5-04-00049A
CHRISTINA MICHELLE MOORE, Defendant	)	

DECISION AND ORDER

At Harrisonburg in said District this 29th day of July, 2005:

The parties are before the court on the complaint of Rockingham Memorial Hospital (herein the Hospital) to determine the dischargeability of debt owed to it by Christina Michelle Moore (herein the debtor). The parties have submitted the case for decision on the Hospital's Brief, Debtor's Brief and Hospital's Reply Brief. The court has reviewed the arguments of both parties, and for the reasons outlined below, the court will deny discharge under § 523(a)(6).

BACKGROUND

The parties stipulated that there are no contested facts. The court has considered the arguments of the parties and the complete record, and the issue is ripe for determination.

On June 14, 2004, the debtor, filed a Chapter 7 petition for relief. On September 10, 2004, the Hospital filed an adversary proceeding to determine dischargeability of judgment debt pursuant to 11 U.S.C § 523(a)(6). The debt arose from final judgment of the Rockingham County General District Court in the matter of Rockingham Memorial Hospital v. Christina M. Moore, Case No. 02-0053. Judgment was rendered for the Hospital on February 5, 2002, in the original amount of $3,343.22, plus interest of 9% from April 17, 2001, and costs of $28.00.

On January 6, 2004, the General District Court of Rockingham County conducted interrogatories of the debtor and ordered the Hospital to have execution against the debtor in the amount of $4,272.35, plus costs, by levy upon the 2003 State and Federal Income Tax Refund Checks of Christina M. Moore. The order "advised" the debtor to turn over the checks to counsel for the Hospital, or risk fines and/or imprisonment for contempt. On February 12, 2004, the debtor received a federal tax refund check in the amount of $3,684.05, but she did not turn it over to Hospital's counsel. Though debtor admits that she was aware of the state court's order, debtor negotiated the check and spent the proceeds on the maintenance and support of herself and her children.

The parties stipulated these questions before this court: (I) Whether the order entered by the Rockingham County General District Court on January 5, 2004 constitutes a levy; (II) whether said order, regardless of whether it is a levy, changed ownership of the income tax refund check or otherwise gave the Hospital a property interest in the income tax refund check; (III) whether debtor's use of the income tax refund check constitutes willful and malicious conversion or injury to property interest so as to entitle the Hospital to relief

pursuant to 11 U.S.C. § 523(a)(6); and (IV)(i) whether the remedy of contempt of court pursuant to § 8.01-508 of the Virginia Code is available to the Hospital, and (ii) if so, whether such relief is the Hospital's sole remedy.

LAW AND DISCUSSION

This Court has jurisdiction over the parties and subject matter of this proceeding under 28 U.S.C. §§ 151, 157, and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I), which the Court may hear and determine. Venue is proper in this District under 28 U.S.C. § 1409(a)

I. WHETHER THE ORDER ENTERED BY THE ROCKINGHAM COUNTY GENERAL DISTRICT COURT ON JANUARY 5, 2004 CONSTITUTES A LEVY.

II. WHETHER SAID ORDER, REGARDLESS OF WHETHER IT IS A LEVY, CHANGED OWNERSHIP OF THE INCOME TAX REFUND CHECK OR OTHERWISE GAVE THE HOSPITAL A PROPERTY INTEREST IN THE INCOME TAX REFUND CHECK.

The term "levy" is not defined by Title 11 of the United States Code, but the term is generally considered a procedural civil act effected by an officer of the court upon property or money to satisfy a judgment.[1] Bankruptcy courts must apply relevant state law when determining substantive legal matters if Congress has remained silent on the issue. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (U.S. 1938).

[1] The sixth edition of *Black's Law Dictionary* lists *Levy* twice: (1) Verb–to assess; raise; execute; exact; tax; collect; gather; take up; seize. [T]o levy an execution, i.e., to levy or collect a sum of money on an execution; and (2) noun–a seizure, the obtaining of money by legal process through seizure and sale of property, the raising of the money for which an execution has been issued, the process whereby a sheriff or other state official empowered by writ or other judicial directive actually seizes, or otherwise brings within her control, a judgement debtor's property which is taken to secure or satisfy the judgment.

In the customary process of enforcement of a judgment in Virginia, the judgment creditor may request the clerk of the court where a money judgment was obtained to issue a writ of fieri facias. Va. Code Ann. §§ 8.01-466 (2005). The writ commands an officer of the court, typically the sheriff, "to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is." Va. Code Ann. §§ 8.01-474 (2005). In execution of the writ of fi fa, the sheriff will actually identify the property of the judgment debtor by going to the property and will, typically, attach to the return a list of property he identified and levied upon. In the case at bar this did not happen because the tax refunds were not in the hands of the judgment debtor. A writ of fieri facias binds the property only after the officer has made the actual levy. Va. Code Ann. § 8.01-478 (2004). However, a writ of fieri facias creates a lien on intangible property the judgment debtor owns or acquires before the return date when the writ is delivered to a sheriff or other officer, or any person authorized to serve process pursuant to § 8.01-293. Va. Code Ann. § 8.01-501 (2004)[2]. The lien in favor of the judgment creditor arises specifically where levy is not practical because of the characteristic nature of the property sought to be seized. *Id.*

Here, there is evidence that a writ of fieri facias together with the summons to answer interrogatories was delivered into the hands of the sheriff as indicated by some words that

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> Every writ of fieri facias shall, in addition to the lien it has under §§ 8.01-478 and 8.01-479 on what is capable of being levied on under those sections, be a lien from the time it is delivered to a sheriff or other officer, or any person authorized to serve process pursuant to § 8.01-293, to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return day of such writ become, possessed or entitled, in which, from its nature is not capable of being levied on under such sections, except such as is exempt under the provisions of Title 34, and except that, as against an assignee of any such estate for valuable consideration, the lien by virtue of this section shall not affect him unless he had notice thereof at the time of the assignment.

Va. Code Ann. § 8.01-501 (2005)

appear to be a signature and a date[3]. The sheriff made no return of property or money of the debtor under the writ. The date for return was the same day the judgment debtor was to appear to answer interrogatories.[4] Following the interrogatories, the district court ordered the Hospital to have "levy" upon the debtor's 2003 federal income tax refund checks. A court may command a levy upon intangible property revealed at an interrogatory proceeding to be in the debtor's possession or under his control. Va. Code Ann. § 8.01-507 (2004)[5]. Clearly, the judgment debtor revealed her entitlement to the 2003 tax refund at interrogatories because this was reported to the judge at the conclusion of the interrogatories and he instructed her to turnover the refund when received. Thus, on the return day a lien attached to the refund in favor of the judgment creditor under § 8.01-501.

According to Virginia law, a writ of fieri facias creates a lien only to the extent of the judgment debtor's interest in the subject intangible property acquired on or before the return date. International Fidelity Ins. Co. v. Ashland Lumber Co., 250 Va. 507, 511 (Va. 1995). The lien itself can continue in existence past the return date. The lien on intangibles

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[3] The court cannot identify the individual by the signature dated January 6th, on the writ of fieri facias.

[4] The parties stipulated to add to the record a copy of the Summons to Answer Interrogatories issued by the General Distrcit Court of Rockingham County to the debtor on December 1, 2003. The writ of fieri facias on the summons form contains a return date of January 6, 2004, the same date the District Court conducted the interrogatories and issued an order to the debtor to turn over her federal income tax refund checks to counsel for the plaintiff. There appears to be a signature on the writ of fieri facias by the receiving officer pursuant to Va. Code Ann. § 8.01-487 (2004), which indicates delivery unto the officer. The summons is stamped "DISMISSED", presumably because the debtor appeared for the interrogatories.

[5]

> The interrogatory procedure is also one method for reaching judgment debtors' intangible property that is not subject to levy. When intangible property is discovered, the court may compel the person in possession or in control of the property to deliver it to the officer holding the unsatisfied fi. fa. The court also can order the party to assign the property to the judgment creditor in a manner specified in the order.

1-2 ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA § 2.7 (Matthew Bender, 2004).

expires whenever the judgment creditor's right to enforce the judgment expires, or the longer of (i) one year from the return date, or (ii) one year from the final determination of an amount owed to the judgment debtor by a third party. Va. Code Ann. § 8.01-505 (2004). Ownership of property subject to a valid execution lien remains with the judgment debtor until the property is sold at the sheriff's sale in satisfaction of the judgment. *See* Jones v. Hall, 177 Va. 658, 664 (Va. 1941).

CONCLUSION:

As stated above in the preceding questions, the district court was empowered to order the debtor to turn over her federal income tax refund pursuant to Va. Code Ann. § 8.01-507[6]. The debtor did not obey the court. On February 12, 2004, the debtor received the refund check, negotiated it, and spent the proceeds on herself and her dependents. The check was subject to the lien created by § 8.01-501, and the judgment creditor had a property interest in it. The judgment debtor never asserted any right to exempt the property under Title 34 of the Virginia Code which would permit her to keep the property notwithstanding the lien.

III. WHETHER DEBTOR'S USE OF THE INCOME TAX REFUND CHECK CONSTITUTES WILLFUL AND MALICIOUS CONVERSION OR INJURY TO PROPERTY INTEREST SO AS TO ENTITLE THE HOSPITAL TO RELIEF PURSUANT TO 11 U.S.C. § 523(A)(6).

Bankruptcy courts and state courts share concurrent jurisdiction over several of the

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> Any real estate out of this Commonwealth to which it may appear by such answer that the debtor is entitled shall, upon order of the court or commissioner, be forthwith conveyed by him to the officer to whom was delivered such fieri facias, and any money, bank notes, securities, evidences of debt, or other personal estate, tangible or intangible, which it may appear by such answers *are in possession of or under the control of the debtor or his debtor or bailee*, shall be delivered by him or them, as far as practicable, to such officer, or to some other, or in such manner as may be ordered by the commissioner or court.

Va. Code Ann. § 8.01-507 (emphasis added).

exceptions to discharge enumerated in 11 U.S.C. § 523(a). In re Crawford, 183 B.R. 103, 105 (Bankr. W.D. Va. 1995). However, Section 523(c) states that bankruptcy courts have exclusive jurisdiction to decide exceptions to discharge that arise under sections 523(a)(2), (4), (6), and (15). *See also* FED. R. BANKR. P. 4007, Advisory Committee Notes (1983). In order to prevail on a § 523(a)(6) dischargeability proceeding, the plaintiff must carry the burden of proof by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (U.S. 1991).

Under § 523(a)(6), a debt that arises from willful and malicious injury by the debtor to another entity or to the property of another entity is nondischargeable. Overall, a court called upon to determine dischargeability of a judgment based on willful and malicious injury should look to the entire record to determine the wrongfulness of the act. 4 COLLIER ON BANKRUPTCY ¶ 523.12[3] (Alan N. Resnick & Henry J. Sommer eds.,15th ed. rev.). A bankruptcy court may not override the prior judgment if the issue has been necessarily decided. *See* Combs v. Richardson, 838 F.2d 112, 114 (4th Cir.1988).

The Supreme Court of the United States determined that the creditor must show that the injury was both willful and malicious[7]. The term "willful" defines a deliberate or intentional act. 4 COLLIER ON BANKRUPTCY ¶ 523.12[2] (Alan N. Resnick & Henry J. Sommer eds.,15th ed. rev.). The Geiger court held that debts arising from reckless or negligent acts which may cause injury, even those committed intentionally, hence willfully,

[7] Geiger v. Kawaauhau (In re Geiger), 113 F.3d 848 (8th Cir. 1997), *aff'd*, 523 U.S. 57 (U.S. 1998) (refusing to adopt a bright-line rule of nondischargeability only for acts defined as intentional at law because the rule would make part of the code superfluous, and determining that negligent or reckless acts lack requisite intent for nondischargeability, but finding that acts committed with substantial certainty of causing harm or injury are" malicious").

are not malicious acts. Geiger, 523 U.S. at 64. Since Geiger, most courts have held that a malicious act is an intentional act that is substantially certain to cause injury. Johnson v. Davis (In re Davis), 262 B.R. 663, 670 (Bankr. E.D. Va. 2001). The Fourth Circuit addressed the "maliciousness" requirement in St. Paul Fire and Marine Insurance Co. v. Vaughn, 779 F.2d 1003 (4th Cir. 1985) (holding the equivalent of actual malice may be implied from the circumstances to satisfy § 523(a)(6)). Under this "equivalency rule", actual malice may be inferred from the circumstances. *See* In re Criswell, 52 B.R. 184, 193 (Bankr. E.D. Va. 1985). There is rarely direct evidence to prove an intentionally malicious act to cause injury; most cases are proved circumstantially. *See* In re Higginbotham, 117 B.R. 211, 215 (Bankr. E.D. Va., 1990). Thus, malice may be implied from a deliberate and intentional act done with "knowing disregard for the rights of others." In re McNallen, 62 F.3d 619, 626 (4th Cir. 1995).

CONCLUSION:

The case law reveals that nondischargeability under § 523(a)(6) is available only for deliberately caused injury. The debtor's act has to be one in which the debtor intended to cause harm to the entity, or to a property interest of the entity, not just an intentional act where harm resulted. In the Fourth Circuit malice may be implied where the debtor acted knowingly in disregard for the rights of the harmed entity. Under this subjective test, the debtor here clearly acted willfully in derogation of the Hospital's lien upon the tax refund check. She intended for the Hospital not to have execution upon its judgment or the resulting lien by obstructing judicial process and dissipating the value of the lien when she liquidated the collateral. Under the factual circumstances present in this case, cashing the

check appears to be an oppressive and wanton act on the part of the debtor against the Hospital. The first prong of § 523(a)(6) requiring a showing of willfulness is satisfied.

The second prong of § 523(a)(6) requiring a showing of malice is satisfied by implication. The District Court of Rockingham County's order clearly advised the debtor that her disobedience could result in imprisonment and fines[8]. The debtor acted intentionally and with knowing disregard for the rights of the Hospital to have satisfaction on its lien on the property. According to McNallen, supra, malice is implied in this case. Therefore, this court answers in the affirmative that the debtor's use of the refund check constitutes willful and malicious injury to property of the Hospital, which entitles the Hospital to relief under 11 U.S.C. § 523(a)(6).

IV. (I) WHETHER THE REMEDY OF CONTEMPT OF COURT PURSUANT TO § 8.01-508 OF THE VIRGINIA CODE IS AVAILABLE TO THE HOSPITAL, AND (II) IF SO, WHETHER SUCH RELIEF IS THE HOSPITAL'S SOLE REMEDY.

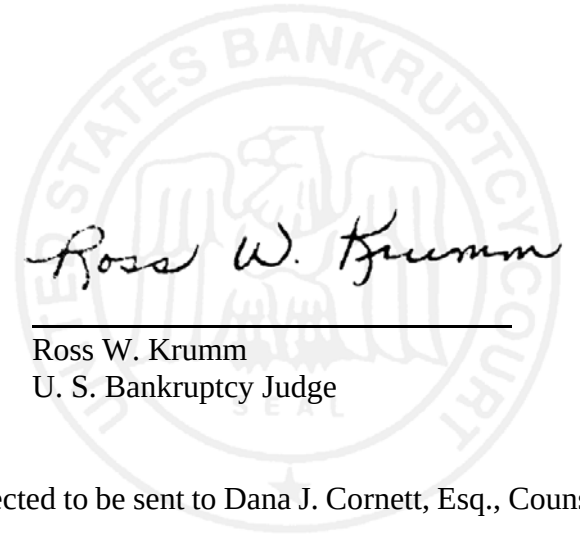
Having decided the issue of dischargeability pursuant to 11 U.S.C § 523(a)(6), this court declines to define the contours of the set of remedies available to the Hospital.

[8] The debtor implies some defense of necessity by claiming to have negotiated the check to pay for the support of herself and her dependents, and it appears reasonable to presume the debtor was insolvent some time prior to filing her Chapter 7 petition. However, that technical legal argument was not developed with enough force to overcome the strong circumstantial inference that the debtor acted with knowing disregard for the plaintiff's rights, or that she committed an act which she must have known would have been certain to cause injury to the economic interests of the Hospital in further pursuing the debtor. Further, the existence of a defense of necessity would merely cause to excuse the acknowledged illegal behavior because it served a greater good. *But see* In re Long, 774 F.2d 875, 882 (8th Cir. 1985) (finding implied malice not followed by Eighth Circuit and holding that acts injuring economic interests of entity but which saved business to the benefit of all creditors were not malicious). If the debtor truly faced such dire straits inherent in the moral dilemma of necessity, the choice between starvation or imprisonment, then her decision to file bankruptcy a full 120 days after receiving the refund does not follow.

For the reasons stated above, it is

ORDERED:

That pursuant to 11 U.S.C. § 523(a)(6) the debtor's debt to Rockingham Memorial Hospital is not dischargeable.



Ross W. Krumm
U. S. Bankruptcy Judge

Copies of this order are directed to be sent to Dana J. Cornett, Esq., Counsel for the Plaintiff, 57 S. Main Street, Suite 309, Harrisonburg, VA 22801; and David W. Earman, Esq., Counsel for the Debtor, 57 S. Main Street, Suite 206, Harrisonburg, VA 22801.