

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: )  
)  
KENNETH D. COX and )  
CAROLYN SUE COX, )  
Debtors. ) BK 95-40443  
)  
AGRIBANK, FCB, a federally )  
chartered corporation, )  
Plaintiff, ) Adversary No. 95-4049  
)  
vs. )  
)  
KENNETH D. COX and )  
CAROLYN SUE COX, )  
Defendants. )

**OPINION**

This matter is before the Court on cross motions for summary judgment to determine the dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(6). The following facts are not in dispute: Pursuant to a security agreement between the parties, Kenneth and Carolyn Cox (hereinafter debtors), gave the plaintiff, Agribank, FCB (hereinafter FCB), a security interest in certain real estate. The mortgage agreement granted FCB an interest in all improvements and fixtures on the property, including trees and shrubs. However, in late 1990, the debtors, without FCB's knowledge or consent, sold some of FCB's timber for approximately \$15,667.21. They then used these sale proceeds to make a partial Chapter 12 plan payment of \$27,166.06 to the plaintiff in January, 1991. This payment was made pursuant to their Chapter 12 plan. The parties agree that the debtors retained none of the sale proceeds. They also agree that the debtors made no other payments to

the plaintiff for the timber other than this partial plan payment.

When FCB discovered that its collateral had been sold, it filed a Motion to Order Reimbursement for Unauthorized Sale of Collateral. The parties resolved this matter without hearing, and, on August 21, 1991, this Court entered a stipulated order in which the parties agreed that FCB would be granted a priority administrative expense claim for the total amount of monies which the debtors received as a result of the unauthorized sale. The debtors agreed to reimburse FCB for the lost collateral from future operations and noncollateral sources, in addition to making annual plan payments of \$34,507.38. The stipulation provided that the debtors would not be entitled to seek or obtain a discharge in the Chapter 12 case until FCB was reimbursed for the timber, and, in the event the case was converted to a Chapter 7, the parties agreed that FCB's § 364(c) priority lien and administrative expense priority would be limited to the amount of its secured claim.

The debtors never completed their Chapter 12 plan, and the case was dismissed in May 1992. FCB then brought suit against the debtors in the Circuit Court of Gallatin County, Illinois, to recover its indebtedness. On December 21, 1992, the circuit court entered a deficiency judgment against the debtors in the amount of \$136,401.75. Included in the judgment was the \$15,667.21 which the debtors received from the unauthorized sale of FCB's collateral.

On May 15, 1995, the debtors filed the instant Chapter 7 proceeding, in which FCB now seeks to determine the discharge-ability of its debt pursuant to 11 U.S.C. § 523(a)(6). FCB alleges that the debtors' unauthorized sale of collateral constituted a "willful and

malicious" conversion and that, therefore, its judgment against the debtors is nondischargeable to the extent of the conversion. Specifically, FCB requests that the \$15,667.21 that the debtors received for the timber sale, plus judgment interest, be held nondischargeable. The debtors, while admitting that they sold FCB's collateral without permission, argue that because they remitted all of the timber sale proceeds to the plaintiff, there was no "conversion" and, therefore, no injury for purposes of § 523(a)(6). Both parties now seek summary judgment as to the dischargeability of the debt.

Section 523(a)(6) of the Bankruptcy Code provides that "a discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Willful and malicious injury under this section includes willful and malicious conversion. In re Wolfson, 56 F.3d 52 (11th Cir. 1995).

In their motion for summary judgment, the debtors argue that, because they used the proceeds of the timber sale to make a plan payment to the plaintiff, there was no conversion and, hence, no actionable injury for purposes of § 523(a)(6). Illinois law defines conversion as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may be justly required to pay the other the full value of the chattel." In re Thebus, 108 Ill. 2d 255, 259, 483 N.E.2d 1258, 1260 (Ill. 1985). "All that is required is that defendant exercise control over the chattel in a manner inconsistent with

plaintiff's right of possession." Monroe County Water Cooperative v. City of Waterloo, 107 Ill. App. 3d 477, 480, 437 N.E.2d 1237, 1239 (5th Dist. 1982) (citations omitted).

In the instant case, the debtors admit that they sold the plaintiff's collateral without the plaintiff's permission. In doing so, the debtors exercised unauthorized control over the plaintiff's property to the exclusion of the plaintiff's rights. Therefore, the Court finds, as a matter of law, that the debtors' sale of the plaintiff's collateral constituted conversion. However, not every act of conversion is actionable under

§ 523(a)(6). As the United States Supreme Court has explained:

"a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion that is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. \* \* \* In these and like cases, what is done is a tort, but not a willful and malicious one.

Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934) (citations omitted).

See also In re Kessnick, 174 B.R. 481, 485 (S.D. Ohio 1994); In re Walters, 176 B.R. 835, 879 (Bankr. N.D. Ind. 1994); In re Donny, 19 B.R. 354, 357 (Bankr. W.D. Wis. 1982). Therefore, in order to prevail in a § 523(a)(6) action, the plaintiff must prove by a preponderance of the evidence not only that debtor injured another entity or property of another entity, but also that the debtor's conduct was willful and malicious. In re Camden, 115 B.R. 156, 158 (Bankr. S.D. Ill. 1990).

Historically, the Courts of Appeals have wrestled with the definition of "willful" and "malicious" for purposes of § 523(a)(6). The controversy, essentially, has centered on the extent

to which "an intent to harm or the inevitability of harm is a component of one or both words." In re Knapp, 179 B.R. 106, 108 (Bankr. S.D. Ill. 1995). However, this conflict was recently resolved in the Seventh Circuit by Matter of Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994), where the Court of Appeals defined the terms as follows:

We give effect to the words of the statute by viewing their plain meaning. 'Under § 523(a)(6) of the Bankruptcy Code, willful means deliberate or intentional . . . [and] malicious means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm.' .

Id. (quoting Wheeler v. Laudani, 783 F.2d 610, 615 (6th Cir. 1986) (citations omitted). See also Knapp, 179 B.R. at 108. Under the Seventh Circuit's more liberal interpretation, malice may be implied.

Id. "Thus, a plaintiff 'need not show that the defendant acted with specific ill will or evil motive, or that the act was specifically intended to cause unlawful consequences. Rather, the plaintiff need only show that the defendant acted intentionally and without just cause." Knapp, 179 B.R. at 108 (quoting Custom Coffee Serv. Inc. v. Raguso (In re Raguso), Nos. 94 A 01072, 94 B 19184, 1994 WL 744333, at \*4 (Bankr. N.D. Ill. Dec. 21, 1994).

The determination of whether a debtor committed willful and malicious conversion for purposes of § 523(a)(6) is dependant on the circumstances of the particular case. Davis, 293 U.S. at 332; Knapp, 179 B.R. at 109 ("application of § 523(a)(6) should be circumstance specific rather than categorical"); In re Lewis, 31 B.R. 83, 86 (Bankr. W.D. Ok 1983) ("[i]n a determination of dischargeability under § 523(a)(6), it is important that careful analysis be made of the facts

of each particular case . . . ."). As the Seventh Circuit stated in Matter of Thirtyacre, "[w]hether an actor behaved willfully and maliciously is ultimately a question of fact reserved for the trier of fact." Thirtyacre, 36 F.3d at 700 (emphasis added). In the instant case, the Court finds that an issue of material fact exists as to whether the debtors' actions were willful and malicious within the meaning of § 523(a)(6). Therefore, summary judgment in favor of either party is inappropriate,<sup>1</sup> and the cross-motions are denied.

In reaching this decision, the Court rejects the plaintiff's argument that this Court's order of August 21, 1991, implicitly resolved the dischargeability question in FCB's favor and that, therefore, the doctrine of res judicata forecloses further litigation of the matter. In support of its argument, FCB relies on paragraph 3 of the stipulated order which states:

[i]t is the intent that the Debtors will pay the priority administrative expense for the unauthorized timber sale as stated in paragraph 1 above from future operations and potential acquired [sic] estate property. The Debtors will not be entitled to seek or obtain a discharge in this Chapter 12 proceeding unless and until FCB is paid in full for the paragraph 1 unauthorized timber sale expense as it has damaged FCB'S collateral position.

Stipulated order of August 21, 1991 at 2-3.

Res judicata or claim preclusion "operates to bar a party who has

---

<sup>1</sup>A party moving for summary judgment has the burden to show "'that there is no genuine issue of material fact and that he is entitled to summary judgment as a matter of law'" and "'[a]ny doubt as to the existence of a genuine issue for trial is resolved against the moving party.'" La Scola v. U.S. Sprint Communications, 946 F.2d 559, 563 (7th Cir. 1991) (quoting New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1477 (7th Cir. 1990)). See also Samson v. Prokopf (In re Smith), 285, 290 n. 4 (Bankr. S.D. Ill. 1995).

had an opportunity to litigate a cause of action before an appropriate tribunal from relitigating the same cause of action in a subsequent proceeding." In re Pyramid Energy, 160 B.R. 586, 590 (Bankr. S.D. Ill. 1993). See also In re Antablían, 140 B.R. 534, 539 (Bankr. C.D. Cal. 1992). The essential elements of res judicata are: (1) a final judgment on the merits in the earlier action; (2) an identity of the parties or their privies; and (3) an identity of the cause of action." Marx v. M & I Bank of Watertown, 17 F.3d 1012, 1014 (7th Cir. 1994).

In the instant case, there is no question that there was a final judgment on the merits in the prior proceeding, and, that the previous action involved the same parties. The question that remains, however, is whether there is an identity of the causes of action sufficient to preclude further litigation of this matter. This Court has stated that

[a] 'cause of action' for res judicata purposes is the claim upon which a litigant asserts a right or seeks redress of an injury. Under the test employed in a majority of jurisdictions, including the Seventh Circuit, a single cause of action includes all rights of a plaintiff to remedies against the defendant that arise out of the same transaction or occurrence.

In re Pyramid Energy, 160 B.R. at 590. See also Matter of Energy Cooperative, 814 F.2d 1226, 1230 (7th Cir), cert. denied 484 U.S. 928 (1987).

While the plaintiff's 1991 Motion to Order Reimbursement and its present dischargeability complaint do involve the same operative facts, the Court finds that these proceedings involve different causes of action. Dischargeability of an obligation in bankruptcy involves a new or separate cause of action, In re Doerge, 181 B.R. 358 (Bankr. S.D. Ill. 1995), which is determined by filing an adversary proceeding in

the bankruptcy court. Fed. R. Bankr. P. 7001(6). In order to succeed in a § 523(a)(6) action, the plaintiff must allege and prove that it suffered an injury as a result of the debtor's willful and malicious actions. In re Camden, 115 B.R. at 158. The Court may not simply imply nondischargeability of a debt under § 523(a)(6) without a determination that the elements of willful and malicious injury are satisfied. Id. ("[t]he elements of willfulness and maliciousness must be analyzed separately and both must be found in order to justify denial of discharge."). Here, the plaintiff did not bring its 1991 action as an adversary proceeding to determine the dischargeability of its debt under § 523(a)(6). The claim of dischargeability was not before the Court in the 1991 action, there was no allegation or determination that the defendants' actions were willful and malicious in the previous motion and order, and, therefore, res judicata does not preclude a determination of dischargeability in this Chapter 7.

However, while the 1991 order does not preclude the plaintiff's dischargeability claim, it does prevent the debtors from relitigating the issue of whether FCB was injured as a result of the unauthorized sale of its collateral. The doctrine of collateral estoppel, or issue preclusion, "bars the resuscitation of questions that have already been actually litigated and decided." Levinson v. United States, 969 F.2d 260, 263 (7th Cir. 1992). It requires that (1) the issue sought to be precluded is the same as that involved in the prior action; (2) the issue was actually litigated; (3) determination of the issue was essential to the final judgment; and (4) the party to be estopped was fully represented in the prior action. Id.

Because the 1991 stipulated order revolved around the issue of injury to FCB's collateral position and because the debtors were fully represented in the prior proceeding, three of the four requirements for collateral estoppel have been satisfied. Admittedly, the "actually litigated" requirement is in question in this case because the 1991 order was entered pursuant to a stipulation of the parties. However, while collateral estoppel generally "do[es] not apply where, as here, the issue . . . sought to be precluded in a subsequent proceeding w[as] allegedly determined in a stipulation or judgment by consent," Levinson, 969 F.2d at 263 (quoting Gall v. South Branch Nat'l Bank of South Dakota, 783 F.2d 125, 127 (8th Cir. 1986)), there is an exception where the parties to the stipulation intended to foreclose an issue from further litigation. Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1989). See also 1B Moore's Federal Practice ¶ 0.444[1] at 794 (2d ed. 1984) (collateral estoppel does not apply to "issues determined by the parties unless it can be said that the parties could reasonably have foreseen the conclusive effect of their actions") (emphasis added).

In the stipulated order in this case, not only did the parties specifically agree that the debtors' unauthorized sale of the collateral had injured FCB, they provided for repayment of the sale proceeds from noncollateral sources in the Chapter 12 proceeding, prohibited the debtors from seeking a discharge in the Chapter 12 until the debt was repaid, and addressed how the debt would be treated in the event that the case was converted to a Chapter 7. The Court finds that these provisions demonstrate that the parties intended to foreclose the

issue of injury from further litigation and that they understood the conclusive effect of their agreement.<sup>2</sup> For the reasons stated above, the Court finds that, while the debtors' unauthorized sale of FCB's collateral did cause injury to the plaintiff, there is an issue of material fact as to whether the injury was "willful and malicious" for purposes of 11 U.S.C.

§ 523(a)(6), and, therefore, granting summary judgment on the claim of dischargeability would be inappropriate.

SEE WRITTEN ORDER.

**DATED:** November 28, 1995

---

<sup>2</sup>While a debtor may not, for public policy reasons, "contract away" the right to a discharge in bankruptcy, "a debtor may stipulate to the underlying facts that the bankruptcy court must examine to determine whether a debt is dischargeable." Klingman v. Levinson, 831 F.2d 1292, 1296 n. 3 (7th Cir. 1987).