

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
DENNIS E. GRIMM,) Bankruptcy Case No. 99-32255
)
Debtor.)
_____)
)
JACK FORTNER, Administrator)
of the Estate of)
Brenda Sue Fortner,)
)
Plaintiff,)
)
vs.) Adversary Case No. 99-3216
)
DENNIS GRIMM,)
)
Defendant.)

OPINION

This matter having come before the Court for trial on an Amended Complaint to Determine Dischargeability of Debts; the Court, having heard sworn testimony and arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The Plaintiff herein seeks to have a State Court default judgment in the amount of \$500,000 declared non-dischargeable in the Debtor's bankruptcy, pursuant to 11 U.S.C. §§ 523(a)(6) and 523(a)(9). The State Court default judgment in question was entered in Randolph County, Illinois, in Case No. 86-L-30, on February 14, 1991, in favor

of the Plaintiff, Jack Fortner, Administrator of the Estate of Brenda Sue Fortner, who died from injuries she received in an automobile accident on September 28, 1985, while a passenger in a vehicle driven by the Debtor/Defendant, Dennis E. Grimm.

Under 11 U.S.C. § 523(a)(9):

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt - . . .

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

The burden is upon the Plaintiff to prove the elements of 11 U.S.C. § 523(a)(9) by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279 (1991). To determine non-dischargeability of a debt under § 523(a)(9), a Court must determine by a preponderance of the evidence that the debtor was legally intoxicated under State law while operating a motor vehicle. In re Odom, 1992 WL 350575 (Bankr. N.D. Ill. 1992), *citing* In re Pahule, 849 F.2d 1056 (7th Cir. 1988). In the case at bar, there is absolutely no credible evidence that the Debtor/Defendant was intoxicated while operating his motor vehicle on the night of the accident in question on September 28, 1985. The evidence indicates that the Debtor/Defendant was never tested for any type of intoxication, nor was he ever charged with any crime for being intoxicated from using alcohol, a drug, or any other substance on the

date of the accident. The police officer investigating the scene of the accident on the night of September 28, 1985, testified at a Coroner's inquest, held on December 18, 1985, that no tests were taken of either of the drivers of the vehicles involved in the accident because there was no evidence indicating that either alcohol or drugs played a part in the accident. (See Plaintiff's Exhibit No. 1, testimony of State Trooper Ivan Castens). There being no evidence of intoxication of any type whatsoever, the Court must conclude that the Plaintiff's Complaint must fail as to its allegations under 11 U.S.C. § 523(a)(9).

Plaintiff's Complaint alternatively seeks a finding of non-dischargeability under 11 U.S.C. § 523(a)(6), which states:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt - . . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

The Plaintiff has the burden of proof by preponderance of the evidence to prove the elements of 11 U.S.C. § 523(a)(6). See: Grogan v. Garner, supra. Section 523(a)(6) has been recently interpreted by the United States Supreme Court in the case of Kawaauhua v. Geiger, 118 S.Ct. 974, 523 U.S. 57 (1998). In that case, the Supreme Court ruled that the word "willful," in (a)(6), modifies the word "injury," indicating that non-dischargeability takes a deliberate or intentional

injury, not merely a deliberate or intentional act that leads to injury. The Supreme Court opined that, in order to prove a debt non-dischargeable under 11 U.S.C. § 523(a)(6), the debtor must have intended the "consequences of the act." There was disagreement between the parties in this case as to the interpretation of the Supreme Court's Opinion in Kawaauhua v. Geiger in that the Plaintiff argued that all that was required was an intentional act on the part of the debtor and not necessarily an intent to injure. In reviewing the Supreme Court's Opinion in Kawaauhua v. Geiger, this Court finds that the Debtor/Defendant must have had an intent to injure Plaintiff's decedent in order for the debt to be found non-dischargeable under 11 U.S.C. § 523(a)(6). However, it does not matter which reading of the Opinion this Court chooses, as, in the instant case, the evidence clearly shows that there was no intentional act or intent of injury on the part of the Debtor/Defendant resulting in the accident on September 28, 1985. The Court notes that the Debtor/Defendant did plead guilty to the charge of reckless homicide; however, that plea has no effect on these proceedings because, by the very definition of "reckless homicide," no intentional act is required. See: Chap. 38, Ill. Rev. Stat., para. 9-3 (1983).

In conclusion, the Court finds that the evidence presented at trial on July 10, 2000, fails to establish non-dischargeability under either §§ 523(a)(6) or 523(a)(9). The Court found the Debtor/Defendant

to be a credible witness and, in the absence of any evidence to the contrary, must accept his version of the incidents leading to the accident the night of September 28, 1985. In so doing, the Court concludes that the debt resulting from the default judgment entered in the State Court in Randolph County, Illinois, on February 14, 1991, is dischargeable in the Debtor/Defendant's Chapter 7 bankruptcy proceeding.

ENTERED: July 14, 2000.

/s/ GERALD D. FINES
United States Bankruptcy Judge