IT IS SO ORDERED.

Dated: 09:57 AM June 04 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 07-52980
	)	
LOUIS VAN RIPER	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
TONJUA LEA JONES,	)	
	)	**ADVERSARY NO. 08-05001**
PLAINTIFF(S),	)	
	)	JUDGE MARILYN SHEA-STONUM
vs.	)	
	)	
LOUIS VAN RIPER	)	
	)	**MEMORANDUM OPINION RE: OBJECTION TO DISCHARGEABILITY OF DEBT**
DEFENDANT(S).	)	
	)	

This matter comes before the Court on the complaint of Plaintiff-Tonjua Jones ("Plaintiff") objecting to the dischargeability of a claim pursuant to 11 U.S.C. § 523(a)(6) [docket #1] and the answer of Defendant-Debtor, Louis VanRiper ("Defendant") [docket #7]. The Court held a trial in this matter on April 21, 2008. Appearing at the trial were L. Ray Jones, counsel for Plaintiff, and Troy A. Reeves, counsel for Defendant. During the trial, the parties presented evidence in the form

of exhibits and in the form of testimony from the following: (1) Janice Harrah ("Harrah"), a bystander; (2) Mogadore Detective Todd Higgins; (3) Plaintiff; (4) Scott Grim ("Grim"), a friend of Plaintiff; and (5) Defendant.[1] At the conclusion of the trial, the Court took the matter under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (I), over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

The Court is not trying the underlying action that gave rise to the complaint in this adversary proceeding. The sole question before the Court is whether Plaintiff proved by a preponderance of the evidence that Defendant's conduct toward her was willful and malicious pursuant to 11 U.S.C. § 523(a)(6) such that her claim would be excepted from discharge in Defendant's bankruptcy case.

FACTUAL BACKGROUND

The parties stipulated that Plaintiff dismissed Summit County Court of Common Pleas Case No. CV2005-03-1574 concerning the facts of the situation which gave rise to this adversary proceeding, and that the time to refile a complaint is extended to July 18, 2008 [docket #14]. The parties did not stipulate to any other facts.

The Court heard decidedly different chronologies from each of the witnesses regarding what happened in this case. Therefore, the facts are somewhat murky. Most telling to the Court were the

[1] All of the witnesses were called by Plaintiff during her case in chief. Defendant was called as if on cross-examination. After cross-examination by Plaintiff's counsel, he was also subject to direct examination by his own counsel, Mr. Reeves. Other than cross-examination of the other witnesses, Defendant did not put forth any additional evidence in the case.

inconsistencies between Plaintiff's contemporaneous statements to the police and her testimony at trial with respect to the operative facts. Her trial testimony recalled events in a manner necessary to carry her burden of proof on the § 523(a)(6) elements, though her trial testimony was inconsistent in several critical aspects from her police report.[2]

Based upon the testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceedings, and the Court's evaluation of the credibility of the witnesses, the following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

1. On November 7, 2004, an estate auction took place on property known for mailing purposes as 324 Cleveland Avenue, Mogadore, Ohio (the "Property"). Plaintiff and Grim, who had an on-off dating relationship, attended the auction together. Defendant also attended the auction and was bidding on a lot of the items.

2. At one point during the auction, Defendant and Grim were bidding against one another on a set of three vacuum cleaners. During the bidding, Grim was standing in front of Plaintiff, and Plaintiff was standing in front of Defendant. [Trial Ex. B]. Harrah was seated across the aisle of merchandise from the parties, about three or four feet away, facing them in the opposite direction. *Id.* Neither Harrah nor Plaintiff were bidding on the vacuum cleaners.

3. As the bidding on the vacuum cleaners spiraled, both Grim and Plaintiff said, "This is stupid." At trial, Plaintiff and Grim both testified that they couldn't remember Grim's next words to

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[2] Plaintiff's written statement to the police was not formally admitted into evidence or introduced as an exhibit at trial. However, relevant portions of her statement were used during cross-examination to refresh her recollection as to her contemporaneous report to the police and to discredit her testimony.

Defendant. However, Plaintiff's statement to the police revealed that Grim called Defendant a "stupid shit." The Court finds that statement to be credible.

4. Defendant overheard Grim's derogatory remarks and became angry that Grim was calling him "stupid." Defendant asked Grim twice to go out to the road and fight, but Grim was not interested in that invitation.

5. Defendant then charged toward Grim as if to start a fight. At trial, Plaintiff testified that she did not know who Defendant was really coming after and trying to fight. However, in her statement to the police she said that Defendant "was coming after Scott Grim as if to hit him." This statement was corroborated by the testimony of the other witnesses who all said the fight was between Defendant and Grim over the bidding on the vacuum cleaners, and that Defendant was not trying to fight Plaintiff. The Court finds that explanation to be credible.

6. In the process of approaching Grim, Defendant pushed Plaintiff and she fell onto the ground. Plaintiff testified that at the time the fight broke out between Defendant and Grim she was already standing between them and did not get out of the way because "it happened so fast." However, Plaintiff told the police that she stepped in between Defendant and Grim to try and stop the fight. Also, Defendant testified that Plaintiff "jumped in front of" himself and Grim. The Court finds that explanation to be credible.

7. After Plaintiff fell to the ground, Defendant continued pursuing Grim but someone grabbed Defendant and restrained him. No physical contact took place between Defendant and Grim. The auction stopped and others immediately assisted Plaintiff. Some of the men in attendance tried to make Defendant leave the Property. Shortly afterwards, Defendant voluntarily left the auction and did not return.

8. Detective Higgins arrived on the Property approximately five (5) minutes later. He was met by Plaintiff. She was crying and appeared to be shaken up but told him she was ok. Detective Higgins took her verbal statement there at the scene. The next day Plaintiff filled out a written statement to the police which was consistent with her verbal statement.

9. Plaintiff did not complain of physical injury or require medical treatment on the day of the incident. She sought treatment in the ensuing weeks.

10. On September 17, 2007, Defendant filed a voluntary chapter 7 bankruptcy petition. Listed, among others, on Defendants' Schedule F - Creditors Holding Unsecured Nonpriority Claims was Plaintiff, for damages caused by an alleged assault in the amount of $7000. The instant complaint was filed on January 4, 2008.

DISCUSSION

Whether or not Defendant is liable to plaintiff for damages is an issue of Ohio law that was not finally determined prior to Defendant's bankruptcy filing. Instead, Plaintiff contends that any liability that Defendant may have for damages is a debt that should be excepted from Defendant's chapter 7 discharge pursuant to 11 U.S.C. § 523(a)(6). *See* 11 U.S.C. § 101(12)(defining "debt" as "liability on a claim") and 11 U.S.C. § 101(5) (defining "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"). *See also In re Glance,* 487 F. 3d 317, 320 (6th Cir. 2007) (noting that, by defining "claim" broadly as any "right to payment" or "any right to an equitable remedy," Congress has adopted the broadest possible definition of "debt"). In sum, the dischargeability of a debt is a matter that is separate from the merits of the debt itself. *See In re Sweeney*, 276 B.R. 186, 195 (B.A.P. 6th Cir. 2002).

Pursuant to § 523(a)(6) of the Bankruptcy Code, a chapter 7 discharge will not discharge an individual debtor from any debt "for willful and malicious injury by debtor to another entity or to the property of another entity." *See* 11 U.S.C. § 523(a)(6). Plaintiff must prove all necessary elements of § 523(a)(6) by a preponderance of the evidence, *Grogan v. Garner,* 498 U.S. 279, 291 (1991); *Barclays/American Business Credit, Inc. v. Adams (In re Adams),* 31 F.3d 398, 394 (6th Cir. 1994), and exceptions to discharge are to be strictly construed in debtor's favor. In determining whether Plaintiff has proved the necessary elements of her case, the bankruptcy court, as trier of fact, must weigh conflicting facts, determine the credibility of witnesses, and draw inferences from the evidence presented. *Investors Credit Corp. v. Batie (In re Batie),* 995 F.2d 85, 88 (6th Cir. 1993); Fed. R. Bankr. P. 8013.

Pursuant to the United States Supreme Court's decision in *Kawaauhau v. Geiger,* a debtor's conduct can be deemed "willful" for purposes of § 523(a)(6) only when the debtor intended both his conduct and the resulting consequences of that conduct. *Kawaauhau v. Geiger,* 523 U.S. 57, 61-62 (1998); *See also Markowitz v. Campbell (In re Markowitz),* 190 F.3d 455, 464 (6th Cir. 1999) ("unless 'the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it,' he has not commited a 'willful and malicious injury' as defined under § 523(a)(6)"). That a reasonable debtor "should have known" that his conduct risked injury to others is simply insufficient. *Markowitz,* 190 F. 3d at 465, n.10. Instead, the debtor must "will or desire harm, or believe injury is substantially certain to occur as a result of his behavior." *Id.* Simply put, § 523(a)(6) requires deliberate or intentional injury. *Geiger,* 118 S. Ct. at 977.

A debtor is deemed to have acted "maliciously" for purposes of § 523(a)(6) of the Bankruptcy Code when his action is taken in conscious disregard of his duties or without just cause or excuse,

however there need not be a showing of personal hatred, spite or ill-will. *Gonzalez v. Moffitt (In re Moffitt),* 252 B.R. 916, 923 (B.A.P. 6th Cir. 2000); *Garcia v. Amaranto (In re Amaranto)*, 252 B.R. 595, 599 (Bankr. D. Conn. 2000); *McNichols v. Shala (In re Shala),* 251 B.R. 710, 713 (Bankr. N.D. Ill. 2000).

Plaintiff contends that Defendant's conduct was willful because (1) the act of placing his hands on her and pushing her to the ground demonstrates a deliberate intent to harm, and (2) Defendant knew this act was substantially certain to result in injury because when someone throws another person down, that person will probably be injured. Defendant does not dispute that he acted deliberately when he charged toward Grim to start a fight with him. He also admitted that he intended to harm Grim. However, Defendant maintains that his conduct with respect to Plaintiff was not willful as that term is used in *Geiger* and *Markowitz* because (1) he did not will, intend, or desire to cause injury to Plaintiff, and (2) he did not believe that injury to Plaintiff was substantially certain to result from his conduct.

The Court has weighed the conflicting facts, evaluated the credibility of the witnesses, and drawn inferences from the evidence presented by Plaintiff and for the reasons that follow cannot conclude that Plaintiff carried the burden of proof required to substantiate her allegations.

First, the undisputed testimony is that Defendant wanted to fight with Grim over the bidding on the vacuum cleaners, and that Plaintiff was not the object of his aggression. *See* Findings of Fact #5 and #7. Plaintiff presented no evidence that Defendant had the will, desire, or intent to harm Plaintiff. Further, Plaintiff voluntarily intervened to try and stop the fight between Defendant and Grim and made no effort to get out of the way. *See* Finding of Fact #6. Thus, this Court cannot reasonably conclude that Defendant believed his actions were substantially certain to result in injury to Plaintiff because he did not know or have warning that she would get in the way when he charged

toward Grim. Defendant simply did not have the time or opportunity to deliberate over the consequences of his conduct with respect to Plaintiff.

Stated succinctly, Plaintiff's statements to the police taken together with the testimony of the other witnesses were not sufficient to support a finding by a preponderance of the evidence that Defendant "willfully and maliciously" injured Plaintiff under the analysis set forth in *Geiger* and *Markowitz***.** *See cf. In Re Thirtyacre*, 36 F. 3d 697(7th Cir. 1994) (debtor had plenty of time to deliberate before finally confronting victim's boyfriend. When the victim got in the way, debtor hit her. This conduct was found to be willful and malicious and therefore nondischargeable).[3] Moreover, Plaintiff's counsel has failed to draw to this Court's attention any authorities that may indicate Defendant's liability under theories of transferred intent to third parties.

CONCLUSION

Based upon the foregoing, the Court finds that Plaintiff has not proven by a preponderance of the evidence that Defendant acted willfully or maliciously pursuant to 11 U.S.C. § 523(a)(6) when he injured Plaintiff. Accordingly, Plaintiff's claim in this matter will not be excepted from Defendant's chapter 7 discharge. A final judgment consistent with this Opinion will be entered separately.

# # #

[3] In *Thirtyacre*, debtor drove from a tavern, to his home, to the victim's home, to the police station, and then back to the victim's home in an effort to find victim's boyfriend, whom he believed was having an affair with his wife. When debtor arrived at the victim's home, she was standing outside with her dog. Debtor approached the house, and the victim demanded that he leave the property. Debtor then approached the victim and hit her in the neck, knocking her down. The Court concluded that based on the lengthy course debtor took prior to arriving at victim's home, he clearly wanted to find victim's boyfriend and had plenty of time to deliberate before finding and confronting him. *See Thirtyacre,* 36 F. 3d at 699-700.