

IT IS SO ORDERED.

Dated: 10:46 AM September 04 2009


MARILYN SHEA-STONUM *ESP*
U.S. Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:)	
)	
AVRIL CURTIS,)	Case No. 08-52970
Debtor)	
)	Adv. Pro. No. 08-5176
JOHN PETERSON,)	
Plaintiff)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
AVRIL CURTIS,)	MEMORANDUM OPINION
Defendant)	
)	
)	
)	

This matter comes before the Court on John Peterson's (the "Plaintiff") complaint to determine the dischargeability of a debt pursuant to 11 U.S.C § 523(a)(2) and (a)(6). The Court held a trial in this matter on August 7, 2009. Appearing at the trial was Warner Mendenhall, counsel for the Plaintiff, and Michael Partlow, counsel for Avril Curtis (the "Debtor"). During the trial Exhibits A, B, and L were admitted into evidence. The Plaintiff, the Debtor, David

Curtis, the Debtor's father, and Jessica Morton, a friend of the Debtor testified.. At the conclusion of the proceeding 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. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the testimony and evidence presented at the trial, the Court's consideration of the demeanor and credibility of the testifying witnesses, the arguments of counsel, the pleadings in this adversary proceeding and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Plaintiff and the Debtor were introduced to each other by a mutual friend in August or September 2006.

2. The Plaintiff and the Debtor engaged in a romantic relationship shortly after meeting one another.

3. The Plaintiff owned a home in Akron, Ohio at the time that he met the Debtor, but he was working in Northern Kentucky during most of the parties' relationship.

4. The Debtor resides in Akron, Ohio and lived in Akron while she was romantically associated with the Plaintiff.

5. The Debtor traveled to Northern Kentucky on weekends to spend time with the Plaintiff during their relationship.

6. At some time prior to November 16, 2006, the Plaintiff asked the Debtor to marry him and the Debtor accepted the Plaintiff's proposal.

7. On November 16, 2006, the Plaintiff purchased an engagement ring (the “Ring”) for the Debtor. The Plaintiff paid \$15,733.47 for the Ring.

8. Both the Plaintiff and the Debtor testified that they discussed getting married in Brazil.

9. The Debtor testified that the parties also discussed having the marriage ceremony performed in Canada or Mexico.

10. The parties discussed the possibility of marrying as early as late December 2006.

11. The Plaintiff met the Debtor’s parents on Thanksgiving in 2006. At that time the Plaintiff asked the Debtor’s father whether or not he had the Debtor’s passport because the Plaintiff wanted to make travel arrangements for the wedding.

12. The Debtor asked the Plaintiff to introduce her to his family, but the Plaintiff never did so.

13. The Debtor made plans for the wedding, including looking at wedding dresses, picking a color theme for the wedding ceremony, and asking her friend Jessica Morton to be her maid of honor.

14. The Debtor testified that some members of her family ran a background check on the Plaintiff. At some point in November 2006 the Debtor’s mother, aunt, and a family friend told the Debtor that the Plaintiff was married. The Debtor did not believe the allegation.

15. At some time late in the relationship between the Plaintiff and Debtor, but before January 1, 2007, the Debtor received a voice mail message from an unidentified woman who claimed that the Plaintiff was her husband.

16. The Plaintiff testified that the Debtor often expressed concern that he was married.

17. The Plaintiff testified that he was not married during his relationship with the Debtor.

18. According to the Plaintiff, sometime in late December 2006, the Debtor and Plaintiff discussed whether or not they should continue with their engagement. Plaintiff claims that the Debtor was supposed to get in touch with him to let him know whether or not she still wanted to get married. The Plaintiff also testified that he asked the Debtor for the Ring back at that time, although he was unable to say when and where that conversation occurred.

19. The Debtor testified that she and the Plaintiff were together on December 31, 2006 and January 1, 2007 and that she did not remember having a discussion about breaking off the engagement on either of those days. Debtor testified that she attempted to contact the Plaintiff on numerous occasions between January 1, 2007 and January 23, 2007. Debtor called the Plaintiff's cell phone numerous times, she attempted to contact the Plaintiff at his hotel in the Cincinnati/Northern Kentucky area, she went to the Plaintiff's Akron residence five to six times, and also attempted to contact the Plaintiff at his father's house to no avail. The Debtor testified that she did not see the Plaintiff again until February 17, 2007, when the Plaintiff came to her home and requested that she return the Ring.

20. After attempting to contact the Plaintiff for three weeks, the Debtor testified that she believed that the Plaintiff had abandoned the relationship and she decided to sell the Ring.

21. The Debtor sold the Ring to the Executive Coin Company on January 23, 2007 for \$7,400.00.

22. The facts of when and how the Plaintiff's and Debtor's engagement came to an end are murky. The Plaintiff and the Debtor gave differing accounts of what occurred between the parties in late December 2006 and how the parties ended their relationship. Despite the differing accounts, both parties testified that they had no contact with one another from at least January 2,

2007 through February 17, 2007. The Court finds credible the Debtor's testimony regarding the numerous attempts the Debtor made to contact the Plaintiff before she decided to sell the Ring.

23. Without objection, the Debtor testified that she was convicted of felony forgery and gave an explanation of that incident. The Plaintiff testified that the Debtor told him of her plea to this charge during their relationship

STIPULATED FACTS

The following facts are not in dispute and are the subject of Joint Stipulations filed by the Plaintiff and the Debtor [docket #17]:

1. The sales receipt, Exhibit A, is authentic and is the sales receipt from the purchase of the Ring.
2. The parties were engaged to be married.
3. The Ring was an engagement ring.
4. The relationship was terminated and the Ring was not returned to the Plaintiff.
5. The Debtor sold the Ring.

DISCUSSION

The Plaintiff alleges that the Debtor is liable to him for the value of the Ring (the "Debt"). The Plaintiff seeks a determination that the Debt is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A)¹ and § 523(a)(6). In Ohio, "most, .., courts hold the view that gifts made in contemplation of marriage, typically exemplified by engagement rings, may be recovered by the donor if marriage does not ensue. *Pine v. Price*, 2002 Ohio 5223, P14 (Ohio Ct. App. 7th

¹The Plaintiff generally alleged in his complaint that the debt was non-dischargeable pursuant to 523(a)(2). At trial Plaintiff's counsel stated that Plaintiff was seeking a determination specifically under 523(a)(2)(A).

Dist. 2002). Whether or not the Debtor is liable to Plaintiff for the Debt is an issue of Ohio law and was not finally determined before the Debtor's bankruptcy filing. Whether or not the Debtor is liable for the Debt is not a matter before this Court. The issue before the Court is whether or not the Debt, if the Debtor were to be found to be liable to Plaintiff, should be excepted from the Debtor's chapter 7 discharge.

In a non-dischargeability action the plaintiff carries the burden of proving the necessary elements by a preponderance of the evidence and "§ 523(a) is strictly construed against the plaintiff." *Knoxville TVA Empls. Credit Union v. Sallie (In re Sallie)* 2009 Bankr. LEXIS 2097, *12-*13 (Bankr. M.D. Tenn July 1, 2009) (citing *Grogan v. Garner*, 498 U.S. 279, 291 (1991), *Rembert v. AT&T Universal Card Servcs., Inc (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998)). Additionally, the dischargeability of a debt is separate from the merits of the underlying debt. *In re Sweeney*, 276 B.R. 186, 195 (6th Cir. B.A.P. 2002).

1. 11 U.S.C. §523(a)(2)(A)

§ 523(a)(2)(A) provides the following:

- (a) A discharge under section 727, . . . , of this title does not discharge an individual debtor from any debt-
 - (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by-
 - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

According to the Sixth Circuit in *In re Rembert*, a creditor must demonstrate the following elements in order for a debt to be determined to be non-dischargeable under § 523(a)(2)(A):

- (1) the debtor obtained money [or something of value] through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) [the creditor's] reliance was the

proximate cause of loss.

Rembert, 141 F.3d at 280-81 (6th Cir. 1998).

The Plaintiff alleges that the Debtor never intended to marry the Plaintiff and that the Debtor accepted the Ring under false pretenses. [Plaintiff's Complaint, pg. 2]. The Court finds no evidence of such a misrepresentation in this case. The evidence presented at trial shows that the Debtor accepted Plaintiff's marriage proposal in good faith and that she intended to marry the Plaintiff when she accepted both the proposal and the Ring. The Debtor engaged in the type of behavior that would be expected of a newly engaged woman; she made wedding plans and she introduced the Plaintiff to her family. At some point after the two became engaged, the Debtor obtained information that led her to believe that the Plaintiff was married or that he had been married in the past. Plaintiff's counsel suggested that if the Debtor believed that the Plaintiff was already married she could not in good faith agree to marry the Plaintiff. This argument does not hold up because the Debtor did not start to question the Plaintiff's marital status until after the parties were engaged. The time of the proposal and the acceptance of the Ring are the key time periods for purposes of determining whether or not the Debtor made material misrepresentations or intended to deceive the Plaintiff when she accepted the Ring. The Plaintiff ignored the utility of any chronological precision in the presentation of his case.

During the trial the Plaintiff attempted to add to the allegations he made in his complaint and alleged that the Debtor intended to deceive the Plaintiff in December 2006 when she decided to keep the Ring and not return it to the Plaintiff. Plaintiff's counsel argued that the Debtor had already decided that she was not going to marry the Plaintiff in late December 2006 and that she deceived the Plaintiff by holding onto the Ring. The Plaintiff did not, however, provide

sufficient evidence to support that argument. The Plaintiff and the Debtor offered differing accounts of how the relationship ended. The Plaintiff testified that he asked the Debtor to return the Ring to him in December 2006, if she had decided not to marry him. The Debtor testified that she did not recall a conversation such as the Plaintiff described and she was unable to get in contact with the Plaintiff for three weeks. Given the varying accounts given by the Debtor and the Plaintiff, it is unclear if the parties had a conversation about terminating the relationship or if the engagement ended due to a lack of communication by the Plaintiff with the Debtor in the first three weeks of January 2007.

The Plaintiff's entire case seemed to center around the fact that the Debtor sold the ring approximately three weeks after the Plaintiff and Debtor last saw one another. This fact alone does not establish that the Debtor made a material misrepresentation to Plaintiff or that she never intended to marry Plaintiff. The Court finds credible the Debtor's testimony that she was undecided about whether or not she wanted to marry the Plaintiff up until the day that she sold the Ring. The Plaintiff failed to carry his burden of proof with respect to the first two elements necessary for a non-dischargeability determination under 523(a)(2)(A). The Court need not assess whether the Plaintiff met his burden of proof with respect to the third and fourth elements.

2. 11 U.S.C. §523(a)(6)

The Plaintiff also claims that the Debt is non-dischargeable pursuant to §523(a)(6). 11 U.S.C. § 523(a)(6) excepts from discharge 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). The Bankruptcy Code does not define the terms "willful" and "malicious," the Supreme Court

clarified that “‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that non-dischargeability takes a deliberate or intentional act that leads to injury.” *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). The Plaintiff bases his claim under § 523(a)(6) on the Debtor’s alleged conversion of the Ring. Under Ohio law, conversion is “the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.” *Joyce v. General Motors Corp.*, 49 Ohio St.3d 93, 96 (1990). At least two Ohio courts have held that “an action in conversion is proper to recover wedding and engagement rings upon termination of the relationship prior to marriage.” *Pine*, 2002 Ohio 5223 at P17; *Lyle v. Durham*, 473 N.E.2d 1216, (Ohio Ct. App. 1st Dist. 1984).

Proving conversion alone does not make a claim non-dischargeable under 523(a)(6). It is not enough for a plaintiff to show a reasonable debtor should have known that his conduct risked injury to Plaintiff. *Markowitz v. Campbell*, 190 F. 3d 455, n.10. (6th Cir. 1999). The debtor must “will or desire harm, or believe injury is substantially certain to occur as a result of his behavior.” *Id.* Section 523(a)(6) requires deliberate or intentional injury. *Kawaauhau*, 523 U.S. at 62. A conversion may be “innocent or technical” or “an unauthorized assumption of dominion without willfulness or malice.” *Davis v. Aetna Acceptance Co.* 293 U.S. 328, 332 (1934) (interpreting §17(2) of the Bankruptcy Act, which is now §523(a)(6)). In this type of case, “what is done is a tort, but not a willful and malicious one.” *Id.* The Plaintiff must show not only that the conversion occurred, but also that the Debtor intended to cause harm or knew that harm was substantially certain to occur due to her actions.

During closing arguments, Plaintiff’s counsel utterly failed to demonstrate how the record evidence could support a finding that Plaintiff’s claim is non-dischargeable under §

523(a)(6). The Plaintiff claimed in his complaint that the injury he suffered was due to the Debtor's conversion of the Ring. Plaintiff's counsel argued that the Debtor's act of selling the Ring was willful and malicious because he asserted that the Debtor was mad and upset about the state of the relationship. This fact alone is not evidence of a willful and malicious conversion. The Plaintiff needed to demonstrate that the Debtor's alleged conversion of the Ring was willful and malicious. Viewed through the lens of conversion, the central question is whether or not the Debtor believed that she had a right to keep the Ring when she sold it. Based upon the Plaintiff's failure to communicate with her, the Debtor's perception that the Plaintiff had abandoned the relationship is supported by the evidence.

If the Plaintiff had demonstrated that the Debtor believed that the Ring was not hers to keep and she sold it despite that belief, he may have been able to establish that the Debtor's actions arose to a willful and malicious injury pursuant to § 523(a)(6). Neither party touched on the Debtor's belief about her right to keep the Ring, and no testimony was elicited with respect to this question at trial. The Court is not able to determine if the Debtor sold the Ring under a belief that the Ring was hers to dispose of or if she sold it believing that she was doing so adverse to the Plaintiff's interests. Therefore, the evidence is insufficient to support a finding that the claim is non-dischargeable under § 523(a)(6).

CONCLUSION

The Plaintiff failed to prove by a preponderance of the evidence that the Debtor made a material misrepresentation pursuant to § 523(a)(2)(A) or that the Debtor acted willfully and maliciously pursuant to § 523(a)(6) with respect to the Debt. Accordingly, based upon the foregoing, the Debt will not be excepted from the Debtor's chapter 7 discharge. A judgement

consistent with this Memorandum Opinion will be entered in this case.

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cc:

via electronic mail

Warner Mendenhall, Counsel for the Plaintiff

Michael Partlow, Counsel for the Debtor

Marc Gertz, Chapter 7 Trustee

via U.S. Mail

John Peterson, Plaintiff

Avril Curtis, Debtor