
John P. Gustafson
United States Bankruptcy Judge

**Dated: December 18 2014**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| In Re: | ) | Case No. 14-30027 |
| | ) | |
| Charles K. Palmer and | ) | Chapter 7 |
| Tina M. Palmer, | ) | |
| | ) | Adv. Pro. No. 14-3032 |
| Debtors. | ) | |
| | ) | Hon. John P. Gustafson |
| Joseph Abraham and | ) | |
| Sue Abraham, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Charles K. Palmer, | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM OF DECISION AND ORDER DENYING MOTION OF PLAINTIFFS JOSEPH ABRAHAM AND SUE ABRAHAM FOR SUMMARY JUDGMENT**

This adversary proceeding is before the court on Plaintiffs Joseph Abraham and Sue Abraham's ("Plaintiffs" or "The Abrahams") Motion for Summary Judgment ("Motion") [Doc. # 18], Defendant's Memorandum in Opposition [Doc. # 19], and Plaintiffs' Reply to

Defendant's Memorandum [Doc. # 20]. Defendant Charles K. Palmer ("Defendant" or "Debtor"), along with his wife Tina M. Palmer, are the debtors in the underlying Chapter 7 case, filed in this court on January 6, 2014. [Case No. 14-30027, Doc. # 1]. Plaintiffs allege in their Complaint that Defendant is liable for allegedly defamatory statements made by the Defendant while answering questions at an Allen Township Zoning Board Public Hearing [Doc. # 1, Main Document] and that the debt is nondischargeable under 11 U.S.C. §523(a)(6).

Count I of the Complaint claims defamation, Count II claims false light invasion of privacy, Count III claims intentional infliction of emotional distress, and Count IV is a request for attorney fees. [*Id.*]. Plaintiffs move for summary judgment on all claims. For the reasons that follow, Plaintiffs' Motion will be denied.

**FACTS**

The pertinent facts in this case all relate to two events: 1) an incident alongside Trowbridge Road; and 2) the statements made by the Defendant at the Zoning Board hearing. The following facts regarding the Zoning Board hearing are undisputed.

Plaintiffs and Defendant both live on Trowbridge Road in Ottawa County. Their houses are located on the same side of the road, with only one house between them. [Doc. # 7]. From the court's review of the record, it is clear that both parties have had numerous issues, many of which have resulted in phone calls being made to the Ottawa Country Sheriff's Department. In a letter from Ottawa County Sheriff Robert L. Bratton to the Ottawa Country Common Pleas Court, he notes that "[t]he Ottawa County Sheriff's Office

has become very familiar with both families. Calls for service number well over 100." [Doc. # 19, p. 29, Defendant's Ex. 4].

At the time of the two important events in this case, Defendant was working as an auto mechanic, and he was seeking approval from the Township Zoning Board to perform mechanical work for customers in a barn located on his property. [*Id.* at p. 6]. On July 20, 2010, Defendant was in attendance at the Allen Township Zoning Board ("Board") hearing. Plaintiffs were also a part of "about 15 other citizens from the neighborhood and the local area" in attendance. [*Id.*].

Both parties provided only short excerpts of the transcript of the "Allen Township Zoning Board Public Hearing" held on July 20, 2010 [Doc. # 18, Ex. A; Doc. # 19, Defendant's Ex. # 7], making it difficult to determine the extent to which the statements made by the Defendant were actually testimony given as a witness, and whether the zoning hearing was quasi-judicial in nature.[1]

At the hearing, Defendant presented his plan to the Board and answered any questions that they had regarding his plan. Plaintiffs were the only individuals present at the hearing who opposed approval of the plan.

Plaintiffs (specifically, Susan Abraham) listed five reasons for opposing the Board granting Defendant the zoning permit. According to the transcript of the Board's hearing, one of the board members addressed each of the five complaints with Defendant. The fifth complaint was in regards to a nightlight that Defendant had attached to his property, which

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[1]/ *See e.g.*, *Barilla v. Patella*, 144 Ohio App.3d 524, 525-536, 760 N.E.2d 898, 906 (OhiApp. 2001); *Gintert v. WCI Steel, Inc.*, 2007 WL 4376178, 2007 Ohio App. LEXIS 5903 (Ohio App. 11th Dist. Dec. 14, 2007).

faced in the direction of the Plaintiffs' property. What follows is taken directly from the Board's transcript:

> Mr. Baker: [Complaint..] Number four. And number five?
>
> Charles Palmer: That's the security light.
>
> Mr. Baker: Okay. How long has that been up?
>
> Charles Palmer: That has been up since a week ago Tuesday - - or actually a week ago Wednesday, I'm sorry, Wednesday. And the reason for that, we've had multiple issues with the Abrahams and they physically tried to run my son and my wife over, and we have charges filed against them.
>
> * * * * * *
>
> Mr. Baker: Excuse me, excuse me.
>
> Charles Palmer: You had asked me why it was there, that's why it was there, it was for our protection because we didn't know what he was going to do next. He assaulted our neighbors, has made threats at us. So the actual sheriff was the one who said, you know, you need to have some sort of security here, I was, like, well, I've got a big light, I'll put it up. And I called and made sure it was okay with the county before I did that.

Doc. # 19, pp. 40-42, Defendant's Ex. # 7.

Defendant's statements at the Board hearing, specifically "we've had multiple issues with the Abrahams and they physically tried to run my son and my wife over, and we have charges filed against them," made while in the presence of approximately fifteen to twenty people, is the alleged willful and malicious act that resulted in Plaintiffs' lawsuit.

Defendant's statements that were made at the Board hearing on July 20, 2010 refer to the second pertinent incident in this case, and the facts regarding the second incident are

disputed. Both parties agree that on July 13, 2010, Tina Palmer was following her son home from his friend's house. Collin Palmer, Defendant's son, was riding a dirt bike on the side of the road, facing the oncoming traffic. At the same time, Plaintiff Joseph Abraham was arriving home and traveling down Trowbridge Road from the opposite direction. The parties disagree about what happened next.

Defendant, based upon his wife's observations that had been communicated to him earlier in the day, alleged the following: 1) That Plaintiff observed Collin Palmer approaching from the opposite direction; 2) that Plaintiff pulled into his driveway and made eye contact with Collin Palmer as he approached; and 3) that Plaintiff "deliberately backed his vehicle into the passing motorcycle driving it off the road and into a ditch." Defendant stated that the vehicle did not make contact with Collin Palmer, but based upon Collin Palmer's testimony in the state court deposition, the vehicle was "close enough to touch."[Doc. # 7, p. 4].

Defendant further alleged that after Plaintiff caused Collin Palmer to drive into the ditch, Plaintiff remained "cross-wise in the road blocking" Defendant's wife's passage. After honking several times at Plaintiff, Plaintiff pulled forward into his driveway and proceeded into his home. [*Id.*] Upon her return home, Defendant's wife called the Sheriff's Department, filed a police report, and an investigation was performed. During the investigation, Defendant's neighbor, Joshua Bryer, was contacted by police and questioned about the incident. Mr. Bryer was in a vehicle behind Defendant's wife as the incident occurred. The Offense Report regarding the incident reflects that Mr. Bryer stated that "Mr. Abraham backed out of the driveway." [Doc. # 18-5, Ex. E].

Plaintiffs, along with their daughter Amber Abraham and their son Collin Abraham, allege that Joseph Abraham backed into his driveway, as opposed to pulling in forward. They further allege that Joseph Abraham "had backed into his driveway somewhat askew and then pulled forward onto the street, straightening his angle to back into the driveway." [Doc. # 18, p. 10]. The offense report states that an officer went and spoke with the Abrahams about the incident, and that Mr. Abraham stated that after he backed into his driveway and realized he was out of position, he pulled out and noticed a dirt bike coming at him. Plaintiff then stated that "he stopped partially in the road and his driveway and allowed the dirt bike to pass." [Doc. # 18-5, Ex. E].

As a result of the incident on the roadside and the statements made by the Defendant at the Board hearing, Plaintiffs filed a complaint in the Ottawa County, Ohio Court of Common Pleas.[2] Defendant and his wife filed a Chapter 7 bankruptcy petition the day before the trial was set to take place. [Doc. # 1]. Plaintiffs timely filed their Adversary Complaint.

## LAW AND ANALYSIS

### I. Summary Judgment Standard

The district court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b) as a civil proceeding arising under a case under Title 11. This proceeding has been referred to this court by the district court under its general order of reference. 28 U.S.C. §157(a); General Order 2012-7 of the United States District Court for the Northern

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[2]/ *Abraham v. Palmer*, Case No. 11CV392. The complaint claims the Defendant intentionally defamed the Plaintiffs willfully and with malice, for saying false information that placed the Plaintiffs in a false light and placed their interests in jeopardy, and for intentional infliction of emotional distress. [Doc. # 1].

District of Ohio. Proceedings to determine dischargeability of a debt are core proceedings that the court may hear and decide. 28 U.S.C. §157(b)(1) and (b)(2)(F). For the reasons that follow, Plaintiffs' Motion for Summary Judgment will be denied.

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment is proper only where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In reviewing a motion for summary judgment, however, all reasonable inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Where the moving party has met its initial burden, the adverse party "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

A genuine issue for trial exists if the evidence is such that a reasonable fact finder could find in favor of the nonmoving party. *Id*. "The non-moving party, however, must provide more than mere allegations or denials . . . without giving any significant probative

evidence to support" its position. *Berryman v. Rieger*, 150 F.3d 561, 566 (6th Cir. 1998).

**II. 11 U.S.C. §523(a)(6)**

Section 523(a)(6) provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is not dischargeable. 11 U.S.C. §523(a)(6). In order to be entitled to a judgment that the debt is excepted from discharge, Plaintiff must prove by a preponderance of the evidence that the injury from which the debt arises was both willful and malicious. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999); *J & A Brelage, Inc. v. Jones (In re Jones)*, 276 B.R. 797, 801-2 (Bankr. N.D. Ohio 2001). The "debt" arising from the injury must also be one that is not subject to a valid defense. *See*, *Niedert v. Rieger*, 200 F.2d 522 (7th Cir. 1999); *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 450–51(2007)("state law governs the substance of claims. . ."); *In re Underwood*, 2013 WL 4874341, 2013 Bankr. LEXIS 3789 (Bankr. N.D. Ala. Sept. 12, 2013).

Addressing the "willful" requirement of §523(a)(6), the Supreme Court agreed that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts" and held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). A willful injury thus occurs when "(i) the actor desired to cause the consequences of the act or (ii) the actor believed that the given consequences of his act were substantially certain to result from the act." *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 307 (B.A.P. 6th Cir. 2004) (*citing Markowitz*, 190

F.3d at 464). Under §523(a)(6), "'malicious' means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent." *Id.* (citing *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)).

Maliciousness is met when a party demonstrates that (1) the defendant-debtor has committed a wrongful act, (2) the defendant-debtor undertook the act intentionally, (3) the act necessarily causes injury, and (4) there is no just cause or excuse for the action. *Vulcan Coals, Inc. V. Howard*, 946 F.2d 1226, 1228 (6th Cir. 1991); *see also, Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001).

In this case at hand, Plaintiffs' nondischargeability claims under §523(a)(6) are all based on alleged defamatory statements made by Defendant at an Allen Township Zoning Board meeting. Defendant's statement was made in response to the Board's questioning, and the allegedly defamatory statements referred to the roadside incident that had occurred seven days prior. In response to Plaintiffs' allegations, Defendant cites to Ohio Revised Code 2739.02, which provides that, in an action for slander "proof of the truth thereof should be a compete defense." Although Plaintiffs argue that Defendant's statements at the Board hearing made it seem that both Mr. And Mrs. Abraham were driving the vehicle ("they physically tried to run my son over"), Defendant states that he clarified the statement by remarking immediately thereafter that "it was for our protection because we didn't know what he was going to do next." He later states that "truth is a defense" to defamation, with regards to his statements made at the Board hearing. [Doc. # 19, pp. 9-10; Doc. # 5, ¶ 31].

In their Motion for Summary Judgment and their Reply to Defendant's Opposition, the Plaintiffs have not met the requirements set forth by both the *Kawaauhau* and *Jercich*

courts. Their claims and allegations have not proven, when viewed in the light most favorable to the Defendant, the existence of a willfully deliberate or intentional injury for purposes of *Kawaauhau*, nor have they met the requirements for maliciousness under *Jercich*. Additionally, their allegations, averments, and exhibits presented to the court regarding their version of the event that took place on July 13, 2010, as opposed to Defendant's version of the same event, have not proven to the court that there is no genuine issue as to any material fact, precluding summary judgment.

Plaintiffs have failed to demonstrate that there are no genuine issues of material fact in this action, as to both the issue of liability and whether Defendant possessed the culpable state of mind required for a nondischargeability determination under §523(a)(6) as a matter of law with respect to the allegedly defamatory statements made by the Defendant.

**THEREFORE**, for all of the foregoing reasons, good cause appearing,

**IT IS ORDERED** that Plaintiffs' Motion for Summary Judgment [Doc. # 18] be, and hereby is, **DENIED.**

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