

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:)	Case No. 02-10306
)	
PETER BILYJ,)	Chapter 7
Debtor.)	
)	
HOUSE OF LAROSE)	Adversary Proceeding No. 02-1151
CLEVELAND, INC.,)	
Plaintiff,)	
)	
v.)	Judge Arthur I. Harris
)	
PETER BILYJ,)	
Defendant.)	

MEMORANDUM OF OPINION AND DECISION

The plaintiff House of LaRose Cleveland, Inc. (LaRose) filed this adversary proceeding seeking a determination that the \$26,458.62 wage benefits paid to the debtor/defendant Peter Bilyj (Bilyj) is a nondischargeable debt under §523(a)(2)(A) due to Bilyj's alleged false representations. LaRose also seeks an award of punitive damages and attorney's fees. For the reasons that follow, the Court finds that the \$26,458.62 wage benefits paid to Bilyj is a nondischargeable debt under §523(a)(2)(A), but that LaRose is not entitled to an award of punitive damages or attorney's fees.

PROCEDURAL BACKGROUND

On January 10, 2002, Bilyj filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. This adversary proceeding was commenced on April 12,

2002, to determine the dischargeability of a debt under § 523(a)(2)(A) of the Bankruptcy Code. This case was transferred to the undersigned judge on October 7, 2002.

A bench trial was held on February 25, 2003. Bilyj's post-trial brief was filed on July 25, 2003 (Docket No. 32). LaRose filed its post-trial brief on August 1, 2003, (Docket No. 36), and the trial transcript was provided to the Court on August 28, 2003. This memorandum constitutes the Court's findings of fact and conclusions of law as required by Rule 7052 of the Federal Rules of Bankruptcy Procedure.¹

FACTS

LaRose's Wage Continuation Program

In January 1999, LaRose implemented its "Wage Continuation Program." Trial Transcript (Tr.) 51-52. Exhibit 1. Under this program, LaRose would pay wage continuation benefits "in all certified workers' compensation claims occurring after December 1998." Exhibit 1. The injured worker was required to apply for

¹ The findings of fact contained in this memorandum reflect the Court's weighing of the evidence and credibility. In so doing, the Court considered the witnesses' demeanor, the substance of their testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language, or nuance of expression. Even if not specifically mentioned in this decision, the Court has considered the testimony of all of the witnesses at trial, as well as all exhibits admitted into evidence and all stipulations.

benefits with the Ohio Bureau of Workers' Compensation (BWC), and if the BWC certified the wage loss claim LaRose would pay the wage continuation benefits (wage benefits) directly to the injured worker. Tr. 48-49. LaRose adopted this type of program because it was less costly for LaRose to pay the benefits directly to the worker than to pay workers' compensation premiums. Tr. 86. Under LaRose's program the injured worker received the amount of benefits calculated by the BWC based upon the application for benefits filed by the worker with the BWC. Thus, LaRose relied on the representations of the injured workers and determinations made by the BWC when paying wage benefits. Tr. 83, 86; Exhibit 27. Although not indicated in writing, LaRose apparently required injured employees to perform light duty when they were able to do so, in order to receive their regular wage. Tr. 51-52.

Bilyj's Injury

Since 1994, Bilyj has been employed as a truck mechanic at LaRose's business, a wine and beer distribution center. Bilyj's job as a truck mechanic requires bending, stooping, twisting, and lifting heavy equipment and parts including tires and springs weighing more than 200 pounds. Tr. 78, 96-97. In February 1999, Bilyj suffered a work-related back injury. Tr. 44-45. Due to the injury, Bilyj received medical benefits and worked "light duty" at LaRose for the

months of February, March, and April 1999. Tr. 30-31, 45, 80. In May 1999, Bilyj applied to the BWC for wage loss claims asserting that he was no longer able to work at LaRose. Tr. 45; Exhibit 30.

The BWC certified Bilyj's wage loss claim. Tr. 48-49. Thereafter, LaRose paid Bilyj weekly wage benefits from May 9, 1999, through December 31, 1999.² Tr. 87. Also in May 1999, Bilyj applied to the BWC for wage loss benefits based on his inability to deliver newspapers at National Delivery Service (NDS). Tr. 55-59; Exhibits 24, 27. The BWC certified Bilyj's claim regarding NDS. As a result, LaRose was required to pay an increased amount of wage benefits to Bilyj. Tr. 58-59. During the time period May through July 1999, Bilyj was actually working for NDS delivering newspapers; however, he did not disclose this to the BWC or LaRose. Tr. 15; Exhibit 17. LaRose paid a total of \$26,458.62 in wage benefits to Bilyj for the period May 9, 1999, through December 31, 1999. Joint Stipulation of Fact No. 5 (Docket # 22). Exhibit 10.

In 2000, the BWC investigated Bilyj regarding his eligibility to receive disability compensation. The BWC and the Industrial Commission of Ohio determined that Bilyj improperly received temporary total disability compensation.

² A portion of the benefits was paid in a lump sum sometime in July 1999, and the balance was paid in weekly installments. Tr. 99.

The basis for this determination was that at the same time Bilyj received disability compensation he was also employed by NDS to deliver newspapers. He was ordered to remit the overpayment of temporary total disability compensation. Exhibits 7-9. The payments that BWC made directly to Bilyj are for periods other than May 9, 1999, through December 31, 1999, and are not the subject of this dischargeability action.

In 2001, LaRose demanded Bilyj repay the \$26,458.62 in wage benefits because Bilyj had received the wage benefits for the same time period as his undisclosed employment at NDS. Exhibit 10. Bilyj has refused to repay LaRose. Tr. 109.

THE PARTIES' POSITIONS

LaRose contends that the entire amount it paid to Bilyj in 1999 – \$26,458.62 – is nondischargeable under § 523(a)(2)(A) because the benefits were paid to Bilyj based upon his false representations that he was not working at the time and unable to perform any work whatsoever. LaRose further contends that its claims for punitive damages and attorney's fees stemming from this debt are likewise nondischargeable. Bilyj contends that he never made any misrepresentations and that the debts should be discharged. Bilyj argues in the alternative that, if this Court determines Bilyj made false representations to LaRose regarding his employment at

NDS, the nondischargeable amount should be limited to \$994.00 – the wages Bilyj received while employed at NDS from May through June 1999.

Debtor/Defendant’s Closing Argument, page 5 (unmarked) (Docket # 32).

ISSUES

- I. Did Bilyj obtain the \$26,458.62 wage benefits from LaRose by false representations, thus making that debt nondischargeable under § 523(a)(2)(A)?
- II. Is LaRose entitled to an award of punitive damages and attorney fees?

JURISDICTION

The Court has jurisdiction in this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and (I).

- I. DID BILYJ OBTAIN THE \$26,458.62 WAGE BENEFITS FROM LAROSE BY FALSE REPRESENTATIONS, THUS MAKING THAT DEBT NONDISCHARGEABLE UNDER §523(A)(2)(A)?

LAW

Section 523 addresses exceptions to discharge and provides, in part,

(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.

11 U.S.C. § 523(a)(2)(A).

In order to establish that a debt is nondischargeable under § 523(a)(2)(A), a creditor must prove the following elements by a preponderance of the evidence:

(1) the debtor obtained money through a material representation 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) its reliance was the proximate cause of loss.

See Rembert v. AT & T Universal Card Servs., Inc., (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998), *cert. denied*, 525 U.S. 978 (1998).

Preponderance of the Evidence

In order to except a debt from discharge, a creditor must prove each element of § 523(a)(2)(A) by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279 (1991). “The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the

party who has the burden to persuade the [judge] of the fact's existence.” *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

DISCUSSION

The Court will review separately each element of the test under § 523(a)(2)(A).

1. Bilyj Obtained Money Through a Material Representation That, at the Time, He Knew Was False or Made with Gross Recklessness as to its Truth.

First, LaRose must prove Bilyj obtained the wage benefits through a material misrepresentation that, at the time, he knew was false or the misrepresentation was made with gross recklessness as to its truth. LaRose has satisfied this first element.

Those factors weighing most heavily in the Court’s evaluation include:

1. On May 3, 1999, Bilyj requested temporary total compensation from the BWC and represented to the BWC that he was unable to work “in any capacity” for any employer for the period May 1, 1999, through June 28, 1999. Exhibit 30, p.1; Tr. 113-14. At the same time Bilyj made this representation, he was employed and compensated by NDS to deliver newspapers for the time period May 1, 1999, through June 22, 1999. Tr. 113-14; Exhibit 17 pp. 1-3, 6, 9, 12, 15, 18, 21, 24.
2. On May 19, 1999, Bilyj presented a doctor's note to LaRose indicating he was unable to work until further notice. Exhibit 3; Tr. 52-53. At the same time Bilyj made this representation to LaRose, he was employed and compensated by NDS to deliver newspapers for

the time period May 1, 1999, through June 22, 1999. Tr. 113-14; Exhibit 17 pp. 1-3, 6, 9, 12, 15, 18, 21, 24.

3. On May 27, 1999, Bilyj presented LaRose with a physician's statement indicating he was "totally and continuously disabled" from his own occupation and other occupations from March 11, 1999, to the present. Exhibit 29. Tr. 54-55. At the same time Bilyj made this representation to LaRose, he was employed and compensated by NDS to deliver newspapers for the time period May 1, 1999, through June 22, 1999. Tr. 113-14; Exhibit 17 pp. 1-3, 6, 9, 12, 15, 18, 21, 24.
4. Videotapes taken of Bilyj in November 1999 show him lifting and carrying newspaper bundles while employed by NDS. Exhibit 4. The videotapes were taken at the same time Bilyj indicated to LaRose that he was unable to work in any capacity.
5. During the period of May 1, 1999, through June 22, 1999, Bilyj never disclosed to LaRose that he was working for NDS. Tr. 32, 37-38, 40-41, 108.

The evidence supports the finding that Bilyj obtained money from LaRose in 1999 through a material misrepresentation that he knew was false – that he was unable to work and was not working *in any capacity*. Accordingly, LaRose has satisfied the first element of the test under § 523(a)(2)(A).

2. Bilyj Intended to Deceive LaRose.

The second element requires LaRose to prove that Bilyj intended to deceive LaRose. LaRose has satisfied this second element. Those factors weighing most heavily in the Court's evaluation include:

1. Bilyj testified that he did not disclose to LaRose that he was working for NDS because LaRose contested his wage loss claim, and he was uncertain if he would receive any wage continuation benefits from LaRose. Tr. 101.
2. In 1999, Bilyj transferred his route into his son's name, although he continued to deliver the newspapers on the route. Exhibit 7; Tr. 20-21, 25-26.
3. Bilyj repeatedly failed to disclose to LaRose that he was delivering newspapers for NDS. Tr. 60.
4. On December 8, 1999, by written statement to LaRose, Bilyj indicated he was unable to work in any capacity. Exhibit 5. At the same time Bilyj made this representation to LaRose, he was employed and compensated by NDS to deliver newspapers. Exhibit 4; Tr. 14-15. Although LaRose did not rely on this false statement in making payments prior to December 8, 1999, this document does evidence Bilyj's intent to deceive LaRose.
5. On May 3, 1999, Bilyj completed a "Request for Temporary Total Compensation" form to submit to the BWC. Tr. 26-30; Exhibit 30. On the form Bilyj indicated that he would be off work due to his disability from May 1, 1999, through June 28, 1999, and he had not worked in any capacity (full time, part time, self employment or commission work) during that time period. In the paragraph above Bilyj's signature the form provides this acknowledgment of truthfulness:

I understand that I am not permitted to work while I am receiving temporary total compensation. I have answered the foregoing questions truthfully and completely. I am aware that any person who knowingly makes a false statement,

misrepresentation, concealment of fact or any other act of fraud to obtain compensation as provided by BWC or who knowingly accepts compensation to which that person is not entitled is subject to felony criminal prosecution and may, under appropriate criminal provisions, be punished by a fine or imprisoned or both.

Bilyj signed this form representing that the information provided was complete and truthful. This form is dated May 3, 1999, and was received by the BWC on May 21, 1999. Tr. 113-14. At the time Bilyj completed this form he was working at NDS. Exhibit 17, pp. 1-2. Furthermore, Bilyj continued to work for NDS through the time period he claimed he would be unable to work in any capacity. Exhibit 17, pp. 6, 9, 12, 15, 18, 21, and 24.

6. The Court finds Bilyj lacks credibility as a witness and has been untruthful during this proceeding and the discovery process. For example, at trial Bilyj admitted that at his deposition he denied ever working for NDS and that he failed to disclose working for NDS in his interrogatories. Tr. 22-23; Exhibit 14.

Therefore, the Court finds that Bilyj intended to deceive LaRose in order to obtain the wage benefits, and the second element of § 523(a)(2)(A) is satisfied.

3. LaRose Justifiably Relied on the False Representation.

The third element requires LaRose to prove that it justifiably relied on Bilyj's misrepresentations in paying the wage benefits. LaRose has satisfied this third element. Those factors weighing most heavily in the Court's evaluation include:

1. Upon the BWC's certification of Bilyj's claim for temporary total compensation, LaRose was required to pay the wage benefits to Bilyj. Exhibit 1. In determining that wage benefits were to be paid, Al Scott justifiably relied on the information included in Exhibit 30, which included Bilyj's representation that he was not working in any capacity and his signature indicating that all information provided was complete and truthful. LaRose justifiably relied on this information, provided by Bilyj on May 3, 1999, in determining that it was required to pay wage benefits to Bilyj. Exhibit 30; Tr. 48-49.
2. LaRose's reliance was further justified because Bilyj continued on several occasions to make misrepresentations regarding his inability to work and concealed the fact that he was working for NDS in conversations with Al Scott. Tr. 59-60.

The evidence before the Court indicates that Bilyj continuously represented to LaRose, in both oral statements and through documents submitted to LaRose and the BWC, that he was unable to perform work of any kind. Although Bilyj's representations were untrue, no evidence to the contrary was available to LaRose. LaRose was justified in relying on Bilyj's representations in paying the benefits.

4. LaRose's Reliance Was the Proximate Cause of Loss.

The fourth and final element requires that LaRose's reliance on Bilyj's misrepresentations be the proximate cause of LaRose's loss. This element is also satisfied. LaRose paid \$26,458.62 in wage benefits because it was required to do so based upon the BWC certifying that Bilyj was entitled to wage loss benefits. LaRose also relied on Bilyj's continued misrepresentations that he was unable to

perform any type of work in continuing to pay the benefits. Tr. 61-62; Exhibits 5 and 10.

Collateral Estoppel

LaRose has submitted a BWC Administrative Order and two subsequent appellate decisions of the Industrial Commission of Ohio in support of its argument that Bilyj's fraudulent conduct has been established by these decisions under the doctrine of collateral estoppel.³ Exhibits 7-9. Although LaRose asserts that the wage benefits it paid Bilyj are nondischargeable under principles of collateral estoppel, the Court need not address this argument because each of the elements under § 523(a)(2)(A) has already been established at trial by a preponderance of evidence. In addition, the precise collateral estoppel effect of these administrative decisions is unclear because they involved time periods other than those at issue in this case – *i.e.*, other than May 9, 1999, through December 9, 1999, and because none of the three administrative decisions discusses any representations made by Bilyj to LaRose.

³ The issue of whether a decision by the Industrial Commission of Ohio has a preclusive effect on any subsequent bankruptcy adversary proceedings is controlled by the standards stated in *Corzin v. Fordu, (In re Fordu)*, 201 F. 3d 693, 703-704 (6th Cir. 1999). See *Bureau of Workers' Compensation v. Foster (In re Foster)*, 280 B.R. 193, 203 (Bankr. S.D. Ohio 2002) (prior decision of Industrial Commission of Ohio was entitled to preclusive effect in subsequent § 523(a)(2)(A) nondischargeability proceeding after application of issue preclusion standards as stated in *Fordu*).

II. IS LAROSE ENTITLED TO AN AWARD OF PUNITIVE DAMAGES AND ATTORNEY’S FEES?

LAW

The United States Supreme Court has held that punitive damages and attorney’s fees, if provided for by state law on account of the debtor’s fraud, are also excepted from discharge under § 523(a)(2)(A). *Cohen v. De La Cruz*, 523 U.S. 213 (1998).⁴ In Ohio, punitive damages are awarded only with a showing of actual malice or conduct characterized by hatred, ill will, “spirit of revenge,” retaliation or conduct that is particularly gross or egregious. *Combs Trucking, Inc. v. International Harvester Co.*, 12 Ohio St.3d 241, 466 N.E.2d 883 (1984). See *Logsdon v. Graham Ford Co.*, 54 Ohio St.2d 336, 339, 376 N.E.2d 1333 (1978) (gross or malicious fraud supports an award of punitive damages but “a bare case of fraud” does not).

In the present case, LaRose’s claims for punitive damages and attorney’s fees are unliquidated, *i.e.*, there has been no state or federal court judgment fixing an amount of punitive damages or attorney’s fees. Nor has any court found that the elements entitling LaRose to punitive damages or attorney’s fees have been

⁴ Although prejudgment interest, if available under state law, would also be nondischargeable, LaRose is no longer seeking an award of prejudgment interest. Tr. 125-26.

established by either a preponderance of the evidence or by clear and convincing evidence. Nevertheless, the absence of a prior judgment does not prevent a bankruptcy court from entering a judgment that fixes the amount, if any, of these unliquidated claims in the context of determining the nondischargeability of the underlying debt. *See* 28 U.S.C. § 157(b)(2)(B); *In re McLaren*, 990 F.2d 850, 853-54 (6th Cir. 1993)(bankruptcy court can enter judgment as to amount of unliquidated debt as well as determine debt's nondischargeability).

Clear and Convincing Evidence

The burden of proving entitlement to punitive damages is on the plaintiff and must be satisfied by clear and convincing evidence. *Cabe v. Lunich*, 70 Ohio St.3d 598, 601, 640 N.E.2d 159 (1994). The Ohio Supreme Court has defined “clear and convincing evidence” as that evidence “which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cleveland Bar Association v. Cleary*, 93 Ohio St.3d 191, 198, 754 N.E.2d 235 (2001) (applying clear and convincing standard to disciplinary proceedings involving judicial misconduct), *citing Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954) (applying clear and convincing standard for actions to rescind a contract procured by fraudulent representations). *Accord Brooks v. American Broadcasting Co.*, 999 F.2d 167, 171 (6th Cir. 1993)

(applying Ohio's clear and convincing standard to defamation claim).

The decision to award punitive damages is within the trial court's discretion. *See Cabe v. Lunich*, 70 Ohio St.3d at 602-03. In Ohio, where punitive damages are proper, the aggrieved party may then also recover attorney's fees. *Villella v. Waikem Motors, Inc.*, 45 Ohio St.3d 36, 543 N.E.2d 464 (Ohio 1989). At trial the parties agreed that an award of punitive damages must be determined before the Court can award attorney's fees to the prevailing party. Thus, the Court must determine whether LaRose is entitled to punitive damages before it can address the issue of an award of attorney's fees.

DISCUSSION

To establish malice for an award of punitive damages, the plaintiff must show that the defendant possessed either (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *See Cabe v. Lunich*, 70 Ohio St.3d at 601.

Upon review of the record, the Court finds that LaRose has failed to establish, by clear and convincing evidence, that Bilyj acted with malice regarding

the fraudulent representations he made to LaRose. The Court simply is not left with a “firm belief or conviction” that Bilyj acted with hatred, ill will, a spirit of revenge or a conscious disregard for the rights and safety of others that has a great probability of causing substantial harm to LaRose. *See Cleveland Bar Association v. Cleary*, 93 Ohio St.3d at 198 (defining clear and convincing standard), *citing Cross v. Ledford*, 161 Ohio St. at 477. Indeed, even if the standard were a mere preponderance of the evidence, the Court would find that LaRose has failed to establish that Bilyj acted with the requisite malice to support an award of punitive damages. Thus, LaRose has not succeeded in its burden to show that punitive damages should be awarded.

Those factors weighing most heavily in the Court’s evaluation include:

1. Bilyj was indeed unable to perform the heavy work required for his job as a truck mechanic at LaRose, even though he could and did perform light work while delivering newspapers for NDS. Tr. 103; Exhibit 29.
2. Bilyj was also unable to perform any work, including newspaper delivery work, for an unknown period of time when Bilyj was incapacitated as a result of back surgery sometime in the summer of 1999. Tr. 15, 102.
3. During 1999, there was uncertainty regarding LaRose’s unwritten policy for light work as well as the availability of such light work for truck mechanics such as Bilyj. Tr. 94-95.

While none of these factors excuses Bilyj’s intentional misconduct and deception that continued even through the discovery process of this litigation, the Court does

not believe that this conduct evinces the actual malice required for an award of punitive damages under Ohio law.⁵ Because the Court fails to find that punitive damages are appropriate here and will be denied, LaRose's request for attorney's fees will also be denied.

CONCLUSION

For the foregoing reasons, the Court finds that LaRose has satisfied all the elements under § 523(a)(2)(A) by a preponderance of the evidence, and the \$26,458.62 in wage loss benefits LaRose paid to Bilyj is a nondischargeable debt under § 523(a)(2)(A). The Court further finds that LaRose has failed to establish that it is entitled to punitive damages or attorney's fees.

A separate judgment shall be entered in accordance with this memorandum of opinion and decision.

/s/ Arthur I. Harris 12/02/2003
Arthur I. Harris
U.S. Bankruptcy Judge

⁵ Moreover, even if Bilyj's misconduct fell within the category for which punitive damages could be awarded under Ohio law, this Court, in the exercise of its discretion, *see Cabe v. Lunich*, 70 Ohio St.3d at 602-03, would decline to award punitive damages to LaRose for the same reasons noted above. The Court is satisfied that imposing a nondischargeable debt in excess of \$26,000 on a 53 year old truck mechanic, who rents an \$835 per month apartment for himself and his two sons, is sufficient punishment for this intentional misconduct.