

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 04-34950
)	
Jerry Diebert,)	Chapter 7
)	
Debtor.)	Adv. Pro. No. 04-3360
)	
Joseph Diebert,)	Hon. Mary Ann Whipple
)	
Plaintiff,)	
v.)	
)	
Jerry R. Diebert,)	
)	
Defendant.)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on Plaintiff Joseph Diebert's complaint to determine dischargeability of a judgment debt owed to him by his father, Defendant Jerry Diebert. Plaintiff alleges that the debt should be excepted from Defendant's discharge under 11 U.S.C. § 523(a)(6).

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and the general order of reference entered in this district. Actions to determine dischargeability are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I). This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that \$11,604.72 of the debt in issue is not dischargeable.

FINDINGS OF FACT

Plaintiff is 21 years old and lived with his father, Defendant Jerry Diebert, until after his senior

year in high school. According to Defendant, Plaintiff has been diagnosed with attention deficit disorder and is learning disabled such that he has difficulty reading and writing. As a result, Plaintiff attended special education classes throughout his high school years.

In May 2001, when Plaintiff was 18 years old and a junior in high school, he was assaulted in the school cafeteria by an unnamed individual. As a result of the assault, Plaintiff sustained a broken jaw and chipped teeth that required significant medical and dental treatment, including having his jaw set and wired shut for 6 to 8 weeks. According to Defendant, Plaintiff endured a great deal of pain during his recovery and incurred medical and dental expenses totaling approximately \$14,000. As Plaintiff was still a dependent at the time, Defendant's medical and dental insurance covered his treatment, paying 80 percent for medical treatment and 60 percent for dental treatment and prescriptions. Defendant paid the balance, as well as otherwise providing for Plaintiff's support while he was in high school. Of the total amount of medical and dental expenses, \$7,400 was incurred as a medical expense for setting Plaintiff's fractured jaw, of which Defendant paid 20 percent, or \$1,480. While it is not clear whether the \$6,600 balance represents medical, dental or prescription expenses, at most, Defendant paid 40 percent of those costs, or \$2,640. Thus, Defendant paid, at most, a total of \$4,120 in medical and dental expenses relating to Plaintiff's injury. At Defendant's insistence, a lawyer was engaged to formally pursue the claim after the assailant's parents backed out of an informal arrangement to pay the medical expenses resulting from Plaintiff's injuries.

In August, 2002, while Defendant and his wife were out of town, Plaintiff held an unauthorized party at his father's house. It is undisputed that Defendant's damages as a result of the party total \$18,170. Plaintiff was arrested the night of the party. Although there is some dispute as to whether Plaintiff returned to his father's house to live after his release or went to live with his mother, he did return at least by some time in October, 2002 and agreed to reimburse Defendant for his losses.

On October 20, 2002,¹ Plaintiff received a check made payable to him in the amount of

¹The evidence varies as to the date of receipt of the settlement check and its deposit. The court's notes show that Jerry Diebert testified twice that the date was October 20, 2002. Documentary evidence indicates that the deposit

\$33,894.72 as settlement for the injuries he sustained as a result of the assault in May, 2001.² He and his father went together to counsel's office to pick up the check. When questioned as to whether Plaintiff signed the settlement check at the attorney's office, Defendant testified that it was not signed at that time. He further testified that he told Plaintiff, "If we get in an accident and it blows away, *your* money is gone." (Emphasis added). But Plaintiff later endorsed the check and Defendant deposited it in his own savings account at National City Bank.

The parties' testimony differs regarding the circumstances surrounding that deposit. Defendant testified that Plaintiff went in the bank with him and knew the check was being deposited in Defendant's account. Defendant further testified that Plaintiff signed the check over to him in order to reimburse him for such things as missing work to take Plaintiff to doctor appointments, buying a food processor used to puree foods while Plaintiff's jaw was wired, paying for medical expenses and other costs of support, as well as reimbursing him for damages caused by Plaintiff's party. Plaintiff, on the other hand, testified that he went with Defendant to the bank but waited in the car while Defendant went in. He testified that Defendant was supposed to deposit the check in an account he was to open in Plaintiff's name as Plaintiff did not have a bank account, at National City or otherwise. He testified that he and his father had discussed Plaintiff using the money to buy a car and investing the balance and that he had no agreement with Defendant regarding the money. He also testified that he had argued with his father on the day of the deposit after learning that the money was deposited in his father's account, telling him that "I should have *some* of it."

occurred on October 30, 2002. See Plf's Ex. 1, Defendant's Answers to Interrogatories, Answer No. 2; Plf's Ex. 6, Defendant's October, 2004, bank statement, showing deposit of \$32,894.72 on October 30, 2002. The court need not decide which is the correct date, as the exact date as between the two is not material to the outcome of this adversary proceeding. The evidence also varies as to the amount of the check. The state court found that the sum received was \$33,894.72, with a check of \$28, 894.72 and \$5,000.00 held back. That differs from the evidence on this record, which includes an interrogatory response stating that the check was \$33,894.72. See Plf's Ex. 1. Defendant's bank records show a deposit of \$32,894.72. See Plf's Ex. 6. The court does not need to determine what the amount was, because Plaintiff is claiming a maximum of \$15, 724.72 as nondischargeable in this proceeding.

² An additional five to seven thousand was withheld by counsel in the event additional medical bills were received. Plaintiff eventually obtained the balance after such bills were paid. Those funds are not part of the debt owed to Plaintiff by Defendant. There is no dispute that Plaintiff received those funds.

The court finds Plaintiff's testimony to be credible only in part. Considering Plaintiff's

education and learning disabilities, the court finds it likely that he believed his father could open a bank account in Plaintiff's name without him being present. But the court does not believe his testimony that he had no agreement with his father regarding the settlement proceeds. Rather, the court finds that the parties had some understanding with respect to part of the proceeds. That Plaintiff argued only that he should have *some* of the money after learning that his father had deposited all of it in his own account lends support to this finding. As the court found above, Plaintiff had agreed to reimburse Defendant for his damages resulting from Plaintiff's party.³ Those damages total \$18,170 as determined by the state court. Plaintiff was not working at the time. Finding Defendant's testimony credible on this issue, the court finds that the parties had agreed that such reimbursement would be paid from a settlement or award in Plaintiff's personal injury action.

The court also finds that the parties had an understanding at the time the state lawsuit was filed that Plaintiff's medical expenses paid by Defendant would be reimbursed from any recovery in that action. Initially, Plaintiff did not want to take legal action against the student who had assaulted him. But when the parents of the student did not perform under an oral agreement with Defendant to pay for medical expenses, and on Defendant's insistence, the claim was pursued by counsel. Thus, the main impetus for taking legal action was to obtain reimbursement of medical expenses. Indeed, as indicated by the fact that the personal injury attorney retained a portion of the settlement to pay any additional medical bills that would be submitted by service providers, Plaintiff's state law claim sought and the settlement proceeds included recovery for those expenses. These facts convince the court that even if Plaintiff had not expressly agreed to reimburse Defendant for medical costs, he had impliedly agreed to do so when the claim was turned over to counsel to pursue.

³ At trial, both parties referred to the state court judgment in the action brought by Plaintiff against Defendant to recover the settlement proceeds. The amended Judgment Entry and the Memorandum Decision and Judgment Entry in the state action is attached to Plaintiff's complaint in this proceeding and incorporated by reference in paragraph 7 of the complaint, which paragraph was admitted by Defendant. The state court specifically found that "[a]s a condition of returning to reside in the Defendant's home, the Plaintiff agreed to reimburse Defendant for his losses." (Complaint, Ex. B).

However, the court finds Plaintiff's testimony credible that there was no agreement to reimburse Defendant for any other costs associated with Plaintiff's support, such as food, clothing,

medical or dental expenses unrelated to his assault, etc. Plaintiff was eighteen years old and attending high school at the time he was assaulted and sustained injuries requiring medical attention. Under Ohio law, the parental duty of support continues beyond the age of majority as long as the child attends high school on a full-time basis. Ohio Rev. Code § 3103.03(B). Defendant's testimony that he expected and that Plaintiff agreed to reimburse him for such expenses is not credible. The court's conclusion is bolstered by the fact that very soon after the settlement check was deposited in his father's account and after Plaintiff had argued with Defendant regarding Plaintiff's entitlement to a portion of the proceeds, Plaintiff sought the advice of counsel, on November 7, 2002, in order to recover the funds to which he was entitled but which Defendant refused to turn over to him.

After Defendant deposited the \$33,894 in his savings account on or about October 30, 2002, he made a number of large withdrawals and, by December 31, 2002, there was a zero balance in the account. As Defendant answered in response to an interrogatory asking "[s]tate where the funds are presently located," "[t]here are no funds." Plf's Ex. 1, Defendant's Answers to Interrogatories, Answer Number 8. Defendant does not dispute that by December 31, 2002, the settlement funds were completely exhausted. When questioned regarding the disposition of the funds, Defendant was evasive and repeatedly referred to expenses paid before even receiving the settlement, including expenses for Plaintiff's support after the assault and while he was still in high school. He testified that the money was only spent on "necessities" for Plaintiff, his sister and the household, but really had no explanation for how and where it was all spent in such short time. Defendant also testified that he gave Plaintiff \$5,500 shortly after receiving the settlement check. Plaintiff denies this, and Defendant was vague and evasive as to when this allegedly occurred. The court finds this testimony is not credible.⁴

⁴In telling contrast, Defendant was surprisingly firm in being able to testify that without a shred of doubt he was not at a casino in Detroit on the specific date of November 4, 2002, indicating that could not have been in Detroit because that was "a change of watch night" at work.

In the action brought by Plaintiff against Defendant in order to recover the settlement funds, the state court found that Defendant owed Plaintiff the sum of \$15,724.72 after setting off the amount that Plaintiff owed Defendant for the damages resulting from Plaintiff's unauthorized party.

(Complaint, Doc. #1, ¶ 7; Answer, Doc. #4, ¶ 3). Although Plaintiff indicated at trial that he was not proceeding on grounds of res judicata or collateral estoppel, Plaintiff seeks to except only \$15,724.72 from Defendant's Chapter 7 discharge.

LAW AND ANALYSIS

Plaintiff alleges that Defendant converted for his own use \$15,724.72 of the proceeds received in settlement of Plaintiff's personal injury action and seeks a determination that this amount is nondischargeable under § 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). The plain language of the statute requires that the debt be for an injury that is both willful and malicious. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999). The party seeking the exception to discharge bears the burden of proof on each element of his claim by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Addressing the willful requirement of § 523(a)(6), the Supreme Court explained 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, 61-62 (1998). The Court found that a more encompassing interpretation could place within the excepted category a variety of situations "in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor." *Id.* at 62. In addition to proving a "willful" injury, Plaintiff must also demonstrate that Defendant acted maliciously. *Markowitz*, 190 F.3d at 463 (holding the absence of either the willful or malicious requirement creates a dischargeable debt). Under § 523(a)(6), "[m]alicious' means in conscious disregard of one's duties or without just cause or excuse." *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986); *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 308 (B.A.P. 6th Cir. 2004).

Before *Geiger*, it was well-established in case law that debts resulting from conversion of collateral may be excepted from discharge under § 523(a)(6). *National CityBank v. Wikel (In re Wikel)*, 229 B.R. 6, 9 (Bankr. N.D. Ohio 1998). In dicta in *Geiger*, the Supreme Court noted that while “not every tort judgment for conversion is exempt from discharge,” those involving willful and

malicious injury as opposed to negligent or reckless acts of improper dominion over the property of another may still meet the standard under § 523(a)(6). *Geiger*, 523 U.S. at 64. It is therefore clear that conversion continues to be a basis for nondischargeability under § 523(a)(6), as long as it was committed with the requisite intent to cause harm and not merely negligently or recklessly.

Under Ohio law, conversion is defined generally as a wrongful or unauthorized act of control or exercise of dominion over the personal property of another which deprives the owner of possession of his property. *Taylor v. First Nat. Bank of Cincinnati*, 31 Ohio App. 3d 49, 52 (1986). In cases involving the conversion of money, as in this case, an additional and more exacting standard is employed. In *Howard v. McWeeney (In re McWeeney)*, 255 B.R. 3 (Bankr. S.D. Ohio 2000), the court explained the Ohio standard as follows:

Under Ohio law an action for conversion of *money* arises only where: (1) there exists an obligation on the part of the defendant to deliver to the plaintiff specific money; and (2) the money is capable of identification. *Haul Transport of VA, Inc. v. Morgan*, No. CA 14859, 1995 WL 328995, at *3-4 (Ohio Ct. App. June 2, 1995); *NPF IV, Inc. v. Transitional Health Servs.*, 922 F. Supp. 77, 81 (S.D. Ohio 1996). . . . To establish the first element . . . the plaintiff must demonstrate that the defendant owes an obligation to deliver “identical” money as opposed to a certain sum of money. *Haul Transport*, 1995 WL 328995 at *4. The latter situation creates only an indebtedness stemming from a debtor-creditor relationship. . . . [T]he second element that must be shown under Ohio law to support a claim for tortious conversion of money is that the specific money that is to be set aside by promise, agreement or fiduciary duty must be identifiable.

Id. at 5-6. But unlike a claim under § 523(a)(6), in order to prevail on a state law conversion claim, a plaintiff need not demonstrate intent or wrongful purpose. *Id.* As *Geiger* instructs, a debt will be excepted from discharge due to conversion of Plaintiff’s settlement monies only to the extent there exists the requisite intent to cause harm.

In this case, Defendant had an obligation to deposit into an account or otherwise preserve for Plaintiff \$11,604.72. This amount is the balance of the settlement check entrusted to him by Plaintiff after deducting \$18,170 as reimbursement for damages resulting from Plaintiff's unauthorized party⁵ and \$4,120 as reimbursement for medical and dental expenses.⁶ The settlement check was specifically identifiable at the time it was entrusted to Defendant's care. *See id.* at 6 (noting that courts have found notes entrusted to a defendant's care constitute money capable of identification). By depositing the entire check into his own account and refusing to turn any of it over to Plaintiff, Defendant exercised an unauthorized dominion and control over Plaintiff's funds. The evidence shows that Plaintiff quickly confronted and argued with Defendant regarding his exercise of control over all of the funds but that Defendant refused to turn any of the funds over to him, requiring Plaintiff to resort to legal help to help recover his money. The court finds it significant that Plaintiff sought legal help to get his money very quickly after the entire check was deposited by his father.

After depositing the check, the settlement proceeds to which Plaintiff was entitled were dissipated by Defendant over the course of just two months. On these facts, the court finds that Defendant had the requisite intent to deprive Plaintiff of \$11,604.72 to which he was entitled and to, therefore, cause him injury. The court's conclusion is bolstered by Defendant's own testimony at trial. Specifically, he testified at trial that he told Joey that if the check was endorsed before they got to the bank and it blew away, then "your", meaning Joey's, money will be gone. Defendant also made the statement at trial that he never used any of "his", i.e. Joey's, money to gamble. This testimony shows that Defendant knew when it was received that he was depositing his son's money. Ergo, when he dissipated all of it, he knew he was dissipating his son's money. This demonstrates an intent to cause injury to his son's interests, not just intentional acts in the deposit and dissipation of money that happened to injure his son.

Having demonstrated a willful injury and thus satisfying the first element of proof under § 523(a)(6), Plaintiff must also prove that the debt owed by defendant is the result of a malicious injury. *See Markowitz,*

⁵ Although there is no indication that the parties had agreed upon the amount of damages sustained by Defendant at the time Plaintiff entrusted the settlement check to him, Plaintiff's complaint alleges conversion by Defendant of only \$15,724.72, the balance after deducting Defendant's damages as determined in the state court action. In addition, at trial Plaintiff indicated that he was pursuing his claim only with respect to the amount of the settlement check less Defendant's damages. Thus, the court will assume that Defendant was authorized to withhold \$18,170.

⁶ It is Plaintiff's burden to prove the extent of the debt that he alleges to be nondischargeable. Plaintiff having failed to offer any evidence on the medical and dental expenses paid by Defendant, the court finds on the evidence before it that \$4,120, the most Defendant would have paid, is the appropriate amount in determining the dischargeability of Defendant's debt owed to Plaintiff.

190 F.3d at 463. As indicated earlier, under § 523(a)(6), “[m]alicious’ means in conscious disregard of one’s duties or without just cause or excuse.” *Wheeler*, 783 F.2d at 615;

Trantham, 304 B.R. at 308. For the same reasons discussed above, the court finds that Defendant’s debt was the result of a malicious injury. There was no just cause or excuse shown at trial for Defendant’s exercise of dominion and control over and subsequent dissipation of *all* of the funds Plaintiff was awarded in the settlement. The parties argued about the money quickly. Plaintiff quickly sought legal advice. Defendant cannot credibly argue that his son acquiesced in his use of all of the money, or that he was under the impression that his son so acquiesced. The lack of just cause or excuse is sadly enhanced by the relationship of the parties as father and son. At trial, Defendant seized upon every possible opportunity to dig at his son’s perceived behavioral and intellectual shortcomings and character. Most of these opportunities were completely non-responsive to the question asked and wholly gratuitous. The problems of his son according to his own testimony only emphasize the total disregard of Defendant’s duties to his son, whether beyond the age of majority or not. Defendant’s trial testimony clearly showed his personal belief that his son was untrustworthy, unemployable and incapable of handling a large sum of money, which was all the more reason for Defendant to handle it properly and not dissipate it all in ways he cannot explain when his son’s ability to support himself was always in doubt in his mind.

CONCLUSION

For the foregoing reasons, the court finds that \$11,604.72 of the \$15,724.72 debt owed to Plaintiff by Defendant is nondischargeable under 11 U.S.C. § 523(a)(6). A separate judgment in accordance with this Memorandum of Decision will be entered by the court.

Mary Ann Whipple
United States Bankruptcy Judge