Dated: June 12 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-35956
	)	
Ronnie M. Spence,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 05-3345
	)	
State Farm Fire & Casualty Co.,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Ronnie M. Spence,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on State Farm Fire & Casualty Co.'s ("State Farm") complaint to determine dischargeability of a debt allegedly owed to it by Debtor Ronnie Spence. State Farm alleges that it is subrogated to the rights of its insured to collect a debt for theft of property for which State Farm paid its insured. State Farm alleges that the debt should be excepted from 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 Defendant is entitled to judgment in his favor.

FINDINGS OF FACT

On or about July 18, 2004, numerous valuable items were stolen from the home of Roger Coe and his wife while they were vacationing. The Coes had made arrangements with their neighbor's niece, who was staying with the neighbor at the time, to take care of their dogs while they were on vacation. Erica Smith, the niece, was permitted to enter the Coes' home to care for the dogs and let the dogs outside on a daily basis. On at least two occasions, including the evening of July 18, 2004, Erica allowed some friends to accompany her to the Coes' home. On July 18, 2004, Defendant, along with friends Manny Torres and Lonnie Good, went with Erica to the Coes. According to Defendant, Erica also invited others to the Coes' house that evening and allowed her guests to drink alcohol found in the house. Defendant testified that he was at the house for a couple of hours and that no one was in the house when he left with Erica. He further testified that he did not steal any property and did not see anyone steal any property from the Coes' home.

Detective Scott Smith, a Toledo police officer, testified that he conducted an interview of Defendant on September 29, 2004, in connection with an investigation of the theft. Defendant told Detective Smith the following. At the time of the interview, Defendant was aware of the theft at the Coe residence. After the property was discovered missing, Erica called him and accused him of stealing the property. According to Defendant, he did not take any of the property but told Erica that he would try to get some of the property back. He then called Manny Torres and Lonnie Good and others to inquire about the property. He claimed that he recovered baseballs belonging to Roger Coe from an individual named Bunky Campos. Although he did not pay Bunky for the baseballs, he lied and told Erica and her family that he paid $300 for them and received that amount from them. He also told Detective Smith that he did not see anyone take any property from the Coe residence.

After returning from their vacation, the Coes submitted a claim under their homeowners' policy to

their insurer, State Farm, for the stolen property in the amount of $51,000. Because the baseballs that were stolen had been recovered, the Coes did not include their value in the claim submitted. State Farm paid a total of $31,186.91 to the Coes, an amount less than what they claimed due to certain policy exclusions and limits.

Defendant was later charged with a theft offense in connection with the property stolen from the Coe residence. The charges were ultimately dismissed after Roger Coe was offered and agreed to accept full restitution in the amount of approximately $20,000 ($51,000 less the amount paid by State Farm). Defendant's mother testified that her son's goal was to become a police officer and she did not believe he would have stolen the Coes' property. She and her father, therefore, obtained loans in order to pay the restitution in order to ensure that Defendant would not have a felony record.

LAW AND ANALYSIS

State Farm alleges that, as subrogee to the rights of the Coes, Defendant owes it a debt for amounts paid to the Coes under their insurance policies for property stolen from their home and that such debt is nondischargeable under § 523(a)(6). That section provides in relevant part as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –
>
> . . . .
>
> (6) 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). In order to be entitled to a judgment that the debt is excepted from discharge, State Farm must prove by a preponderance of the evidence that (1) Defendant owes it a debt, and (2) that the injury from which the debt arises was both willful and malicious. *See 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).

State Farm, as subrogee of the Coes, may assert the nondischargeability of any debt created by the theft of property from the Coe residence to the extent of the subrogation. *See S.J. Groves & Sons Co. v. Peters (In re Peters)*, 90 B.R. 588, 604 (Bankr. N.D.N.Y. 1988); *Fireman's Fund Ins. Co. v. Dynda (In re Dynda)*, 19 B.R. 817, 818 (Bankr. M.D. Fla. 1982); *Reitzel v. DeLong (In re DeLong)*, 228 B.R. 406 (Bankr. N.D. Ohio 1998). However, it must first establish that the alleged debt is owed by Defendant. State Farm has failed to prove that element of its § 523 claim.

State Farm offered testimony proving that Defendant, along with others, was at the Coe residence

on the evening that the theft occurred. However, the mere presence of a person at the scene of a crime, without more, is not sufficient to prove that the individual participated in any manner in carrying out the crime. *See, e.g., United States v. Searan*, 259 F.3d 434, 445 (6th Cir. 2001); *State v. Lett*, 160 Ohio App. 3d 46, 52 (2005). Except for certain baseballs stolen from the Coe residence that were returned by Defendant, there is no evidence connecting Defendant to any of the stolen property. With respect to the baseballs, Defendant testified that he recovered them from a third party after making inquiry regarding the theft. At most, the court could find his testimony is not credible and find that Defendant stole the baseballs. But the baseballs were returned to Roger Coe, and no insurance proceeds were paid by State Farm on their account. Thus, State Farm is not subrogated to any debt on account of the theft of the baseballs.

State Farm contends, however, that payment of approximately $20,000 in restitution to the Coes on Defendant's behalf by his family is evidence of his guilt regarding the theft in this case. According to State Farm, a defendant does not pay restitution, especially of this magnitude, unless he is guilty. The court is not so persuaded. Defendant's mother credibly testified that her son's goal is to become a police officer and she and her father borrowed the funds to pay restitution in order to avoid any possibility of a felony conviction on Defendant's record. The theft charge was dismissed by the state court. The fact that Defendant entered into negotiations to obtain the dismissal is not evidence of his guilt.

In any event, at most, the court could infer from the $20,000 restitution payment that Defendant owed the Coes that amount for property stolen. As the $20,000 was paid on behalf of Defendant, it does not constitute a debt owed by Defendant, nor does it constitute a debt to which State Farm is subrogated since the $20,000 was calculated by determining the amount of the Coes' claim that State Farm had not paid. Thus, the court concludes that State Farm has failed to prove the first element of its § 523(a)(6) claim, that is, that Defendant owes it a debt.

CONCLUSION

Finding that State Farm has failed to meet its burden under 11 U.S.C. § 523(a)(6), the court will, in accordance with this memorandum of decision, enter judgment in Defendant's favor.