

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
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GREGORY F. ELLIS,	*	
	*	CASE NUMBER 05-49410
	*	
Debtor.	*	
	*	
*****		
	*	
PETER D. CAHOON,	*	
	*	ADVERSARY NUMBER 06-4055
	*	
Plaintiff,	*	
	*	
v.	*	
	*	
GREGORY F. ELLIS,	*	
	*	THE HONORABLE KAY WOODS
	*	
Defendant.	*	
	*	

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M E M O R A N D U M O P I N I O N  
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This cause is before the Court on a Motion to Dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6) ("Motion to Dismiss") filed by Debtor/Defendant Gregory F. Ellis ("Debtor"). Plaintiff Peter D. Cahoon ("Plaintiff") responded by filing a Response to Debtor's Motion to Dismiss.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). This Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1334, 28 U.S.C. § 157 and 11 U.S.C. § 523. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

**I. STANDARD FOR REVIEW**

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) to test whether

a cognizable claim has been pled in the complaint. If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.<sup>1</sup>

In determining whether to grant a motion to dismiss, the court must analyze the complaint. To withstand dismissal, the complaint must provide (i) a plain and clear statement of the claim that shows the plaintiff is entitled to relief, (ii) the defendant with notice of the claim, and (iii) the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under Fed.R.Civ.P. 12(e) for a more definite statement is the proper avenue rather than under Fed.R.Civ.P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (2003) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d ed. 1990)).

FED. R. CIV. P. 12(b)(6), applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff cannot prove a set of facts to support a claim that would entitle the plaintiff to relief. *Conley*, 355 U.S. at 45-46. In determining the sufficiency of a complaint, the court must construe the complaint in the light most favorable to the plaintiff, accept

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<sup>1</sup>The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

the allegations set forth as true, and resolve any ambiguities in favor of the plaintiff. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge*, 282 F. Supp. 2d. at 803. However, the court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction." *KDI Holdings, Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)); see also *Lewis v. ABC Bus. Servs., Inc.*, 135 F.3d 389, 405-06 (6th Cir. 1998). Thus, in evaluating a 12(b)(6) motion, the court should construe the complaint very liberally. *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

## II. FACTS

On October 6, 2001, Debtor assaulted and caused severe personal injuries to Plaintiff in Alexandria, Virginia. (Compl. Ex. B at p. 1.) On November 16, 2001, Debtor pled guilty to the charge of assault set forth in Code of Virginia § 18.2-57. (Compl. Ex. B at p. 2.) On March 2, 2004, in a civil action stemming from the assault against Plaintiff, the Circuit Court for the City of Alexandria issued a Final Judgment Order against Debtor, having previously entered a default judgment against Debtor. (Compl. Ex. A at p. 1.) In the Final Judgment Order, the Court stated that

"Jeffrey Ellis and Gregory Ellis [Debtor], jointly perpetrated a malicious assault upon the Plaintiff without provocation or cause that caused serious personal injuries to [Cahoon]." (Compl. Ex. A at p. 2.) The Court then ruled that Debtor and Jeffrey Ellis were jointly and severally liable to Plaintiff for \$250,000.00 in compensatory damages and \$50,000.00 in punitive damages plus interest (the "Judgment Debt"). (*Id.*)

On October 15, 2005, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. In Debtor's petition, Debtor scheduled Plaintiff as an unsecured creditor in the amount of \$302,000.00, based upon the Judgment Debt. Subsequently, on February 10, 2006, Plaintiff initiated this adversary proceeding seeking a determination of the dischargability of the Judgment Debt, based on 11 U.S.C. § 523(a)(6).

Debtor answered on March 13, 2006 denying paragraph three of the Complaint in full. After answering, Debtor filed the instant Motion to Dismiss. Debtor argues that "for the Plaintiff to state a cause of action upon which relief may be granted, he must allege that Debtor intends the consequences of his act, which are the allege [*sic*] injuries to the Plaintiff, and not that Debtor intended the act itself." (Motion to Dismiss p. 3.) Debtor claims Plaintiff has failed to state a claim upon which relief can be granted because the elements of willful and malicious injury were not pled as required by § 523(a)(6) of the Bankruptcy Code. On March 31, 2006,

Plaintiff filed Plaintiff's Response in Opposition to Defendant's Motion to Dismiss (the "Response") claiming that he had properly pled willful and malicious injury. In addition, Plaintiff claims the Motion was untimely.<sup>2</sup> On April 5, 2006, Debtor filed a reply to Plaintiff's Response.

### III. LEGAL ANALYSIS

Section 523(a) of the Bankruptcy Code provides for a series of exceptions to the dischargeability of certain debts. The applicable portion states:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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.

In order to prevail in this action, "Plaintiff must establish that: (1) [Debtor] caused injury to Plaintiff or his property; (2) [Debtor] intended to cause the injury or that such

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<sup>2</sup>Plaintiff alleges the Motion to Dismiss was untimely because it was filed after the 30-day period for Debtor to file a responsive pleading to the Complaint. Debtor timely filed an Answer, but failed to assert the defense of failure to state a claim. Having answered without asserting this affirmative defense, such defense is waived. FED. R. CIV. P. 12(b). The Motion to Dismiss should therefore be treated as a motion for judgment on the pleadings. "Once an answer to a complaint or counterclaim has been served, a Rule 12(b)(6) motion is no longer timely. Notwithstanding, the Court may construe a motion styled as a Rule 12(b)(6) motion as a Rule 12(c) motion instead, which requires application of the same standard as that applied to a 12(b)(6) motion." *Nautilus Ins. Co. v. The In Crowd, Inc.*, 2005 WL 2671252, \*1 (M.D. Tenn. 2005). No matter how this motion may be characterized, the outcome is the same – the Court must deny the motion.

injury was substantially certain to occur as a result of [Debtor's] actions; and (3) [Debtor] acted in conscious disregard of [his] duties or without just cause or excuse." *Palik v. Sexton (In re Sexton)*, 2006 Bankr. LEXIS 955, at \*16 (Bankr. N.D. Ohio 2006).

In his Motion to Dismiss, Debtor argues that in order for Plaintiff to state a cause of action upon which relief can be granted, Plaintiff must allege the material element that Debtor intended the actual injuries, and not that Debtor merely intended the assault itself. Debtor contends that Plaintiff fails to make this allegation and, thus, the Complaint does not state a claim upon which relief can be granted.

The pertinent part of the Complaint reads:

The Judgment, as set forth in Paragraph 2 above, was for damages incurred by Plaintiff as a result of a willful, malicious and intentional assault by the Defendant, Gregory F. Ellis, upon the Plaintiff. Defendant caused severe personal injuries to the Plaintiff for which the Judgment in the amount of \$300,000.00 was awarded.

(Compl. ¶ 3.)

Looking at the Complaint in a light most favorable to Plaintiff, the contested element is present. Plaintiff pleads that the assault<sup>3</sup> was willful, malicious, and intentional.<sup>4</sup> A person

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<sup>3</sup>At common law, the tort of assault does not involve a physical contact but only the imminent apprehension of physical contact. However, it is evident there was a physical touching in this case. *Black's Law Dictionary* states, "In popular language, [assault] has always connoted a physical attack. When we say that D assaults V, we have a mental picture of D attacking V, by striking or pushing or stabbing him." *Black's Law Dictionary* 122 (8th ed. 2004). One commentator wrote, "[t]he distinction [between assault and battery] is observed only by lawyers, and even by them not consistently." Bryan A. Garner, *A Dictionary of Modern Legal Usage*, Oxford Univ. Press, Inc. (1990). "[I]n

committing a malicious, willful, and intentional assault logically intends to cause injury or is substantially certain that injury will result.

Paragraph 3 of the Complaint states that the Judgment for \$300,000.00 was for "damages" (*i.e.*, "severe personal injuries") incurred by Plaintiff as a result of a "willful, malicious, and intentional assault by Debtor." The Judgment Debt includes \$50,000.00 as punitive damages, based on the "malicious assault . . . that caused serious personal injuries to" the Plaintiff. (Compl. Ex A at p. 2.) When the two sentences of Paragraph 3 are read together, Plaintiff has pled that his injuries are a result of (*i.e.*, were intended by) the willful, malicious and intentional assault. Thus, Plaintiff has pled the requisite elements of a cause of action under § 523(a)(6).

#### IV. CONCLUSION

Looking at the allegations of the Complaint in a light most favorable to the Plaintiff, the Court finds that the necessary elements under 11 U.S.C. § 523(a)(6) have been properly pled.

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ordinary language, and even to some extent in legal talk, the two are conflated, and one speaks of an assault frequently in referring to the whole incident, from the threat through its consummation. Indeed, at least in ordinary understanding, use of the word assault most likely requires the actual battery." *Id.* (citing *The Leff Dictionary of Law*, 94 Yale L.J. 1855, 2069 (1985)).

<sup>4</sup>"Based upon a fair reading of [the] definition [of malice], it is logical to assume that in the great majority of cases, the same factual events giving rise to a finding of 'willful' conduct, will likewise be indicative as to whether the debtor acted with malice." *In re Sexton*, at \*16.

Accordingly, this Court denies Debtor's Motion to Dismiss.  
An appropriate order will follow.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE

