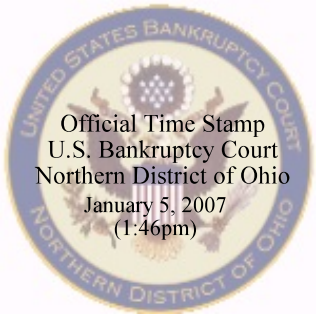
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 04-11537
	)	
BARRY RICE,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
DONNA McGINNIS,	)	Adversary Proceeding No. 05-1177
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
BARRY RICE,	)	
	)	
Defendant.	)	

The plaintiff Donna McGinnis, fiduciary of the estate of Jesse Green, filed a complaint to determine dischargeability of a debt allegedly owed by the debtor-defendant Barry Rice. The complaint alleges that the debt is nondischargeable under 11 U.S.C. § 523(a)(6). The debtor answered and denied all material allegations.[1] The debtor has now moved for summary judgment, with affidavits and exhibits in support.[2] The plaintiff has not filed anything in

[1] Docket 13, 47.

[2] Docket 25, 27, 32.

opposition and the time for doing so has expired.[3] For the reasons stated below, the motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).[4]

SUMMARY JUDGMENT

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex Corp. v. Catrett,* 477 U.S. at 324. All reasonable inferences drawn from the evidence must be

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[3] Docket 42. The adversary case management scheduling order set a deadline of November 10, 2006.

[4] This case was filed before October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Protection Act of 2005, Pub. L. No. 109-8, Stat. 23. All citations are, therefore, to the bankruptcy code as it existed before that date. This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). At the same time, "[t]he nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Poss v. Morris (In re Morris),* 260 F.3d 654, 665 (6th Cir. 2001). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prods., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)). The issue at this stage, therefore, is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

THE COMPLAINT

The plaintiff Donna McGinnis alleges in her complaint that she was appointed by the Cuyahoga County probate court to serve as the fiduciary of the estate of Jesse Green. The plaintiff alleges further that Mr. Green hired the debtor Barry Rice to serve as his real estate agent in the sale of property located at 12100-04 Union Avenue, Cleveland, Ohio (the property). According to the complaint, the debtor located a buyer for the property, Bryan Sheperd. Mr. Green then entered into a contract with Mr. Sheperd under which he would purchase the property for $100,000.00. Mr. Sheperd was to make a $500.00 earnest money deposit. He was to pay an additional $4,500.00 into escrow, and sign a $20,000.00 promissory note payable to Mr. Green secured by a mortgage. The complaint does not address how the balance of the purchase price would be paid.

Shortly thereafter, according to the complaint, Mr. Green died and the plaintiff was appointed as the estate fiduciary. The debtor advised the plaintiff to sign the closing documents and complete the real estate transaction, which she did. The complaint states that the plaintiff later discovered that the $500.00 and/or $4,500.00 deposits were not properly accounted for and that Mr. Sheperd did not sign a promissory note or mortgage.

The complaint states that it is brought under § 523(a)(6) and the counts for relief seem to claim that the debtor fraudulently misrepresented to the plaintiff and/or concealed from her that Mr. Sheperd did not make the $500.00 or $4,500.00 payments or sign the note and mortgage or, alternatively, that Mr. Sheperd did make the payments, but the debtor did not give them to Mr. Green.

FACTS PRESENTED BY THE DEBTOR IN SUPPORT OF HIS MOTION

The debtor supported his motion for summary judgment with his affidavit, an affidavit of his counsel, and exhibits. Taken together, that evidence shows that Messrs. Green and Sheperd came to Century 21 Barry Rice Realty, Inc. stating that Mr. Green wanted to sell the property to Mr. Sheperd for $100,000.00. They signed a purchase agreement that included a term requiring Mr. Green to finance $20,000.00 of the purchase price, with Mr. Sheperd to give him a note and mortgage to secure that debt. The agreement also provided that the debtor would be paid 3% of the purchase price as his commission.

The debtor told Mr. Green that he would need to retain counsel to prepare the note and mortgage because the debtor was not an attorney. The debtor forwarded the purchase agreement to Shaker Title, escrow agent for the transaction. The debtor did not have any further involvement with the transaction, other than receiving from Shaker Title $2,500.00 as partial

payment of his commission. The debtor retained the initial $500.00 deposit from Mr. Sheperd as the balance of his commission. The debtor specifically denied telling the plaintiff that she did not need counsel in connection with the sale of the property and that the plaintiff never retained him to assist her in the transaction.

The debtor also attached part of the deposition testimony of attorney Malinda Harp, who represented the plaintiff in her capacity as the administrator of Mr. Green's estate. The representation included the sale of the property. Ms. Harp reviewed all of the documents relating to the sale of the property with the plaintiff and prepared the deed that transferred the property to Mr. Sheperd. The debtor also provided the deposition testimony of Clarissa Foster, the Shaker Title Services Corp. employee who served as the escrow agent in the transaction. Ms. Foster identified a check in the amount of $5,000.00 from Mr. Sheperd payable to Mr. Green that she had in connection with the closing.

DISCUSSION

11 U.S.C. § 523(a)(6)

A chapter 7 debtor is discharged from all debts except for those identified by Congress in § 523. Exceptions to discharge are strictly construed against creditors. *See Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). The creditor has the burden of proving each element of the cause of action by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279 (1991).

The plaintiff relies on the exception stated in § 523(a)(6), which provides:

> (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[.]

11 U.S.C. § 523(a)(6). A creditor must prove that the injury was both willful and malicious to come within this exception. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999). This is a stringent standard and is limited to acts done with the intent to cause harm. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). The Sixth Circuit has held that "unless 'the actor desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it,' he has not committed a willful and malicious injury as defined under § 523(a)(6)." *Markowitz*, 190 F.3d at 464 (quoting Restatement (Second) Torts § 8A, at 15 (1964)). In other words, the debtor "must have intended not only his conduct, but also the consequences of his conduct." *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 922 (B.A.P. 6th Cir. 2000). A person acts maliciously when he acts in conscious disregard of his duties or without just cause or excuse. *Id*. at 923.

Because the plaintiff did not respond to the motion for summary judgment, the only evidence before the court is that presented by the debtor. That evidence shows that Mr. Green and Mr. Sheperd came to the debtor to assist them with the sale of the property. Mr. Green agreed that the debtor would be paid a 3% commission, or $3,000.00, on the sale. The debtor sent documents to Shaker Title, the company responsible for closing the transaction, but he did not participate in any other way with the closing. He did not advise the plaintiff in connection with the transaction and, in fact, the plaintiff was represented by counsel. The debtor received his commission through retaining the $500.00 earnest money deposit and being paid the balance

by the escrow agent. There is no evidence that the debtor improperly received or retained any funds directly from Mr. Sheperd or that the debtor agree to accept any responsibility for insuring that the buyer signed a note or mortgage in favor of Mr. Green or his estate. In sum, there is no evidence from which a trier of fact could find that the debtor injured the plaintiff in any way, much less with the necessary willful and malicious intent. The debtor is, therefore, entitled to summary judgment in his favor.

CONCLUSION

The debtor showed the absence of a genuine issue of material fact and the plaintiff did not show anything to the contrary. Based on the evidence presented, and construing it most strongly in favor of the non-moving party, a trier of fact could not find that the debtor committed a willful and malicious act that caused harm to the plaintiff. The debtor is, therefore, entitled to summary judgment that any debt owed to the plaintiff is discharged.

A separate judgment will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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DONNA McGINNIS,	)	Adversary Proceeding No. 05-1177
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
BARRY RICE,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, the defendant-debtor's motion for summary judgment is granted and judgment on the complaint is entered in favor of the defendant-debtor under 11 U.S.C. § 523. (Docket 25).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge