

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re:

CAROLYN MABRY GUY,  
Debtor.

Case No. 94-32007-L  
Chapter 7

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Boshwit Brothers Properties, L.L.C.,  
Plaintiff,

v.

Adversary Proc. No. 97-1089

Carolyn Mabry Guy,  
Defendant.

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**MEMORANDUM OPINION AND ORDER ON  
CROSS MOTIONS FOR SUMMARY JUDGMENT**

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Before the court are cross motions for summary judgment filed by the creditor-plaintiff Boshwit Brothers Properties, L.L.C. (hereinafter “Boshwit”) and the debtor-defendant Carolyn Mabry Guy. Boshwit asserts that its claim against the debtor for past due rent is non-dischargeable. The debtor asserts that Boshwit’s claim is dischargeable as a post-petition, pre-conversion debt. For the reasons set forth below, the plaintiff’s motion for summary judgment will be denied and the defendant’s motion for summary judgment will be granted. The following constitutes the Court’s findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

**I. FACTS**

The following are the undisputed facts. On August 5, 1993, the debtor signed a lease with Boshwit for rental property at 3497 Arnold, Memphis, Tennessee. The lease term was twelve months at \$400.00 a month, and the lease contained a “Hold Over” provision. The debtor was in a previous Chapter 13 case, No. 92-20491-D, when she entered into the lease agreement and had the Court’s permission, by order dated August 5, 1993, to incur post-petition debt and enter into the lease. Case No. 92-20491-D subsequently was dismissed.

The debtor filed the present case, No. 94-32007-L, on November 11, 1994. Boshwit was not listed as a creditor in this filing. On August 17, 1995, Bankruptcy Judge Bernice B. Donald entered an Order Lifting Stay as to Boshwit Bros. Properties and Permitting Proof of Claim. This Order provided that, if in the future the debtor missed ongoing rent payments, the automatic stay would be lifted to allow Boshwit to recover possession of its rental property. The order also directed Boshwit to amend its claim to reflect that the debtor was not delinquent through June 1995, except for \$185.00 in attorney and filing fees incurred with respect to Boshwit’s motion, and that Boshwit’s claim “shall be treated as a general unsecured claim, but that on his claim Boshwit Brothers is entitled to and shall receive 100%.” The Court subsequently reiterated this determination that Boshwit’s \$185.00 claim was to be paid in full in its Order on Andrew Boshwit’s Motion for a New Trial, entered on January 21, 1997.

Presumably upon default by the debtor, Boshwit obtained a Writ of Possession from the Shelby County General Sessions Court on or about February 26, 1996, but found the leased premises vacant. On August 20, 1997, the debtor converted her Chapter 13 case to a Chapter 7 case pursuant to 11 U.S.C. § 1307(a). Boshwit timely filed a Complaint Objecting to Discharge of Debtor and/or

to Determine Dischargeability of Debt on September 17, 1997, and the Debtor timely filed an Answer. Both Boshwit and the Debtor filed Motions for Summary Judgment on November 20, 1997.

## **II. ANALYSIS**

### **A. Standard for Granting Summary Judgment**

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). “In determining whether the non-moving party has raised a genuine issue of material fact, ‘[t]he evidence of [the non-moving party] is to be believed, and all justifiable inferences are to be drawn in [his] favor.’” *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 814 (6<sup>th</sup> Cir. 1997) (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2076, 119 L. Ed. 2d 265 (1992)).

### **B. Dischargeability of Boshwit’s Claim**

Boshwit asserts, without any statutory or case law support, that its claim against the debtor is a non-dischargeable debt because it is a post-petition debt. Boshwit appears to base its argument on the fact that its debt arose subsequent to the debtor’s latest Chapter 13 filing and was, therefore, post-petition. Boshwit argues that the prior orders of the Bankruptcy Court are res judicata with respect to the issue of the dischargeability of its claim. Although Boshwit styled its complaint “Complaint Objecting to Discharge of Debtor and/or to Determine Dischargeability of Debt,”

Boshwit has asserted no independent grounds upon which the court might deny the debtor's general discharge. *See* 11 U.S.C. § 727.

The debtor argues that the debt is dischargeable pursuant to 11 U.S.C. §§ 348(d) and 727(b) as a post-petition, pre-conversion debt. The debtor's argument prevails.

It is undisputed that the debt in the instant case arose after the filing of the debtor's Chapter 13 petition but before the conversion to Chapter 7 on August 20, 1997. The Bankruptcy Code section that governs such circumstances, 11 U.S.C. § 348(d), provides:

(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

11 U.S.C.A. § 348(d).

The other Bankruptcy Code section relied upon by the debtor, 11 U.S.C. § 727(b), states:

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C.A. § 727(b).

“For the purposes of the dischargeability of debts, the conversion becomes the order for relief in the converted proceeding.” *F&M Marquette National Bank v. Richards*, 780 F.2d 24, 25 (8<sup>th</sup> Cir. 1985; 11 U.S.C. § 348(a). The court in *In re Gilpin*, 209 B.R. 490 (W.D. Mo. 1997), held that it was clear that a “debt arising during the pendency of a case gives rise to a dischargeable debt upon

conversion of the case to another chapter unless the debt is deemed nondischargeable under § 523 of the Code.’” *Id.* at 491 (quoting *Hines v. Gordon (In re Hines)*, 198 B.R. 769, 771 (9<sup>th</sup> Cir. BAP 1996)). *See F&M Marquette National Bank*, 780 F.2d at 25.

There is no indication or allegation that Boshwit’s claim falls within any of the exceptions to discharge enumerated in 11 U.S.C. § 523 or is an administrative expense pursuant to § 503(b). Construing the evidence in the light most favorable to the defendant and assuming *arguendo* that Boshwit also has a claim for \$2,941.50 in past due rent accrued to the end of February 1996 as well as other fees and expenses, as asserted in Boshwit’s Complaint and Motion for Summary Judgment, this claim would still fall within the purview of the aforementioned Bankruptcy Code sections. Boshwit puts a great deal of emphasis on Judge Donald’s Order of August 17, 1995, which stated that Boshwit’s \$185.00 claim “shall be treated as a general unsecured claim, but that on [the] claim Boshwit Brothers is entitled to and shall receive 100%.” Unfortunately for Boshwit, this order does not address the dischargeability of its claim. It merely states what Boshwit would be entitled to be paid through the debtor’s Chapter 13 plan. Boshwit’s claim is, under the applicable statutory and case law authorities, a dischargeable debt. The debtor is entitled to summary judgment on the issue of dischargeability.

### **III. ORDER**

Based upon the foregoing, it is accordingly ORDERED that:

1. Boshwit’s Motion for Summary Judgment is DENIED and its Complaint DISMISSED.

In re Carolyn Mabry Guy  
Chapter 7 Case No. 94-32007-L  
Boshwit Brothers v. Guy  
Adv. Proc. No. 97-1089

2. The debtor's Motion for Summary Judgment is GRANTED. Judgment shall be entered in favor of the defendant Carolyn Mabry Guy. The claim of the plaintiff is declared to be discharged. The plaintiff shall receive nothing.

BY THE COURT:

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JENNIE D. LATTA  
United States Bankruptcy Judge

Date: December 30, 1997

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