

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

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IN RE:

JOHN CLIFFORD FLOWERS,

BK No. 88-10752-WHB

Debtor.

TENNESSEE FARMERS MUTUAL  
INSURANCE COMPANY,

Plaintiff,

v.

Adversary Number  
No. 88-0218

JOHN CLIFFORD FLOWERS,

Defendant.

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MEMORANDUM OPINION AND ORDER ON  
PLAINTIFF'S COMPLAINT TO DETERMINE  
DISCHARGEABILITY OF DEBT

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This core proceeding<sup>1</sup> is before the Court on plaintiff's Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. §§523(a)(2)(A) and (6). At issue is whether the plaintiff's payment of insurance proceeds for and to the debtor due to the fire loss of his home and contents constitutes a nondischargeable debt because the debtor, or another at his direction,

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<sup>1</sup> 28 U.S.C. §157(b)(2)(J)

intentionally set the fire which resulted in the loss. The following constitutes findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

The record reflects that the debtor filed his voluntary petition for Chapter 7 relief on May 27, 1988. The plaintiff in this proceeding is not listed among the creditors on the debtor's schedules and statement of financial affairs. However, a claim in an "unknown amount" against the plaintiff is listed among the debtor's assets, the claim being one for insurance proceeds for fire damage to the debtor's residence and personalty. The fire occurred on September 22, 1987.

Pursuant to its policy of insurance coverage, with a \$30,000.00 limit of liability on the debtor's residence (Tr. Ex. 1), the plaintiff paid \$27,778.68 in insurance proceeds to the first and second mortgage holders in March, 1988 due to the fire loss. The policy, at paragraph 8, requires that named mortgagees be paid regardless of the suspected circumstances regarding a fire's origin. The plaintiff also advanced \$1,000.00 to the debtor for living expenses during the week immediately following the fire and was potentially liable for the payment of an additional \$5,000.00 in living expenses plus \$18,000.00 for personal property loss. However, based on investigations and expert opinions, it is the plaintiff's position that the debtor intentionally caused the fire which resulted in the loss, and the plaintiff contends that the amounts paid to the mortgage holders and to the debtor constitute a nondischargeable debt for which the debtor should be liable.

Conversely, it is the debtor's position that the fire was accidental or, if intentionally set, that it was set without his knowledge by one other than himself.

The trial of this issue involved the introduction of fifteen exhibits and the testimony of ten witnesses, six of whom were qualified experts. As presented through the testimony and exhibits, the circumstances which led to the filing of this complaint are as follows.

On September 22, 1987, the debtor's residence caught fire causing such extensive damage that the residence was declared a "total loss" the following day by Mr. Gary Payton, one of the plaintiff's claims representatives. The debtor was at home at the time of the fire which occurred at approximately 2:00 a.m. according to the records of the Humboldt, Tennessee Fire Chief, Mr. Leonard Day. The debtor was taken to the local hospital by Mr. Day for treatment of smoke inhalation but he soon returned to the scene. Both Mr. Day and the debtor entered the residence after returning from the hospital. According to Mr. Day's testimony, as well as that of all witnesses who inspected the fire scene, the most serious damage appeared to have occurred in the utility area or the area where the washer and dryer were located.

The following day, the debtor met with Mr. Payton to whom he gave his "statement" concerning the fire and his activities of the night before. In this statement, the debtor denied any suspicion of arson or any knowledge of how the fire started. However, he stated that he had stored a small amount of paint thinner in the utility area. Further, according to this statement, the last visitor at the house prior to the fire were his children who were there the preceding weekend. In addition, the debtor stated that he had spent the evening preceding the fire at home alone before going to bed. He was "awakened sometime after midnight by a sound like something falling. The house was full of smoke . . . ." The debtor then went to a neighbor's and called the fire department. (Tr. Ex. 6) In a later interview with one of the plaintiff's attorneys, the debtor recalled that he had been visited by a friend, Ms. Gladys Reed, the evening of the fire. During her visit, she used the washer and dryer according to her testimony.

Following his meeting with the debtor, Mr. Payton visited the fire scene where he determined that the fire had started in the utility area. He testified that because the electrical box and appliances

were located there, he called Mr. Joe Anderson, a property claims supervisor, to inspect the fire scene for a possible subrogation claim against the dryer manufacturer.

Mr. Anderson arrived at the scene on September 30, 1987, some seven days after the fire to begin his investigation. His findings led him to contact Mr. Terry Brewer, a fire specialist and investigator to assist him with the investigation.

Mr. Brewer and Mr. Anderson concluded their investigation, including an interview with the debtor, on October 1, 1987. Based on the physical evidence at the fire scene, both witnesses testified that the fire was incendiary in origin. The factors supporting this determination include the following:

They found no evidence of an electrical fire notwithstanding the electrical service and appliances located in the area of one fire's origin. Instead, according to Mr. Brewer, they found "liquid" pour patterns or heavily burned areas on the floor of the utility area which indicated that a liquid accelerant had been "poured" on the floor and burned in a pattern in which it spread. (Tr. Ex. 8, picture 10) These "pour patterns" were found near and underneath the clothes dryer. In addition, they discovered extreme fire damage at the floor level. (Tr. Ex. 9, pictures 2, 3, 4 & 5) For example, the shoe molding was destroyed and the bowl of the commode in an adjacent bathroom was cracked. This is significant according to Mr. Brewer because unaccelerated fires burn "up and out" very quickly and rarely burn intensely at "low levels" unless there are accelerants or obstacles in their upward path which cause them to continue burning at low levels. In this instance, Mr. Brewer testified that there was "serious blistering and alligatoring" at the base of the walls and the vanity located in the utility area which also indicates the use of an accelerant. (Tr. 9, pictures 3, 4, & 5)

From their inspection of the exterior of the house, Mr. Brewer and Mr. Anderson also discovered that the fire had "vented" or burned through the roof of the house in two different locations approximately twenty feet apart. The first location where the fire "vented" was directly above the utility room. The second location was above a bedroom which contains pull-down attic stairs. Because they could find no evidence that the utility area fire had spread beyond that area, Mr. Brewer and Mr. Anderson proceeded to the attic. There they found what they believed to be evidence of a "second fire." They believed this to be a different fire of origin from the one which originated in the utility area because they found no indication that the utility area fire had commuted the approximate twenty feet to the area of the attic fire. According to Mr. Brewer, they found indications of intense "low burning" in the attic area and determined the fire there had begun in what appeared to be a "stack of old clothes." They found no charring or actual fire damage, as opposed to smoke damage, in the attic between the utility area fire and the attic fire.

In the bedroom adjacent to the one leading to the attic, Mr. Brewer and Mr. Anderson discovered "piles of linens, sheets and blankets" in the corners according to Mr. Brewer.

All of those findings prompted them to take samples of debris from the badly burned areas. One sample was taken from the attic and three were taken from the utility area. These samples were submitted to AK Analytical Lab for testing. The tests revealed the presence of no identifiable accelerant in one of the utility area samples. The remaining two utility area samples and the one sample from the attic contained evaporated gasoline.

Given these findings, Mr. Anderson employed INS Investigations Bureau, Inc. (INS), an independent corporation which provides fire loss investigators, to conduct an independent

investigation of the fire scene. The investigators for INS were not informed of Mr. Anderson and Mr. Brewer's opinions regarding the fire's origins prior to their investigation.

The investigators for INS who inspected the debtor's residence, Mr. Metz Hardy and Mr. Michael Rambo, both testified at the hearing on this matter. According to Mr. Hardy, he arrived at the fire scene and conducted his initial investigation on October 10, 1987. His findings matched those of Mr. Anderson and Mr. Brewer and as such, he concluded that the fire was incendiary. He also obtained samples, all four of which were from the utility area and an adjoining bathroom. Those samples were also sent to AK Analytical Lab for testing. Two of the samples contained no identifiable accelerants while two others contained evaporated gasoline. Mr. Hardy further testified it did not appear that any furniture had been removed since the fire but that the house was sparsely furnished. Moreover, the walls had nails in them but it did not appear that there were pictures hanging at the time of the fire. All three of these witnesses testified that a pane had been knocked out of the window of the kitchen door. However, Mr. Hardy testified that it appeared to have been intact during the fire because of the presence of smoke residue on the glass. He further testified that there was no other indication of forced entry. Mr. Anderson testified that in addition to the smoke residue, the broken glass had condensation marks, another indication that it was intact during the fire. Moreover, according to Mr. Anderson, the back door appeared to have been locked during the fire because the push button lock had no smoke residue. He further testified that several windows in the house appeared to have been open during the fire because of smoke residue on the screens. This could indicate an attempt to fuel the fire with oxygen, according to Mr. Anderson.

Mr. Michael Rambo, a chief investigator with INS, inspected the fire scene on November 9, 1987. He concurred with the conclusions of the investigators who had preceded him. According to

Mr. Rambo, the strongest indication of the fire's incendiary origin was the fact that "the fire in the attic was totally distinct from the utility [area] fire."

On cross examination, all of these witnesses, including Mr. Payton who inspected the scene the day after the fire, testified that the house was "open" upon their arrival and that they had no difficulty entering. The investigators further admitted that no electrician had examined the wiring in the house but that they found no evidence the fire was electrically caused. Mr. Hardy testified that a spark from an appliance such as a dryer could ignite paint thinner; however, he said that no evidence of such an ignition was present at this scene. Moreover, the markings on the dryer indicated that the fire began on the floor according to Mr. Hardy. Both Mr. Brewer and Mr. Hardy testified that spontaneous combustion could occur in an enclosed area if the mixture of air to a combustible substance, such as paint thinner, were "right." However, such an occurrence in this case would not explain the presence of evaporated gasoline in debris samples. Plaintiff's witnesses testified that no containers other than a small cat food can were found in the utility room and specifically, that none commensurate with the debtor's description of a container of paint thinner were found. Moreover, although they admitted that the possibility existed of the fire in the utility room travelling to the location of the attic fire, they each adamantly denied finding any physical evidence of such a commuting of the fire.

This brings us to the testimony of Mr. Dennis Akin, a forensic chemist and the owner of AK Analytical Lab. Mr. Akin described the analysis technique performed on the samples from the fire at issue as one of "absorption and resolution." According to Mr. Akin, a sample analysis is performed by a machine and interpreted by a chemist. In this case, he personally conducted the tests finding the presence of evaporated gasoline in three of the plaintiff's samples and two of INS'

samples. Mr. Akin testified that there is very little likelihood that the machine which performs the analysis would malfunction because he would recognize such. Moreover, he periodically "checks" the machine's performance by testing a known substance. Mr. Akin could not recall whether he knew at the time the tests were performed that the plaintiff's samples and INS' samples were from the same fire; however, the tests were designed to detect any substance with a boiling point up to and including gasoline, e.g., paint thinner, kerosene or diesel fuel. In this instance, there was no indication that the samples tested had had gasoline poured on them after the fire. According to Mr. Akin, the test result showing the presence of evaporated gasoline is consistent with the use of gasoline to start a fire. However, he further testified that he had no way of knowing how long the gasoline had been in the samples prior to the fire although it could not have been as long as six months to a year before the fire because that much time lapse would in all likelihood cause complete evaporation of the gasoline.

In comparison to the above described testimony of the plaintiff's experts, Mr. Leonard Day, the Chief of the Humboldt Fire Department, who entered the house immediately after the fire was extinguished, testified that he found no visible signs of arson. He admitted to having no arson training but stated that he had investigated several fires since his employment in fire service began in 1951. Mr. Day concluded that the fire had begun in the utility area and he concluded that it had burned through the ceiling, into the attic, and through the roof. He testified that "his men" had chopped a hole in the roof to extinguish the fire in the attic because "the attic was too tight to get into." He further testified that he saw no signs of arcing or beading on the electrical box or wiring in the utility area and that the insulation on the wiring in that area had "burned off." Mr. Day stated that he did not go into the attic but that he did not smell any gasoline.

The defendant also presented the testimony of Gladys Reed who was at the debtor's house on the evening of the fire. According to Ms. Reed, she used the debtor's washer and dryer during her visit and therefore was thus in the utility room that evening. Before leaving at approximately 10:00 p.m., she placed some of the debtor's clothes in the dryer and "left it running." She did not smell gasoline during her visit.

She further testified that she lived in the debtor's house from approximately March, 1987, until May, 1987. At that time, the debtor owned two cats. While living there, Ms. Reed noticed that the commode bowl in the bathroom adjacent to the utility area was cracked, which testimony was intended to rebut the plaintiff's proof that the fire caused the commode to break.

Ms. Reed did not enter the attic during her last visit, nor did she "look at the bedrooms." However, she testified that while she lived there, she and the debtor shared the housework and that he was a "pretty good" housekeeper. She did not recall clothes or linens being piled in the floor during her stay there; rather, the quilts and bedclothes were usually stored on the bed in the bedroom where the investigators had found them on the floor.

Mr. Jerry Riggs, an arson investigator for the Tennessee Fire Marshall, was asked by the plaintiff to investigate the fire scene, which he did on or about October 8, 1987 and again on October 14, 1987. Mr. Riggs, who was called as a witness by the defendant and who had been in the fire investigation business for seventeen years, concluded that the fire was of an "undetermined cause." Further, according to Mr. Riggs, the fire scene had been "disturbed" and debris cleared by "the insurance people." Consequently, he could not see any visible signs of arson. Moreover, because of the scene disturbance, he could not use any of the evidence there for a criminal prosecution, which was the function of his office.

Mr. Riggs did not go into the attic nor did he take any samples of the debris. He testified that he found "very little alligating" in the utility area and added that "some alligating" will be found in most every fire. He further testified that "a lot of wires behind the washer and dryer had beading" but he could not tell whether this was the cause of the fire or because of the fire. In response to questioning regarding the pour patterns, Mr. Riggs testified that sometimes the glue with which a linoleum floor is affixed will form patterns as it burns. Moreover, according to Mr. Riggs, he "could not tell a lot" about the "low burn" of the fire because so much had been "moved around."

However, Mr. Riggs did state that technical equipment is often more valuable than simple visual inspection of a fire scene; thus, had he seen the debris from which samples were taken prior to their testing which resulted in the reported presence of evaporated gasoline, he may have questioned the defendant as to the fire origin and cause. He cautioned that in his experience, he has had lab tests show no accelerant and later has obtained a confession that arson was the cause of the fire. He added that it is very rare for a homeowner to set a fire and remain on the premises or be overcome by smoke.

Armed with their conviction, notwithstanding the opinion of Mr. Riggs, that the fire at issue was caused by arson, the plaintiff's investigators set out to determine who, including the debtor, would have had a motive and an opportunity to cause the fire. This part of their investigation led them to conclude, in their opinion, that the debtor had both motive and opportunity. The evidence which resulted in this conclusion includes the following:

Although the date is disputed by the defendant, Mr. Mason Ashton, the plaintiff's sales agent in Humboldt, Tennessee, testified that on the day prior to the fire, the debtor phoned him to request an increase in the insurance coverage provided by his homeowner's policy and the deletion of his

wife, from whom he was divorced, from the policy. Mr. Ashton testified that the defendant's request for increased coverage was due to the addition of a third lienholder who had installed siding on the house several months earlier. With respect to the requested deletion of his wife from the policy, it was later determined that in February of 1985, the debtor had purchased her half interest in the house. (Tr. Ex. 11) Mr. Ashton further testified that he informed the debtor that he could not increase the coverage without inspecting the residence which he would attempt to do in the near future. He stated that he knew the request was made the day before the fire because he had written a "memo to himself" documenting the request when he received it.

As mentioned above, the debtor disagreed with Mr. Ashton's statement that he requested an increase in coverage the day prior to the fire. According to the debtor, this request was made "a week or two before the fire."

Mr. Anderson testified that upon his arrival at the debtor's house, he noticed that a "for sale" sign was in the front yard. Although in the statement given to Mr. Payton the day following the fire the defendant stated that his mortgage payments were current, he later testified that he was "behind" on the first mortgage payment at the time of the fire and the defendant could not recall the status of the second mortgage, and he had recently added a third mortgage of \$5,500.00 for the installation of siding. According to Mr. Anderson, these factors, coupled with his opinion of the incendiary nature of the fire, indicated to him that the debtor had a motive for setting the fire.

Further, according to Mr. Anderson, the absence of evidence of forced entry; the defendant's presence at the house at the time of the fire; the open windows at the time of the fire; the defendant's testimony that no one other than his children and Ms. Reed, who denied smelling any gasoline in the house prior to the fire, had been to the house recently; the piles of linens in one of the spare

bedrooms; and the appearance that the lawn had recently been mowed at the time of his investigation were factors indicating to him that the debtor was in fact responsible for the fire. Mr. Anderson testified that the significance of the recently mowed lawn was that it may have been done to give the scene a "well kept appearance" or to prevent the spread of the fire to any nearby structures.

In response to the plaintiff's proof, the debtor, who was employed as a truck driver for Milan Express, testified that he had owned and lived in the house eight or nine years before the fire. In that time, it had been broken into once. He further testified that the house had been on the market for approximately one month. He knew that his total mortgages were "in the neighborhood of \$32,000.00" and he had received notices of default from the first mortgage holder. He was asking \$37,900.00 for the house but had had "no interested lookers."

He then testified that on the day of the fire he put some clothes in the washer and watched television after his arrival home. Ms. Reed came over at approximately 7:30 or 8:00 p.m. and used the washer and dryer for her clothes, placing his in the dryer before leaving. After she left, he turned on his stereo and went to bed. He acknowledged that he had failed to reveal her visit in his statement to Mr. Payton but stated that at the time he was "shook up and probably left out a lot of things."

He awakened sometime later to find the house full of smoke and then went to a neighbor's house to call the fire department. He dialed 911 in an effort to contact the fire department and a policeman was sent to the scene first. It was the policeman who radioed the fire department.

The debtor denied any knowledge of how the fire originated or any involvement in its origination. He stated however that he had stored a small container of paint thinner, in an amount sufficient to cover the bristles of a paint brush, in the corner of the utility room where Mr. Brewer

and Mr. Anderson had obtained a sample which indicated the presence of evaporated gasoline. (T-2 on Tr. Ex. 7) He further testified that he probably would have stored any gasoline for his lawnmower in a storage room separated from the utility area by a bathroom. The lawnmower was usually stored outside. He stated that he had mowed the lawn shortly before the fire but could not remember exactly when.

According to the debtor, he often sleeps with his windows open and had done so the night of the fire. He also stated that the doors, both front and back, were locked at the time of the fire. With respect to the piles of linens in the spare bedroom, he stated that when his "kids" came to visit they would pull the bedding down "to play." He additionally introduced photographs of the walls with nails in them which purportedly showed that pictures had been hanging at the time of the fire. (Tr. Ex. 12 and 13) He testified that most had burned or fallen to the floor and broken.

He stated that he believed the last time he had been in the attic prior to the fire had been to put away the Christmas tree the preceding Christmas. He denied any knowledge of how the burned clothes had gotten there, stating that they may have been placed there by his wife prior to their divorce or that they may have been left by the prior owners several years ago. He could only explain the presence of gasoline in this sample if it had been on the clothes. His job as a truck driver occasionally required him to perform repairs to the trucks and to often fill them with gas.

According to the debtor, there was a second air vent in the attic roof where the attic fire vented and he had seen the vent covering, which had been knocked off by the firemen, in the yard the Saturday before the date on which he testified. This statement was apparently made to establish that the utility room fire could have been "drawn" to this attic area because of the location of this

second vent. He denied knowledge of anyone having been in the attic at all during 1987 and stated that he knew of no one who "has anything against him."

On cross-examination, the debtor stated that he had owned two cats. He denied telling counsel for the plaintiff in an earlier deposition that he had given them away and stated that he thought they had "disappeared" sometime before the fire. He maintained this statement after counsel for the plaintiff introduced a photograph taken by the plaintiff's investigators of the utility area which showed bowls of what appeared to be cat food and water plus a bag of cat food in the utility area of the fire. (Tr. Ex. 15)

He then admitted that at the time of the fire, he was "behind on some bills." He further admitted that he had been sued and judgments had been obtained against him by the Milan Animal Hospital and Lashlee-Rich Lumber, Co. but he could not remember when. However, he denied that the Milan Animal Hospital had executed garnishment on his paycheck stating that he had "worked out payments." The debtor could not remember his exact debts at the time of the fire. When questioned concerning whether a judgment had been obtained against him on November 24, 1986, by Western Auto because he had only made two payments toward the purchase of his washer and dryer, he recalled that he had purchased them from Western Auto but could not remember when, and he believed his payments were current. He also testified that at the time of the fire, he owed Heilig-Meyer for his television but could not recall how much. He also owed Wever's Furniture for his stereo but again could not recall how much or whether his payments were current. At the time of the fire, he was additionally obligated to pay for the vinyl siding installed several months earlier. He stated that he knew he was behind on these payments prior to the fire but that he had intentionally refused to make them because the installation was not properly completed. The debtor further

admitted that he had attempted, following the fire, to sell a three ton central air conditioning unit installed at the house, when he knew the unit was subject to the lien of the seller and the installer. However, he said that he intended to use the proceeds from the sale to "pay off" the liens.

#### CONCLUSIONS OF LAW

From all of the facts and circumstances, it is the plaintiff's position that the debtor is in fact responsible for the fire. As such, according to the plaintiff, the insurance proceeds paid on behalf of and to the debtor in the amount of \$28,778.68 constitutes a debt for money which was "obtained by false pretenses, a false representation, or actual fraud" within the meaning of 11 U.S.C. §523(a)(2)(A). In addition, the plaintiff asserts that the amounts paid constitute a debt for "willful and malicious injury by the debtor to another entity or to the property of another entity" pursuant to 11 U.S.C. §523(a)(6). Thus, the plaintiff seeks a determination that this debt is excepted from the general discharge. Such a determination would necessarily require a finding that the debtor is responsible for the fire.

In this regard, the debtor denies responsibility and asserts that the plaintiff has not proved its case beyond a preponderance of the evidence as is required in arson cases. According to the debtor, the plaintiff has the ultimate burden of proof.

The Court agrees that, insofar as the complaint sub judice seeks a determination of nondischargeability, the ultimate burden of persuasion rests with the plaintiff. This is clearly spelled out in Bankruptcy Rule 4005 which provides: "[a]t the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection." Given this language, although the establishment of a prima facie case by the plaintiff in most instances causes the burden of going forward with the evidence to shift from the plaintiff to the defendant to satisfactorily rebut the

plaintiff's evidence, the ultimate burden remains on the plaintiff. See In re Bryson, unpub., BK 87-10696-B (Bankr. W.D. Tenn. 1988); In re Chalik, 748 F. 2d 616 (11th Cir. 1984).

Moreover, the question of dischargeability of a debt pursuant to §523(a)(2) and (6) is exclusively a bankruptcy court issue. 11 U.S.C. §523(c). Consequently, "[i]n addition to the allocation of the burden of proof, a presumption exists that all debts are dischargeable in bankruptcy unless specifically excepted by the Code." In re Mayo, 94 B.R. 315, 322 (Bankr. D. Vt. 1988). This is the case because the discharge provisions are at the very heart of the Bankruptcy Code's purpose and policy to provide a "fresh start" for the honest but financially beleaguered debtor. Consequently, objections to discharge are construed strictly against the objector and liberally in favor of the debtor. Gleason v. Thaw, 236 U.S. 558 (1915).

With respect to the standard of proof required in this proceeding, the Court again agrees with the debtor that the exceptions must be proved at least "beyond a preponderance of the evidence." The Court of Appeals for the Sixth Circuit has stated that the standard of proof in a §523(a)(2) adversary proceeding is "clear and convincing evidence." See, In re Martin, 761 F. 2d 1163 (6th Cir. 1985); In re Parkey, 790 F. 2d 490 (6th Cir. 1986); In re Phillips, 804 F. 2d 930 (6th Cir. 1986); In re Ward, 857 F. 2d 1082 (6th Cir. 1988).

The burden of proof under §523(a)(6) is not as clearly established, with many courts applying the "clear and convincing standard" while others apply a "preponderance of the evidence" standard.<sup>2</sup> At least one Sixth Circuit bankruptcy court has held that "preponderance of the evidence"

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<sup>2</sup> For the former, see, e.g., In re Kimzey, 761 F. 2d 421 (7th Cir. 1985); In re Braen, 94 B.R. 35 (D.N.J. 1988); for the latter, see e.g., In re Shepherd, 56 B.R. 218 (D. Va. 1985).

is only required,<sup>3</sup> and this Court has, in dicta, approved that conclusion. In re Doe, 93 B.R. 608 (Bankr. W.D. Tenn. 1988).

However, for purposes of this proceeding, the plaintiff must prove its §523(a)(2) allegation by clear and convincing evidence. Therefore, the Court will first apply that standard to the evidence presented. If the plaintiff here has met that burden, it will not be necessary to address the §523(a)(6) issue.

Pursuant to §523(a)(2)(A), the plaintiff in this proceeding must prove with sufficient evidence that:

the debtor obtained money through a material misrepresentation that at the time the debtor knew was false or made with gross recklessness as to its truth. The creditor must also prove the debtor's intent to deceive. Moreover, the creditor must prove that it reasonably relied on the false representation and that its reliance was the proximate cause of loss.

In re Phillips, supra, at 932.

The determination of whether the plaintiff has satisfactorily proven each of these elements necessarily requires a determination of whether the plaintiff has shown that the debtor caused the fire which resulted in the payment of proceeds.

According to the Sixth Circuit Court of Appeals, "[a]rson cases typically are difficult to prove. It has been stated that it is rarely 'possible to prove the actual lighting of the match.'" Arms v. State Farm Fire & Casualty Co., 731 F. 2d 1245, at 1249 (6th Cir. 1984), citing Klein v. Auto Owners Insurance Co., 39 F.R.D. 24, 26 (D. Minn. 1965). Courts have long recognized that arson

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<sup>3</sup> Borg-Warner Acceptance Corp. v. Watkins (In re Watkins), 90 B.R. 848 (Bankr. E.D. Mich. 1988)

can be established in civil cases by circumstantial evidence. Id. The factors which tend to prove arson are an incendiary fire, motive, opportunity and unexplained surrounding inculpable circumstances which are relatively strong. Boone v. Royal Indemnity Co., 460 F. 2d 26, 29 (9th Cir. 1972).

In the case sub judice, the Court has been presented with compelling evidence of the incendiary origin of the fire. According to the testimony of four experts trained in the field of arson investigation, the fire was unmistakably caused by arson as evidenced by the absence of arcing or beading or any electrical casual source, by "pour patterns" on the floor, by the suspect characteristics of alligating and blistering on the walls and vanity near the floor, by the samples containing evaporated gasoline, and especially by the fact that the attic fire and the utility area fire had two distinct points of origin. Additionally, the Court has before it the credible testimony of the forensic chemist, Mr. Akin, who unequivocally testified that five of the debris samples from the fire contained evaporated gasoline which would not have been detectable had the gasoline been on the items for six months to a year prior to the fire. Moreover, no paint thinner was detected. The debtor failed to satisfactorily explain the presence of evaporated gasoline.

Contrary to the plaintiff's evidence is the debtor's adamant denial of any knowledge regarding the fire's origin; the testimony of Ms. Reed and Mr. Day who were at the scene prior to and immediately following the fire, both of whom denied smelling gasoline in the home; the debtor's testimony that he stored a small quantity of paint thinner in the utility area; his additional testimony that the dryer was in operation when he went to bed, corroborated by Ms. Reed's testimony that she left it on before leaving the premises; the fact that the debtor was at home at the time of the fire and was "overcome by smoke;" the testimony of Mr. Riggs that alligating is present in almost every fire; Mr. Riggs' further testimony that he did notice arcing and beading on wiring in the utility area,

although he could not tell whether it was the cause of the fire or caused by the fire; the defendant's argument that a second vent in the attic could have drawn the utility area fire to the attic; and the evidence that in his job as a truck driver the debtor may have accidentally gotten gasoline on his clothes, some of which may have been placed in the attic months or years earlier or may have been in the utility room. This Court is asked to accept these "facts" and circumstances and that the paint thinner and operating electrical appliances or some unexplained source may have caused the fire to ignite.

Weighing all of the evidence, the Court must conclude that the plaintiff has proved by clear and convincing evidence that the fire was incendiary in origin. The defendant failed to credibly or effectively rebut that evidence. Thus, the question becomes whether the evidence just as strongly establishes the debtor as the one responsible.

Barring a finding that the fire began accidentally, the debtor would have the Court believe that another unknown person set the fire or later poured gasoline over the damaged areas. However, no convincing evidence was presented to support this theory. The debtor himself testified that he knew of no one who "had anything against him." Although he further testified that the home had been broken into once during the eight or nine years that he lived there, he also stated that at the time of the fire both the front and back doors to the house were locked. The investigators found no sign of forced entry. He did not recall anyone, including himself, being in the attic between the Christmas holidays of 1986 and the fire in September 1987.

However, he and the fire investigators testified that a pane of glass was broken out of the back door window and that the house remained "open" in the weeks and months following the fire. The implication that the window may have been broken by an intruder was rebutted by the testimony

of Mr. Anderson and Mr. Hardy that the glass showed physical signs of having been intact during the fire. Also, the implication that an unknown person may have poured gasoline on the damaged areas following the fire was rebutted by the testimony of Mr. Akin that in such a case, the samples would have shown the presence of unevaporated rather than evaporated gasoline.

This brings the Court to the statement of Mr. Riggs that it is extremely rare for a homeowner, who has intentionally set a fire, to remain on the premises during the fire. In this case, the uncontroverted evidence is that the debtor was there from approximately 10:00 p.m. until the firemen arrived shortly after 2:00 a.m. All indications are that he was there during this time alone. Thus, while it may be rare for a homeowner to remain at the scene of an intentionally set fire, the evidence strongly indicates that this is exactly what the debtor did. Consequently, there remains no question of whether he had an opportunity to start the fire.

The Court must next consider the question of motive. As discussed above, notwithstanding his initial statement to the contrary, the debtor was faced with numerous financial obligations, many of which were delinquent and several of which had resulted in judgments against him by the time of the fire. He was "behind on" his mortgage payments and was attempting to sell his house, with "no interested lookers," in the month or so it had been on the market. When questioned concerning his obligations, the debtor could not recall the amounts due these creditors or the judgments except to disagree that his paycheck had been garnished.

The debtor seeks to have the Court dismiss the fact of these obligations and judgments as "minor obligations" which would pose no real reason for the debtor to consider arson when bankruptcy was an available solution. Moreover, the debtor, through counsel, asserts that he had nothing to gain by intentionally burning his house because he had no equity in the house. Although

the judgment against him and obligations of the debtor may have been "minor" ones, they may be considered "financial difficulties" and financial difficulties are historically a major element in establishing motive to commit arson. See, e.g., Lockamy v. United States Fidelity and Guaranty Co., 652 F. 2d 753 (8th Cir. 1981). Furthermore, although there was minimal equity in the insurance policy's liability coverage of \$30,000.00 on the debtor's residence itself, additional provisions of the policy show \$18,000.00 in coverage for personal property losses and \$6,000.00 coverage for living expenses. (Tr. Ex. 1) Given these circumstances, the Court concludes that the plaintiff has shown sufficient evidence to establish that the debtor had a motive to set the fire.

Finally, the Court has considered unexplained, surrounding inculpatory circumstances. It is undisputed that the debtor requested an increase in his insurance coverage shortly before the fire occurred. The debtor's explanation that this request was made because he had added a third mortgage holder is plausible as is his stated reason that he was in default on the third mortgage payments because the siding had been installed improperly or left uncompleted. The questionable aspect of this circumstance is the timing. The plaintiff's agent testified that the request was made the day before the fire according to his documentation; the debtor testified that the request was made one or two weeks earlier. In either case, the request was made near the time of the fire and the debtor testified that he did not make the request until eight or nine months after the siding was installed, notwithstanding the fact that the third mortgage was added at the time of installation.

According to the plaintiff, additional suspicious circumstances include the sparse furnishings of the debtor's residence, the nails on the walls indicating pictures had been removed prior to the fire, the newly mowed lawn, and the bowl and bag of cat food and water found in the home after the fire, indicating that the cats had been removed from the house in close proximity to the fire.

The debtor explained that his home was sparsely furnished because he had given many items to his ex-wife and children, a credible explanation. However, he explained the "missing pictures" by stating that most of them had burned or fallen to the floor and broken, even though Mr. Hardy testified that there was no evidence that pictures had been hanging at the time of the fire. He could not recall when in relation to the fire he had mowed the lawn, but denied doing so to prevent a fire from spreading. At the trial, the debtor testified that his cats had "disappeared;" however, in an earlier deposition, he stated that he had given them away sometime before the fire. The cross-examination of the debtor revealed conflicting explanations of the cats. While as a single factor, the absence of pets would not prove arson, this factor coupled with others supports a finding and conclusion that arson did occur.

In summary, the Court finds clear and convincing the plaintiff's proof, when viewed in the totality of the facts and circumstances. In contrast, the defendant's proof was not convincing. The debtor's expert witnesses, Chief Day and Fire Marshall Riggs were too general and their "investigation" lacked thoroughness. Their conclusions lacked support of facts. The Court also finds the debtor to lack credibility. As a witness, his demeanor, explanations and theories were not convincing. The defendant's theories of the cause(s) of the fire were not supported by the physical evidence.

According to the Sixth Circuit Court of Appeals in its In re Phillips opinion cited above, the reliance requirement in this context incorporates a reasonableness standard. As such,

. . . the critical factor in evaluating cases involving the issue of reasonable reliance under §523(a)(2)(A), is to accord a construction of the [Bankruptcy Act that] is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved of the burden of hopeless insolvency . . . Neal [v. Clark], 95 U.S. [704] at 709. In this connection, we also find persuasive the reasoning . . . that '[t]he reasonableness requirement was

intended to incorporate prior case law into the current Bankruptcy Act . . . . As such, it cannot be said to be a rigorous requirement but rather directed at creditors acting in bad faith.' [citations omitted] The determination must be made by evaluating all the facts and circumstances of the case. [citations omitted]

(Emphasis provided) In re Phillips, supra at 933.

Evaluation of all the facts and circumstances in the instant proceeding evinces that but for the debtor intentionally setting the fire, the plaintiff would not have been obligated to the mortgage holders. Therefore, even though the plaintiff had reason to believe the debtor was responsible for the fire at the time the mortgage holders were paid, notwithstanding his representation to the contrary, it was his dishonest act of setting the fire and intent to deceive the plaintiff which were the proximate cause of the plaintiff's loss. It is clearly reasonable for an insurance company to rely on the belief that its policyholders will not intentionally set fire to the insured property. The debtor's intentional fires led to an intentional misrepresentation and actual fraud upon the plaintiff insurance company, which was required, by the policy terms, to pay the named mortgage lien holders. Further, the debtor was paid \$1,000.00 in living expenses under the policy. Had the origins of the fire not been discovered, the debtor could have received payment for his losses of personal property. Therefore, the Court concludes that the proof satisfies the requirement of §523(a)(3)(A) and under that provision the debt of \$28,778.68 to the plaintiff is excepted from discharge and judgment will be entered for the plaintiff in that amount, plus the cost of this complaint, plus interest at the legal rate from date of judgment. Because of this conclusion, it is not necessary to make specific findings or comments concerning §523(a)(6).

Because the plaintiff holds assignments of the interests of the first two mortgage lienholders (Tr. Ex. 3 and 5), the plaintiff may proceed to pursue its state law remedies under those assigned deeds of trust, with any recovery to be credited against the judgment.

SO ORDERED THIS 7<sup>th</sup> day of April, 1989

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

cc:

Mr. John Clifford Flowers  
Debtor  
Route 2, Box 306-A  
Bradford, Tennessee 38316

Mr. James F. Butler  
Attorney for Debtor  
618 North Highland  
Jackson, Tennessee 38301

Mr. Wesley A. Clayton  
Attorney for Tennessee Farmers  
Mutual Insurance Company  
106 South Liberty Street  
Jackson, Tennessee 38301

Mr. Jere Albright  
Attorney for Tennessee Farmers  
Mutual Insurance Company  
208 North 14th Avenue  
Humboldt, Tennessee 38343