

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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IN RE:

FRANK WALLACE HUNT,  
Individually and d/b/a  
HUNT CONSTRUCTION COMPANY,  
d/b/a HUNT AND ASSOCIATES

BK #92-27775-WHB  
Chapter 11

Debtor.

JAMES LILLIE AND WANDA LILLIE,

Plaintiffs,

v.

Adversary Proceeding  
No. 92-1060

FRANK WALLACE HUNT,  
d/b/a HUNT CONSTRUCTION COMPANY,  
d/b/a HUNT AND ASSOCIATES,

Defendants.

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IN RE:

GEORGE W. FREEMAN, II and  
CAROLE R. FREEMAN,

BK #91-33178-WHB  
Chapter 7

Debtors.

JAMES LILLIE and WANDA LILLIE,

Plaintiffs,

v.

Adversary Proceeding  
No. 92-0152

GEORGE W. FREEMAN, II and  
CAROLE R. FREEMAN,

Defendants.

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MEMORANDUM OPINION AND ORDER

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These core proceedings<sup>1</sup> are before the Court on the plaintiffs' motions for summary judgment on their complaints to determine the dischargeability of a debt comprised of a state court judgment obtained against the defendants.<sup>2</sup> The judgment upon which the complaints rely were obtained against these respective debtors-defendants jointly and severally. Therefore, the complaints have been consolidated for resolution in this Court and will hereinafter be referenced as a single proceeding.

The complaint seeks a finding that the state court judgment for \$40,000.00 compensatory damages and \$18,000.00 punitive damages is a debt for willful and malicious injury inflicted upon the plaintiffs and their property by the debtors-defendants and is, thus, nondischargeable pursuant to 11 U.S.C. §523(a)(6). As noted, the motion seeks this determination in the form of summary judgment. In the absence of summary judgment, all of the parties have requested a determination of dischargeability based on the state court trial record.

#### FACTUAL SUMMARY

Both the state court litigation and this adversary proceeding arise out of the debtor-defendant Frank Hunt's construction of a home on real estate owned by the debtors-defendants, Carol and George Freeman, that was sold to the plaintiffs, Mr. and Mrs. Lillie.

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<sup>1</sup> 28 U.S.C. §157(b)(2)(I).

<sup>2</sup> The defendant, Mr. Frank Hunt, was previously a debtor in Chapter 7 case number 87-24494. The stay was lifted in that case to allow the parties to litigate the state court action. The then contingent obligation that was the subject of the state court action was "reserved" from the discharge granted to Mr. Hunt in that case.

Briefly, the record reflects that on September 17, 1986, the plaintiffs executed an agreement for the purchase of a partially constructed house located at 4173 Sunny Meadows, Bartlett, Tennessee from Mr. Hunt for \$143,000.00. (State Ct. Tr. Ex. 1).<sup>3</sup> The closing date was scheduled for October 15, 1986. The contract was contingent upon the "successful closing" of the sale of the Lillie's prior residence and the completion, in accordance with the Lillie's specifications, of the house on Sunny Meadows. (Tr. Ex. 1). According to the Lillies, they chose this house because they had seen another house built by Mr. Hunt on Hillman Way in Bartlett, Tennessee and were told that the house they agreed to purchase could and would be completed with exactly the same finish. (Tr. Ex. 1; Testimony of Mrs. Lillie, pp. 13, 14).

The house was not sufficiently completed by October 15, 1986 to be habitable. (Testimony of Mrs. Lillie). Thus, the closing date for the sale was extended. The Lillies closed the sale of their former residence in late November of 1986. The house on Sunny Meadows remained unfinished at that time and the Lillies moved into their small mobile home located at Sardis Lake, Mississippi, approximately seventy miles south of Memphis where they both worked. The Lillies lived in this mobile home with their daughters and commuted to their jobs until May 26, 1987 when their purchase of the house on Sunny Meadows was closed. (Testimony of Mrs. Lillie, p. 31).

According to the Lillies, the closing delay was attributable to the poor workmanship of Mr. Hunt and his subcontractors and the use of inferior and/or incorrect products in the construction and finish of the house. For example, the Lillies contend that Mr. Hunt installed inferior appliances and light fixtures and applied paint to the exterior of the house when they had specifically requested stain. It is the Lillie's position that Mr. Hunt intentionally misrepresented that he would finish the house to their specifications and subsequently failed to do so in an attempt to induce them not to buy the house because he could sell it for more money.

Conversely, Mr. Hunt contends that the closing delay can be attributed to the Lillies' interference with his work and that of his subcontractors. In addition, Mr. Hunt asserts that the Lillies failed to provide him

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<sup>3</sup> Unless otherwise noted, all subsequently referenced trial exhibits were exhibits in the state court litigation.

with light fixtures and appliances as contemplated thus requiring him to install substitutes in order for the house to be inspected. Further, Mr. Hunt asserts that although the exterior paint applied to the house may have varied from that chosen by the Lillies, it was the paint provided him by the store where the Lillies had purportedly chosen it.

Mr. Freeman's testimony was consistent with that of Mr. Hunt. Mr. Freeman testified that he authorized the real estate agent to offer the Lillies a refund of their earnest money on numerous occasions "[b]ecause it just didn't seem like [Mr. Hunt and he] could please [them]." (Testimony of Mr. Freeman, p. 22). According to Mr. Freeman, the closing delay cost Mr. Hunt and him approximately \$1,000.00 a month in interest on their construction loan.

Several experts testified regarding their inspections of the home including one witness who found defects upon inspecting the home approximately eighteen months after it was occupied by the Lillies. There is apparently no real dispute over whether the house was completed to the Lillies' satisfaction. Moreover, it is evident that the jury concluded that their lack of satisfaction was attributable to acts and/or omissions of Messrs. Hunt and Freeman.

#### SUMMARY JUDGMENT

Summary judgment is reserved for proceedings where 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 that the moving party is entitled to a judgment as a matter of law." F.R.B.P. 7056. The movant must first demonstrate the basis on which it believes summary judgment is justified. The nonmoving party must then demonstrate that a genuine issue of material fact arises as to that issue. In re Marlar, 120 B.R. 51, 55 (Bankr. N.D. Miss. 1989). An issue is "genuine" if "there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party." Id. "A fact is 'material' if it would affect the outcome of the lawsuit under the governing substantive law." Id.; see also, In re Suburban Motor Freight, Inc., 124 B.R. 984 (Bankr. S.D. Ohio 1990).

In this proceeding, the plaintiffs contend that summary judgment is justified because the applicable law, §523(a)(6) of the Bankruptcy Code, mandates denial of the discharge of any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" and that their debt results from the debtors' "willful and malicious injury" to their property as reflected by the state court jury's award of punitive damages.

The debtors contest this assertion by contending that neither the punitive or compensatory damages awarded by the state court jury are based upon the actual litigation of whether the plaintiffs suffered harm as a result of willful and malicious injury inflicted by the debtors. Thus, the debtors request dismissal of the complaint and judgment in their favor.

Given the existence of the state court judgment, the parties here are essentially asking the Court to grant summary judgment by applying collateral estoppel to that judgment. It is well settled that the bankruptcy courts have exclusive jurisdiction for determination of the dischargeability of debts pursuant to 11 U.S.C. §523(a)(2), (a)(4) and (a)(6). 11 U.S.C. §523(c); Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); Spilman v. Harley, 656 F. 2d 224 (6th Cir. 1981); In re Stiles, 118 B.R. 81 (Bankr. W.D. Tenn. 1990); In re Hale, 155 B.R. 730 (Bankr. S.D. Ohio 1993). Consequently, res judicata or claim preclusion that bars litigation of claims or defenses that could have been litigated in a previous adjudication is not applicable in such dischargeability proceedings. Brown v. Felson, 442 U.S. 127, 139, 99 S. Ct. 2205, 2213, 60 L. Ed. 767 (1979). However, collateral estoppel or issue preclusion that only bars relitigation of particular issues is applicable. Grogan v. Garner, 498 U.S. at 284, 111 S. Ct. at 658.

In order for collateral estoppel to apply the following is required:

First, the issue sought to be precluded [is] identical to the one in the prior action. Second, the issue [has] been actually litigated in the prior action. Third, the prior determination . . . resulted in a valid and final judgment. Lastly, the determination of the facts for which preclusion is sought [was] necessary to the outcome.

In re McQueen, 102 B.R. 120, 123 (Bankr. S.D. Ohio 1989) (citing Spilman v. Harley, supra). In addition, "[i]t is an elementary principle of issue preclusion that it may only be asserted where the burden of proof as to

that issue [in the dischargeability context] is no greater than it was in the prior proceeding where the issue was decided." In re McQueen, 102 B.R. at 123 (citing U.S. v. Bylander, 714 F. 2d 996, 1002 (9th Cir. 1983), cert. denied, 467 U.S. 1209, 104 S. Ct. 2398, 81 L. Ed. 2d 355 (1984)). For determining the nondischargeability of debts pursuant to §523(a), the creditor's burden of proof must be satisfied by a preponderance of the evidence. Grogan v. Garner, 498 U.S. at 290, 111 S. Ct. at 661.

## DISCUSSION

As noted above, the issue in this proceeding is whether the judgment debt is one for willful and malicious injury inflicted upon the plaintiffs and/or their property and is thus nondischargeable pursuant to 11 U.S.C. §523(a)(6). In the bankruptcy context, a "willful and malicious injury" is one that results from a wrongful act, done intentionally, which necessarily produces harm and is without just cause or excuse. . . . " Perkins v. Scharffe, 817 F. 2d 392, 394 (6th Cir. 1987), cert. den., 484 U.S. 853, 108 S. Ct. 156, 98 L. Ed. 2d 112 (1987). Moreover, according to the legislative history of this section, "'willful' means deliberate or intentional." H.R. Rep. No. 595, 95th Cong., 1st Sess. 365 (1977); S. Rep. No. 989, 95th Cong. 2nd Sess. 79 (1978) (reprinted in Norton Bankr. Code Pamphlet, 1992-93 Ed., pp. 449-450). Obviously, a negligence standard is not sufficient.

Following the trial between these parties in the state court, the jury was instructed that it could find for the plaintiffs and award damages if it concluded from the evidence that: (1) the defendants had breached an implied warranty of workmanlike quality with respect to the home's construction; (2) the defendants had breached the sales contract with the plaintiffs; and/or (3) the defendants had made intentional material misrepresentations to the plaintiffs upon which they relied to their detriment. With respect to punitive damages, the jury was instructed as follows:

You are instructed that if you find that the plaintiffs suffered actual damage as a proximate result of the acts of the defendants on which you base your findings of liability, you may, in your sole discretion, award additional damages against the defendant known as punitive or exemplary damages.

**Punitive damages may be awarded to punish defendants for wrongful conduct and to deter others, and may be awarded in cases of gross negligence or in similar cases involving willful misconduct.**

Such damages relate to the nature of the defendants' actions in inflicting or causing injury, rather than to the extent of the injury.

The law provides no fixed standards to the amount of such punitive damages, but leaves the amount to the jury's sound discretion exercised without passion or prejudice. Punitive damages are not awarded as a matter of right, but the amount of such damages is peculiarly within the discretion of the jury. Punitive damages are assessed as punishment of each wrongdoer by exacting from his pocketbook a sum of money which, according to his financial ability, will hurt but not bankrupt.

(Trial Court Jury Instructions, pp. 16 & 17) (Emphasis added).

Based upon the evidence and these instructions, the jury awarded the following damages:

We the jury find for the Plaintiffs, James Lillie and Wanda Lillie, against the Defendants, Frank Hunt, George Freeman and Carole R. Freeman, jointly and severally, and award compensatory damages in the amount of FORTY THOUSAND DOLLARS (\$40,000.00).

We the jury find for the Plaintiffs, James Lillie and Wanda Lillie, against the Defendants, Frank Hunt, George Freeman and Carole R. Freeman, jointly and severally, and award punitive damages in the amount of EIGHTEEN THOUSAND DOLLARS (\$18,000.00).

(Jury Finding).

There is no indication of the basis for the jury's award of compensatory damages, that is, whether it is based upon breach of warranty, breach of contract or intentional misrepresentation. The same is true for the jury's award of punitive damages. Accordingly, it is not at all evident from these instructions and jury findings that the Lillies' damages resulted from the debtors' "willful and malicious" infliction of injury as opposed to, for example, the debtors' gross negligence or reckless disregard for the Lillies' well being. As such, the Court concludes that there remain genuine issues of material fact and the Court can not conclude that the Lillies are entitled to a determination that this judgment debt is nondischargeable as a matter of law under §523(a)(6). Thus, their motion for summary judgment must be denied.

The question next becomes whether judgment on the state court record may be granted to either party. The pertinent state court record includes the transcript of witnesses' testimony, exhibits,<sup>4</sup> jury instructions and the "Judgment and Jury Verdict" order referenced above. None of these items discuss whether the actions and/or omissions of Messrs. Hunt and Freeman with regard to the dispute at issue were willful and malicious.

From the trial transcript, it is clear that Mr. and Mrs. Lillie believe that Mr. Hunt intentionally breached his contract with them; however, it is just as clear that Messrs. Hunt and Freeman believe the delayed closing and conflicts were a result of the Lillies being too difficult to please. There is no dispute over the fact that the house contains some defects; however, the exhibits, for example, pictures of defects, do not persuade the Court that these defects are a result of willful and malicious acts as opposed to reckless disregard or mere negligence by the defendants. Similarly, the transcripts of the testimony given by the non-party witnesses does little but support the fact that the defects do exist. This Court can not find a preponderance of nontestimonial evidence in this record that supports a finding of willful and malicious injury by the debtors-defendants.

Consequently, critical for the determination of whether this judgment debt is nondischargeable pursuant to §523(a)(6) is the credibility of the witnesses, an element available only with live testimony. Without live testimony, the Court is unable to adequately weigh the evidence presented as required for a determination of dischargeability under §523(a)(6). Accordingly, the parties' respective motions for judgment on the state court record must be denied. These proceedings will be transferred to the Honorable Harvey

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<sup>4</sup> Exhibit number 54 discussed in Mr. Hunt's testimony as invoices and purchase receipts for various materials was not among the exhibits submitted to this Court. Moreover, exhibit number 56, purporting to be a videotape of the house at closing, is viewable only on a Betamax machine to which the Court has no access.

Boswell, United States Bankruptcy Judge Appointee, for trial of the issue of dischargeability pursuant to 11 U.S.C. §523(a)(6).

However, the amount of the damages appear fixed given that in the state court proceeding the jury awarded \$40,000.00 in compensatory damages based upon evidence that the plaintiffs suffered monetary losses in that amount and additionally awarded \$18,000.00 in punitive damages based on the above discussed jury instructions. Accordingly, these sums were "actually litigated" and therefore establish, without the need for additional proof, the amount of the debt for which a determination of dischargeability must be made.

From the above findings and conclusions made pursuant to F.R.B.P. 7052 and 7056, it is hereby

**ORDERED** that:

1. The plaintiffs' motion for summary judgment is denied;
2. The plaintiffs' motion for judgment on the state court trial record and judgment is denied.
3. The debtors/defendants' motion for judgment on the state court trial record is denied;
4. The amount of the debt at issue is fixed by preclusion at \$58,000.00;
5. Both adversary proceedings will be transferred to the Honorable Harvey Boswell, after his investiture, for trial on the §523(a)(6) dischargeability issues; and
6. The parties and their counsel will receive written notification from Bankruptcy Judge Appointee Boswell's office of a pretrial, scheduling conference in these proceedings. It is expected that Judge Boswell will be sworn in by November 1, 1993. The trial of these proceedings will be held in Memphis, Tennessee.

SO ORDERED this 30th day of September, 1993.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

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