UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

Case No.: 99-15129

Brian Hazzard,

Chapter 7

Debtor.

Michael D. Hotaling,

Plaintiff,

-v- Adv. Pro. No.: 99-91322

Brian Hazzard,

Defendant.

APPEARANCES:

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Attorney for Defendant
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Kyle N. Kordich
Of Counsel

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

Before the court is its order to show cause why this adversary proceeding should not be dismissed for the parties' failure to comply with the scheduling order. The Plaintiff has also moved for summary judgment on the underlying 11 U.S.C. § 523(a)(6) claim.

Jurisdiction

This is a core proceeding within the court's jurisdiction pursuant to 28 U.S.C. §§ 157(a)(2)(A) and (I) and 1334(b).

Facts

The material facts are not in dispute and based upon the pleadings before it, the court finds the following:

1. On December 14, 1998, upon returning home and parking his vehicle, Debtor Brian Hazzard ("Defendant") noticed a pickup truck, driven by Michael Hotaling ("Plaintiff"), backing up in his driveway.

2. The Plaintiff's truck abruptly pulled out of the driveway spraying debris which struck the Defendant's vehicle. The Defendant proceeded to get into his pickup truck and follow the Plaintiff.

3. After a short distance, the Plaintiff pulled over, both men exited their vehicles and the Defendant struck the Plaintiff.

4. The Defendant's affidavit, in opposition to the summary judgment motion, states:

> As I was getting out of my truck the driver of the red truck stood up on the running board and yelled out to me "what the f - - - is your problem?" I was furious and ran to his truck and grabbed him out of his truck and to the ground. I stood yelling at him and he then proceeded to spit in my face. It was at this point that I grabbed him and punched him once. (Defendant's Affidavit in Opposition ¶ 2.)

5. That evening the Plaintiff was treated at Little Falls Hospital emergency room for injuries to his nose, face and neck.

6. On February 24, 1999, the Plaintiff commenced an action seeking $1,000,000.00 in damages in the Supreme Court, Montgomery County.

7. On September 2, 1999, prior to any determination by the state court, the Defendant filed a Chapter 7 bankruptcy proceeding.

8. On December 13, 1999, the Plaintiff filed the current adversary

proceeding. The Defendant answered and, on February 18, 2000, a scheduling order was issued. Pursuant to this order, the trial was calendared for August 7, 2000, with pretrial exhibits and witness lists to be filed by July 27, 2000. Neither party filed the required submissions.

9. On August 3, 2000, Plaintiff's newly retained attorney[1] contacted the court and inquired about the status of the adversary proceeding. He was informed that the court would be preparing an order to show cause as to why it should not be dismissed for failure to prosecute.

10. On August 7, 2000, the court served its show cause and the hearing was held on September 7, 2000; both parties appeared at this proceeding. The court adjourned the hearing to October 19th giving the parties an opportunity to submit written memoranda. It was further adjourned, on request of the parties, to November 30, 2000. The November 30, 2000 hearing was held and adjourned to January 25, 2001, to allow additional submissions.

11. On January 18, 2001, the Plaintiff made the current motion for summary judgment. For efficiency, the court carried its show cause with the summary judgment motion. On March 15, 2001, the court heard argument on the summary judgment motion and, on March 22, 2001, the matter was considered fully submitted on both the order to show cause and the Plaintiff's motion for summary judgment.

Arguments

The Plaintiff argues that he has a meritorious § 523(a)(6) and has moved for summary judgment. He contends that his claim should not be dismissed despite the procedural irregularities.

The Defendant argues that the Plaintiff's case should be dismissed for want of prosecution. He also asserts that summary judgment is inappropriate because material issues of

[1]On June 2, 2000, the court received a Notice of Withdrawal by the attorneys that had filed the complaint. The Plaintiff points to this change in representation and his own lack of legal knowledge to explain his delay in prosecuting the claim and why dismissal would be inappropriate.

fact exist.

Discussion

The Court's Order to Show Cause

Yet again this court is faced with the difficult task of rendering a decision in spite of the attorneys that appear before it, rather than with their assistance. The procedural course that led to the court's show cause has been fully set forth in the "Facts" portion of this decision and for the benefit of all concerned the court will refrain from rehashing them.

The court will determine its show cause in the first instance because if dismissal, for lack of diligence, is proper then all other issues are moot. The Second Circuit has made it clear that, "dismissal pursuant to Fed. R. Civ. P. 41(b) for failure to comply with an order of the court is a matter committed to the discretion of the district court. " *Alvarez v. Simmons Market Research Bureau*, 839 F.2d 930 (2d Cir. 1988) (citations omitted). However, dismissal is a harsh remedy and, therefore, several factors should be considered before it is utilized, including:

1. the duration of the plaintiff's failures;
2. whether the plaintiff received notice that further delays would result in dismissal;
3. whether the defendant is likely to be prejudiced by further delay;
4. a balancing of the need to alleviate court calendar congestion with a party's right to due process; and
5. the efficacy of lesser sanctions. *Id.* at 931 (citations omitted).

After due consideration, and despite the Defendant's well articulated arguments to the contrary, the court determines that the facts of this case do not rise to the level where dismissal is warranted.

The court agrees "there has been a complete lack of prosecutorial effort since the [P]laintiff commenced this action" and that this failure has led to an ongoing delay. (Defendant's Memorandum of Law dated November 13, 2000 p.5.) The court also finds that its scheduling order provides sufficient notice that dilatory conduct could result in dismissal.[2] However, the Defendant has not demonstrated prejudice by the further delay. The court finds it crucial that the Defendant failed to file its pretrial submissions and this omission greatly restricts any argument of prejudice. If the Defendant had complied with the scheduling order, he could have made a motion to preclude and/or dismiss which in all likelihood would have been granted.

When balancing this court's calendar against the due process rights of a party before it, the court will err on the side of the individual's due process rights. Finally, the court determines that the lesser sanction of a monetary fine would more appropriately address the current situation. Therefore, the Plaintiff is directed to pay, within 30 days of this decision, the sum of $250.00 to the clerk of the court.

Summary Judgment – 11 U.S.C. § 523(a)(6)

Summary judgment is an extreme remedy to be granted only when there are no disputed material facts. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). The evidence must be viewed in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Catrell*, 475 U.S. 574 (1986). Presently, the Plaintiff has established that no question of fact exists and summary judgment is granted with respect to the liability on this claim. However, the Plaintiff has not sustained his burden with respect to the amount of the damages, and therefore, the court

[2]Paragraph 12 of the court's scheduling order clearly states, "[f]ailure to comply with any of the terms of this Order may result in dismissal or the appropriate sanctions, preclusion, the striking of pleadings, and the entry of an order or judgment accordingly."

will modify the automatic stay to allow the parties to proceed in the state court action to liquidate this claim.

Willful and Malicious Injury

11 U.S.C. § 523(a)(6) states, in part:

> (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.

Courts have determined that for a successful § 523(a)(6) claim the plaintiff must establish an intentional injury[3] inflicted without just cause or excuse.[4] Here, it is undisputed that the Defendant physically struck the Plaintiff causing an intentional injury. Although the Answer contains general denials, as previously noted, the Defendant's affidavit in opposition to the motion for summary judgment admits that he intentionally struck and injured the plaintiff. He states,

> ... I was furious and ran to his truck and grabbed him out of his truck and to the ground. I stood yelling at him and he then proceeded to spit in my face. It was at this point that I grabbed him and punched him once. (Defendant's Affidavit in Opposition ¶ 2.)

This admission establishes that the injuries are "willful," as interpreted by the Supreme Court,[5]

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[3] *Kawaauhau v. Geiger,* 523 U.S. 57 (1998). (Analyzing the term "willful" in 11 U.S.C. § 523(a)(6)).

[4] *In re Stelluti*, 94 F.3d 84 (2d Cir. 1996). (Analyzing the term "malicious" in 11 U.S.C. § 523(a)(6)).

[5] The Supreme Court has stated, "[t]he word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. *Kawaauhau v. Geiger,* 523 U.S. at 61.

and fall squarely within 11 U.S.C. § 523(a)(6).

The Defendant also argues that the injury was not "malicious." He contends his actions were a justified response to being spat upon. The court disagrees. While in no manner condoning the Plaintiff's alleged offensive behavior, the court finds that the Defendant's action, striking the Plaintiff in retaliation when the Plaintiff had not physically threatened the Defendant, to be "...wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will." *In re Stelluti*, 94. F.3d at 87. This court agrees "[c]ertain types of conduct, such as assault, may be inherently and patently malicious" *In re Luppino*, 221 B.R. 693, 699 (Bankr. S.D.N.Y. 1998), and the facts of this case lead to the conclusion that this assault was malicious. Finally, "[m]alice is implied when anyone of reasonable intelligence knows that the act in question is contrary to commonly accepted duties in the ordinary relationships among people, and injurious to another" *In re Martin*, 208 B.R. 799, 802 (N.D.N.Y. 1997) (citing, *In re Stelluti*, 167 B.R. 29, 33 (Bankr. S.D.N.Y. 1994). This Defendant's actions are not commonly acceptable in ordinary relationships among people.

Based upon the Defendant's own admission, the court determines that the injuries inflicted on the Plaintiff were "willful" and "malicious" as interpreted by the Supreme Court and the Second Circuit, respectively. Thus, this debt is nondischargable pursuant to 11 U.S.C. § 523(a)(6).

Liquidation of the Claim

While determining summary judgment is proper with respect to the nondischargability of the claim, it further finds that damages cannot be summarily determined. The adversary complaint and the state court personal injury complaint both request $1,000,000 in damages.

This Defendant is entitled to a jury trial on the issue of damages and a state court proceeding has been commenced. Therefore, the automatic stay is modified to allow the state court proceeding to continue for the limited purpose of liquidating the damages. Pursuant to this decision, any state court determination of damages will be nondischargeable.

Conclusion

For the above reasons, the court concludes that the Plaintiff must pay the sum of $250.00 to the Court Clerk for violating the court's scheduling order. Summary judgment is granted for the Plaintiff on the issue of liability, the claim is nondischargeable pursuant to 11 U.S.C. § 523(a)(6) and the automatic stay is modified to allow the state court action to continue to liquidate this claim.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge