IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 7
	)	
WAYNE C. HAWKINS and	)	
SHAUNA B. THOMPSON,	)	Case No. 99-3537 (MFW)
	)	
Debtors.	)	
	)	
	)	
MORTGAGE CAPITAL	)	
ADVISORS, INC.	)	
	)	
Plaintiffs,	)	
	)	Adversary No. A-99-435
v.	)	(MFW)
	)	
WAYNE C. HAWKINS and	)	
SHAUNA B. THOMPSON,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION[1]

Before the Court is the Motion for Summary Judgment of Mortgage Capital Advisors, Inc. ("MCA") on its complaint objecting to the dischargeability of MCA's claim under section 523(a)(6) of the Bankruptcy Code and to the Debtors' discharges under section 727(a).

I. FACTUAL BACKGROUND

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

In 1997, MCA lent $500,000 to Hawn Investments A.V.V., Ltd. ("Hawn"), a corporation owned and operated by Wayne C. Hawkins. The loan was guaranteed by Hawkins, Shauna B. Thompson, and Key Company, Ltd. (of which Thompson was a principal). After Hawn defaulted on its obligations in April, 1998, MCA sued the guarantors. In August, 1998, a Maryland state court entered judgment against Hawn, Key and the Debtors (collectively, "the Judgment Defendants") in the amount of $549,495.84 ("the Maryland Judgment"). On December 3, 1998, the Maryland Judgment was filed in the Superior Court in Delaware ("the Delaware Court"), and MCA served discovery in aid of execution on the Judgment Defendants.

After the Judgment Defendants failed to respond timely to MCA's discovery request, MCA filed a motion to compel. On February 18, 1999, the Delaware Court granted the motion to compel, ordered each Judgment Defendant to comply with MCA's discovery requests, and fined each Judgment Defendant $300 for reasonable expenses and attorneys' fees.

The Judgment Defendants still did not comply and MCA filed a second motion to compel. On July 23, 1999, the Delaware Court granted the second motion and again directed the Judgment Debtors to respond to discovery and to pay MCA $250 for attorneys' fees and $200 for civil sanctions.

The Judgment Defendants still failed to respond. On September 10, 1999, in response to MCA's third motion to compel, the Delaware Court ordered each Judgment Defendant to pay MCA $750 for costs, $1,500 for attorneys' fees, and civil sanctions of $5,000. Further, the Delaware Court held that if the Judgment Defendants failed to provide MCA with complete and accurate responses within ten days of the Order each Judgment Defendant would be liable to MCA for civil and/or criminal sanctions in the amount of $5,000 per day.

On October 4, 1999, in response to MCA's fourth motion to compel, the Delaware Court found each Judgment Defendant in contempt and ordered each Judgment Defendant to pay MCA an additional $250 for attorneys' fees and $150 for costs. One day later, the Debtors filed bankruptcy under Chapter 7.

On January 6, 2000, four days before the deadline to file a complaint objecting to discharge, we granted MCA's motion to extend the time to file a complaint until April 19, 2000. On March 22, 2000, MCA filed a complaint seeking a determination that the sanctions imposed by the Delaware Court (plus interest and attorney fees and costs) are nondischargeable pursuant to section 523(a)(6) and (a)(7) and that the guaranteed loan debt (plus interest and attorney fees and costs) is nondischargeable under section 523(a)(2)(A) and (B).

MCA filed a Motion for Summary Judgment on Count I of its complaint in which it seeks a determination that the sanctions orders issued by the Delaware Court are nondischargeable pursuant to section 523(a)(6). In that Motion, MCA also seeks a determination that the Debtors should be denied a discharge pursuant to section 727(a)(4)(A), (a)(2)(B), (a)(3), or (a)(6)(A).

II. JURISDICTION

This Court has jurisdiction over this Motion for Summary Judgment, which is a core proceeding pursuant to 28 U.S.C. § 1334 and § 157(b)(2)(I).

III. DISCUSSION

A Motion for Summary Judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Robeson Industries Corp. v. Hartford Accident & Indemnity Co., 178 F.3d 160, 164 (3d Cir. 1999). The court must assume that undisputed facts set forth in the record are true. Catanzaro v. Weiden, 188 F.3d 56, 63 (2d Cir. 1999); In re Trans World Airlines, Inc., 180 B.R. 386, 387 (Bankr. D. Del. 1994). The non-movant must

present specific evidence supporting its case for the court to find that there is a genuine issue of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Where there is a genuine issue of material fact, all evidence presented by the non-moving party must be taken as true, and the court must construe all inferences in a light most favorable to the non-moving party. United States v. Diebold, 369 U.S. 654, 655 (1962); Matsushita, 475 U.S. at 587. See also Catanzaro v. Weiden, 140 F.3d 91, 93 (2d Cir. 1998)("Courts may not make credibility determinations or weigh the evidence when confronted with a Motion for Summary Judgment").

A. Nondischargeability Under Section 523(a)(6)

Section 523(a)(6) provides, in relevant part:

> (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.

MCA makes two alternative arguments in support of its motion. First, the Delaware Court's finding of contempt collaterally estops the Debtors from contesting the nature of

their conduct. Alternatively, MCA asserts that based upon the uncontested facts we must conclude that the Debtors' conduct was willful and malicious.

1. Collateral Estoppel

Collateral estoppel (or issue preclusion) applies to bankruptcy dischargeability proceedings. See, e.g., Grogan v. Garner, 498 U.S. 279, 284-85 (1991). Collateral estoppel applies when:

> (1) the issue sought to be precluded is the same as that involved in the prior action;
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> (2) that issue was actually litigated;
>
> (3) it was determined by a final and valid judgment; and
>
> (4) the determination was essential to the prior judgment.

See, e.g., Wolstein v. Docteroff (In re Docteroff), 133 F.3d 210, 214 (3d Cir. 1997); Graham v. Internal Revenue Service (In re Graham), 973 F.2d 1089, 1096 (3d Cir. 1992); In re McMillan, 579 F.2d 289, 291 (3d Cir. 1978). Here, the issue is whether the Debtors willfully and maliciously caused injury to MCA.

For a debt to be nondischargeable as willful and malicious, the injury must be deliberate or intentional; it is

not sufficient to allege a deliberate or intentional act which leads to injury. Kawaauhua v. Geiger, 523 U.S. 57, 62 (1998). That is, the debtor must have deliberately acted in a manner which was substantially certain to cause harm. See Conte v. Gautam (In re Conte), 33 F.3d 303, 309 (3d Cir. 1994).

Therefore, the issue before the Court is whether the Delaware Court, after actual litigation, necessarily concluded in a final, valid order that the injury to MCA was caused by a deliberate or intentional action of the Debtors which was substantially certain to cause harm.

MCA cites three cases to support its argument that under the doctrine of issue preclusion, a prior order of sanctions or contempt may be the basis for a determination of nondischargeability under section 523(a)(6). See Phipps v. Commonwealth of Kentucky, No 91-5986, 1992 U.S. App. LEXIS 32590 (6th Cir. 1992); Bundy American Corp. v. Blankfort (In re Blankfort), 217 B.R. 138 (Bankr. S.D.N.Y. 1998); PRP Wine Int'l, Inc. v. Allison (In re Allison), 176 B.R. 60 (Bankr. S.D. Fla. 1994). We find none of these cases persuasive.

In Phipps, the Sixth Circuit expressly stated that it was not deciding the merits of substantive bankruptcy law, but rather was only deciding the standards for reconsideration. See id. at *5 ("We emphasize that the only issue before this

court is whether the district court abused its discretion when it denied Phipps's motion to reconsider"). Accordingly, the Sixth Circuit's decision is not instructive here. The decision which MCA ultimately relies upon is the opinion of the district court because that is the court that determined whether the debtor's debts should be deemed nondischargeable as "malicious and willful." The district court opinion is unpublished and, therefore, we are unable to determine that its decision was based on collateral estoppel or on independent findings of fact.

In Allison, the debtor's prior employer had obtained a consent judgment in state court against the debtor for theft of trade secrets. When the debtor continued to violate the Florida Trade Secrets Act, the court entered a sanctions order. After the debtor filed for bankruptcy, the employer sought a determination that the debtor was collaterally estopped from discharging the original judgment and the sanctions award under section 523(a)(6).

The Allison Court concluded that a violation of the Florida Trade Secrets, being akin to theft, is willful and malicious. The Court further concluded that the sanctions order was nondischargeable because it was premised on the

debtor's continuing violation of the statute which was a willful and malicious injury.

This case is distinguishable from Allison. Here, the Debtors were not sanctioned for any affirmative action which constituted a willful and malicious injury under state law. Rather, they violated a discovery order, which unlike a violation of the Florida Trade Secrets Act is not a per se willful and malicious act.

In Blankfort, the debtor had entered into a pre-petition franchise agreement which the franchisor subsequently terminated. The debtor continued to use the franchisor's trademarks and trade names after receiving notice of termination. As a result, the franchisor sought to enjoin the debtor's continuing violations. An injunction was entered, which the debtor ignored. After two contempt orders were entered, the magistrate held a hearing to consider damages. The magistrate made express findings that the debtor had blatantly and willfully violated the contempt orders. Consequently, as sanctions, a default judgment was entered against the debtor on the trademark infringement suit. After the debtor filed bankruptcy, the franchisor moved for summary judgment declaring the damages and contempt judgments nondischargeable under section 523(a)(6) based upon the

district court's finding. The Blankfort Court concluded that the sanctions were nondischargeable because the magistrate had made express findings that the debtor had acted in "blatant and willful violation of the district court's orders." Id. at 145-46.

Unlike the magistrate in Blankfort, the Delaware Court made no express findings that the Debtors had acted willfully or maliciously in failing to produce the requested documents. In fact, none of the Delaware Court's orders specified the basis for imposing sanctions. Nor can we infer from the orders themselves that the Delaware Court necessarily made such a determination. Cf. Crain v. Limbaugh (In re Limbaugh), 155 B.R. 952, 961 (Bankr. Tex. 1993)(concluding that, because the findings made by the state court overlapped the elements of 523(a)(6) on all points, the state court had necessarily determined that the debtor willfully and maliciously injured the plaintiff).

The Delaware Court had two possible bases for imposing sanctions on the Debtors: its inherent power or Rule 37(b) of the Delaware Superior Court Rules.[2] See Chambers v. Nasco,

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[2] Rule 37(b) provides, in relevant part:

> (b) Failure to Comply With Order [for discovery].
>
> . . .

Inc., 501 U.S. 32, 44 (1991)(courts are able to issue sanctions under their inherent power); Heiser v. Dept of Public Safety, No. 97C-04-013 NMT, 1997 WL 718670, at *1 (Del. Super. Aug. 19, 1997)(recognizing a court's ability to impose sanctions under its inherent power).

Neither requires a specific finding that the Debtors' inaction willfully and maliciously injured MCA. See, e.g., Dillon v. Nisson Motor Co., Ltd., 986 F.2d 263, 267 (8th Cir. 1993)(a party could be sanctioned under the court's inherent powers for destroying evidence, even where the destruction was not "willful" or "malicious"); Bass v. General Motors Corp., 929 F. Supp. 1287, 1288 (W.D. Mo. 1996)(same); Heiser, 1997 WL 718670, at *1. See also Fitzgerald v. Cantor, No C.A. 16297-

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> (2) Sanctions by Court. If a party . . . fails to obey an order to provide or permit discovery . . . the Court may make such orders in regard to the failure as are just, and among others the following:
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> . . .
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> In lieu of any of the foregoing orders or in addition thereto, the Court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances made an award of expenses unjust.

NC, 1998 WL 409158 at *3 (Del. Ch. June 22, 1998) (an order for sanctions under Rule 37 requires only that the party willfully or consciously disregard the court's order).

Because neither basis for sanctions requires a finding that the party against whom sanctions were ordered willfully acted to cause harm to the movant, we cannot conclude that the Delaware Court necessarily addressed the issues on which MCA bases its Motion for Summary Judgment. Consequently, collateral estoppel does not apply.

2. Uncontested Facts

MCA asserts that we should determine, based on the uncontested facts, that the sanctions awards were the result of the Debtors' willful and malicious injury of MCA. Specifically, MCA asserts that we need not make a determination of the Debtors' malice or ill will, but can find that the Debtors' conduct was "signified by behavior engaged in with a conscious disregard of one's duties or without cause or excuse." See Mega Enterprises v. Lahiri (In re Lahiri), 225 B.R. 582 (Bankr. E.D. Pa. 1998); Sears, Roebuck & Co. v. Pugliese, (In re Pugliese), 211 B.R. 173 (Bankr. M.D. Pa. 1997); First Seneca Bank v. Galizia (In re Galizia), 108 B.R. 63 (Bankr. W.D. Pa. 1989). MCA states that there is no

factual dispute that the Debtors knew of their duty to provide truthful, accurate answers to MCA's discovery requests. MCA asserts that the Debtors' behavior was clearly willful and malicious because they failed to produce the documents or tell the Delaware Court that they were unable to produce the documents. As evidence of this, MCA notes that the Debtors were able to produce documents when threatened with having their bankruptcy discharge denied. MCA asserts the Debtors knew their intentional refusal to respond to discovery requests would cause MCA financial injury. Therefore, MCA asserts we should find that the Debtors' conduct was willful and malicious.

The Debtors contest MCA's facts. The Debtors assert that they did not intend to cause MCA any harm, as evidenced by their appearance at depositions and the fact that they provided some documents to MCA. They assert they complied with their duty to provide documents to the best of their abilities. We conclude that there is an issue of material fact – namely, whether the Debtors willfully and maliciously disobeyed the orders of the Delaware Court. Consequently, we cannot grant MCA's Motion for Summary Judgment.

B. Denial of the Debtors' Discharge Under 11 U.S.C. § 727

Toward the end of the January 3, 2001, hearing, MCA asserted, for the first time, that the Debtors failed to amend their schedules to include certain assets. MCA therefore raised the issue of whether the Debtors' discharges should be denied pursuant to section 727(a). At that hearing, we declined to address those matters, but directed counsel to "either include it as part of [the motion for] summary judgment or I don't know if the complaint deals with it, amended complaint, but that's not before me today." (January 3, 2001, Transcript pp. 13-14.)

Consequently, in its Motion for Summary Judgment, MCA also seeks an order denying the Debtors' discharges pursuant to sections 727(a)(4)(A), (a)(2)(B), (a)(3), or (a)(6)(A). However, MCA's complaint does not contain any count under section 727.

Where a party seeks relief under section 727, it must do so by filing a complaint. See Federal Rule of Bankruptcy Procedure 7001(4). At the hearing, we did not, nor could we, permit MCA to object to the Debtors' discharges by motion, without filing an adversary complaint. Therefore, there is nothing on which to grant summary judgment under section 727.[3]

[3] In its Motion for Summary Judgment, MCA also seeks to compel the Debtors to amend their Schedules. This has no relevance to the issues raised in the Complaint. Therefore,

Further, the time to file a complaint objecting to the Debtors' discharges under section 727 expired on January 10, 2000, although it was extended to April 19, 2000, at MCA's request. MCA did not amend its complaint (within the deadline) to include a count under section 727. Therefore, we deny its Motion for Summary Judgment on this issue.

IV. CONCLUSION

For the foregoing reasons, we deny MCA's Motion for Summary Judgment for a determination of nondischargeability under section 523(a)(6) and for denial of the Debtors' discharges under section 727.

An appropriate Order is attached.

BY THE COURT:

Dated: March 1, 2001

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Mary F. Walrath
United States Bankruptcy Judge

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it is not properly before the Court.

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Debtors.	)	
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MORTGAGE CAPITAL	)	
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	)	Adversary No. A-99-435
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SHAUNA B. THOMPSON,	)	
	)	
Defendants.	)	

O R D E R

AND NOW, this **1ST** day of **MARCH, 2001**, upon consideration of Mortgage Capital Advisors, Inc.'s Motion for Summary Judgment, it is hereby

ORDERED that the Motion for Summary Judgment is **DENIED**; and

ORDERED that a status hearing be held in this case on March 30, 2001, at 9:00 a.m.

BY THE COURT:

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Mary F. Walrath

United States Bankruptcy Judge

cc: See attached

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