

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
WALTER ZITLOW,)	Case No. 00-10701
)	Chapter 7
)	
Debtor.)	
_____)	
)	
STATE OF KANSAS, <i>ex rel.</i>)	
CARLA J. STOVALL, Attorney General,))	
)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 00-5115
)	
WALTER ZITLOW,)	
)	
)	
Defendant.)	
_____)	

**MEMORANDUM OPINION GRANTING
STATE'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on the State of Kansas' Supplemental Motion for Summary Judgment filed on August 14, 2001. The State's motion was filed in response to this Court's prior Memorandum and Judgment on Decision filed in this case on July 16, 2001. In that decision, this Court granted in part and denied in part the State's prior motion for summary judgment. The State now seeks summary judgment on its complaint that debtor Zitlow's actions taken against his victims which make up the basis of the State's numerous causes of action under the Kansas Consumer Protection Act ("KCPA") were willfully and maliciously injurious to the victims and that its claims against him for restitution should be excepted from his discharge under 11 U.S.C. §

523(a)(6). In its July 16, 2001 decision, this Court held that the pre-petition state court judgment entered against debtor for \$1,365,000.00 in punitive damages and penalties under the KCPA was nondischargeable under 11 U.S.C. §532(a)(7). Because the record before the court is bereft of any state court finding as to the victims' detrimental reliance, and because such reliance was not necessary to the proof of the State's case in state court, this Court declined to grant summary judgment on the State's § 523(a)(2)(A) actual fraud claim.¹ The State's first motion made no mention of § 523(a)(6).

In its Memorandum Opinion, the Court granted the State until August 14, 2001 to file a supplemental motion for summary judgment on its § 523(a)(6) claim and the debtor was granted fifteen days thereafter to respond. When the debtor failed to respond, this Court, acting sua sponte, set the matter for pretrial scheduling conference on the November 8, 2001 motions docket and gave debtor appropriate notice. When the matter was called, Mr. Zitlow appeared in person, accompanied by an attorney, Todd Allison.² Mr. Zitlow explained that he had failed to file a response because he had been incarcerated in Missouri at the time of the due date and that his former counsel had allegedly failed to advise him of the deadlines. Mr. Allison asked for a brief extension of time in which to decide whether to enter his appearance and to make a response to the state's supplemental motion. The Court granted ten additional days for entry of appearance and filing of a response by debtor. On November 19, 2001, Mr. Allison filed a further request for extension, this time seeking until December 5, 2001 in which to respond to the supplemental motion. That time having expired and no response having been filed, the Court is ready to rule on

¹See Memorandum Opinion on Motion for Summary Judgment, July 16, 2001, pp. 12 (Docket no. 18).

²Debtor's counsel, Steven R. Sublett, withdrew from representing the debtor on September 20, 2001 per this Court's order (Docket no. 27).

the State's supplemental motion.

JURISDICTION

As found in this Court's prior memorandum and judgment, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(I) and § 1334.

UNCONTROVERTED FACTS

The Court incorporates by reference its prior findings of uncontroverted fact as set out in its July 16, 2001 opinion.³ Suffice it to say here that debtor was a door-to-door salesman of alarm systems who primarily preyed upon the elderly. As set out in the prior opinion, and as extensively detailed in a prior state court decision, debtor made numerous misrepresentations of fact in the course of his dealings with his hapless customers. Among these statements were representations that he was an authorized dealer of AT&T products and that his products were made by AT&T. Zitlow further assured his customers that the purchase of these alarm systems would garner them discounts in homeowner's insurance premiums, medical deductions on their income taxes, a lifetime guarantee, and free monitoring by the fire department. Zitlow knew that none of these assertions was true.

In a prior state court proceeding filed in the District Court of Sedgwick County, Kansas,⁴ the Hon. D. Keith Anderson, District Court Judge, found that Zitlow had made numerous knowing misrepresentations of fact as a result of which the 27 victims acquired these alarm systems and were damaged in the amount of \$110,977.24, which amount Zitlow was ordered to repay as

³See Mem. Op. pp. 2-5.

⁴State of Kansas ex rel. Carla J. Stovall v. Walter Zitlow, Individually, Complete Home Security, Inc., and Gary Richardson, Individually, d/b/a Alarm Professional Services, Case No. 97 C 1004, journal entry filed February 1, 2000.

restitution under the KCPA. Judge Anderson characterized Zitlow's actions as "deliberate, intentional misconduct . . . in every violation of the Kansas Consumer Protection Act," and entered judgment against Zitlow jointly and severally with his co-defendants for \$110,977.24 in consumer damages and \$1,365,000.00 in civil penalties. The parties stipulated that the state court's Findings of Fact and Conclusions of Law, entered on February 1, 2000 (the "Findings") would be evidence in this adversary proceeding. This Court, in its prior Memorandum Opinion, granted the State summary judgment as to the dischargeability of the penalties, but reserved judgment regarding the actual restitution pending the State's further briefing on whether Zitlow's conduct descended to the level of wilful and malicious harm necessary to support an exception to discharge under § 523(a)(6). Based on Judge Anderson's copious findings and conclusions, this Court finds that Zitlow's representations were not only made intentionally, but also with the knowledge and intent that his victims would be harmed by doing business with him and paying him money.

ANALYSIS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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."⁵ A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law."⁶ An issue of fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.⁷ The moving party bears the initial burden of showing

⁵ Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993).

⁶Anderson, 477 U.S. at 248.

⁷Id. at 248.

that there is an absence of any genuine issue of material fact.⁸ Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof."⁹ The nonmoving party may not rest on its pleadings but must set forth specific facts.¹⁰ The court must consider the record in the light most favorable to the party opposing the motion.¹¹ The Court determines "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law."¹² In making such a determination, the Court should not weigh the evidence or credibility of witnesses. In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment.¹³ If an inference can be deduced from the facts that would allow the nonmovant to prevail, summary judgment is inappropriate.¹⁴ Here, the nonmovant, Zitlow, has failed to respond. Nevertheless, this Court is obligated to make an independent review of the record to determine whether genuine issues of fact remain for trial.

Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." § 523(a)(6). In general, courts

⁸ Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. Watonga, 942 F.2d 737, 743 (10th Cir. 1991).

⁹ Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Celotex, 477 U.S. at 324).

¹⁰ Id.

¹¹ Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984), cert. denied, 469 U.S. 1214, 105 S. Ct. 1187, 84 L. Ed. 2d 334 (1985).

¹² Anderson, 477 U.S. at 251-52.

¹³ McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

¹⁴ United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986) (citation omitted).

define “willful and malicious injury” as

. . . when debtor, without justification or excuse, and with full knowledge of the specific consequences of his conduct, acts notwithstanding, knowing full well that his conduct will cause particularized injury . . .¹⁵

At issue here is whether Zitlow’s conduct, as found by the state court, fits that definition. The state court found that, in violating a number of Kansas consumer protection statutes, debtor committed “deliberate, intentional misconduct . . . in every violation of the Kansas Consumer Protection Act.” As found by the state court, Zitlow’s victims suffered economic loss for which restitution was ordered.

The statutes violated by Zitlow enumerate classes of conduct which one can only characterize as tortious. Kan. Stat. Ann. § 50-626(b) lists a variety of deceptive acts and practices which include (i) misrepresentations made “knowingly or with reason to know” that a product offered has characteristics which it lacks, Kan. Stat. Ann. § 50-626(b)(1)(A); (ii) willful falsehoods with respect with respect to any fact about the items or services offered, Kan. Stat. Ann. § 50-626(b)(2); and (iii) falsehoods concerning discounts, Kan. Stat. Ann. § 50-626(b)(1). The state court found that Zitlow committed all of these acts and more. In addition, Zitlow was found to have failed to inform the victims of their right to cancel these door-to-door sales and to have failed to provide them with written notices of same as required by Kan. Stat. Ann. § 50-640(b)(5). The state court also found that Zitlow committed acts which are enumerated by Kansas law as unconscionable under Kan. Stat. Ann. § 50-627(b). In particular, Zitlow “. . . took advantage of the ability of the consumer reasonably to protect the consumer’s interests because of

¹⁵In re Pasek, 983 F.2d 1524, 1527 (10th Cir. 1993).

the consumer's physical infirmity, ignorance . . . or inability to understand . . .”¹⁶

This record shows that Zitlow committed all of these misdeeds with the hope and expectation that his victims would pay him for the “services” he was selling. He could only have expected that his words and deeds would result in these victims transferring their funds to him, thereby damaging their property interests. His intent here was obvious. Judge Anderson found that Zitlow knew when he made them that his representations that his companies were AT&T dealers selling AT&T security systems were false.¹⁷ He certainly knew that his statements about the tax advantages, insurance premium reductions, discounts and lifetime guarantees were false.¹⁸ The only reasonable reading of the record, even giving Zitlow the full benefit of the doubt, is that he acted “. . .without justification or excuse and, with full knowledge of the specific consequences of his conduct . . . knowing full well that his conduct [would] cause particularized injury . . .”¹⁹ As the Supreme Court has said in the § 523(a)(6) context, the debtor must not only intend the act, but also the injury which is its consequence. “[T]he (a)(6) formulation triggers in the lawyer’s mind the category ‘intentional torts’ . . . [which] generally require that the actor intend the consequences of the act . . .”²⁰ The intentionally tortious nature of Zitlow’s conduct is apparent.

Applying the summary judgment standards, even after drawing every inference in favor of the defendant, this Court cannot find any remaining factual controversies to decide at trial.

Application of the familiar principles of collateral estoppel removes any need for trial. The state

¹⁶Kan. Stat. Ann. § 60-627(b)(1).

¹⁷See, *inter alia*, Findings, p. 10.

¹⁸*Id.*, p. 11

¹⁹*In re Posta*, 983 F.2d 1524 (10th Cir. 1993).

²⁰*Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 977 (1998).

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Case No. 00-10701-7; Adv. No. 00-5115; **Memorandum Opinion Granting State's Supplemental Motion
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court tried issues which are identical with those presented to this Court (willful misrepresentation and intentional misconduct). The state court finally adjudicated its action on the merits. The parties to that action are the same as those here. Finally, the debtor had a full and fair opportunity to litigate all of the issues relevant to this action in the state court action.²¹ Because this Court is bound to respect and adhere to the state court's factual findings, and because those findings so clearly indicate this debtor's willful misrepresentations, made with the intention of separating his victims from their money, summary judgment for the State is granted as to the exception from discharge of the state court's judgment for restitution against the debtor.

Debtor's debt to his numerous victims for actual consumer damages in the amount of \$110,977.24 was incurred by his willful and malicious damage to the victims' property as defined in § 523(a)(6) and controlling case law and shall be excepted from discharge accordingly. A Judgment on Decision shall issue this day.

²¹ See Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1022 (10th Cir. 2001).

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Dated at Wichita, Kansas, this 3rd day of January, 2002.

ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Memorandum Opinion Granting State's
Supplemental Motion For Summary Judgment** was deposited in the United States mail, postage
prepaid on this 3rd day of January, 2002, to the following:

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