



SO ORDERED.

SIGNED this 24 day of June, 2005.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

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

In Re:

**TERESA MICHELLE ULRICH,

DEBTOR.**

**CASE NO. 04-13965
CHAPTER 7**

**DAVID F. ULRICH,

PLAINTIFF,**

v.

ADV. NO. 04-5326

**TERESA MICHELLE ULRICH,

DEFENDANT.**

**MEMORANDUM AND ORDER DENYING
DEFENDANT'S MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

The matter before the Court is the Defendant's Motion to Dismiss for Failure to State a Claim upon which Relief may be Granted or, in the Alternative, Motion for Summary Judgment. The

Defendant, Debtor Teresa Ulrich, appears by Elizabeth A. Carson of Bruce, Bruce & Lehman, LLC. The Plaintiff, David F. Ulrich, appears by Joseph H. Cassell, of Redmond & Nazar, LLP. There are no appearances.

This adversary proceeding was commenced by the Complaint for Exception to Discharge under 11 U.S.C. § 523(a)(6) filed by David F. Ulrich, the former husband of Debtor Teresa Ulrich. The Complaint alleges that discharge should be denied for unspecified damages, including legal fees and expenses, mental anguish and embarrassment, suffered by the Plaintiff as a result of his ex-wife's tortuous and fraudulent conduct during the pendency of the parties' divorce proceeding. The tortuous and fraudulent conduct alleged is the Debtor's alleged invasion of the Plaintiff's right to privacy, tortuous interference with his attorney-client relationship, and fraudulent conduct resulting from Debtor's allegedly surreptitiously accessing the Plaintiff's private e-mail account at "mac.com" and using such information in the divorce proceedings.

The Complaint states a claim which relief may be granted. Debtor's contention that no claim for relief is alleged in the Complaint because it is brought under subsection 523(a)(6) and not section 727 represents a misunderstanding of bankruptcy law. Section 727 addresses a general denial of discharge; section 523 addresses denial of discharge as to specific debts. As sought by the Plaintiff in this case, a debtor may be granted a discharge under 727, subject to an exception of nondischargeability of a specific debt pursuant to subsection 523(a)(6). Further, Kansas law recognizes the tort of intentional invasion of privacy.¹ The tort is premised upon the rule that "[o]ne

¹ *Froelich v. Adair*, 213 Kan. 357, 516 P.2d 933 (1973).

who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable man.”² Subsection 523(a)(6) excepts from discharge debts “for willful and malicious injury by the debtor to another entity or to the property of another entity.” The Debtor has not identified and the Court knows of no reason why, assuming a finding of willful and malicious injury, a judgment for invasion of privacy could not be excepted from discharge under this subsection.³ The motion to dismiss for failure to state a claim is denied.

In the alternative, the Debtor moves for summary judgment. This motion is premised solely⁴ upon the correct rule of law that there can be no invasion of privacy arising from accessing an e-mail account when there is no expectation of privacy because consent to access the e-mail account has been given by the account holder. The Debtor asserts, by affidavit, that the Plaintiff consented to her access to the account by his providing her with his password to the account.

The Plaintiff opposes the Debtor's motion for summary judgment contending that no consent was given. His opposition is supported by an affidavit which states "I have never given my confidential password to my private e-mail account at "mac.com," and/or any other e-mail account, to defendant, nor did I ever give defendant permission to access any account.” Whether consent was given is

² *Id.*, 213 Kan. at 358.

³ *See In re Kennedy*, 249 F.3d 576 (6th Cir. 2001) (holding judgment for willful and malicious injury to reputation was nondischargeable).

⁴ In her reply brief, Debtor raises for the first time a contention that she is entitled to summary judgment because the Complaint does not expressly enumerate all of the elements of a cause of action for invasion of privacy. This was not her contention when initially moving for summary judgment. Moreover, if it had been, the Court would not have granted summary judgment on this basis because the Complaint gives adequate notice of the basis for the claim that discharge should be denied.

therefore a controverted issue of material fact. Therefore, the Court denies summary judgment based upon Debtor's theory that she is entitled to summary judgment on the claim for invasion of privacy because consent was given by Plaintiff.

For the foregoing reasons, the Court denies Debtor's Motion to Dismiss for Failure to State a Claim upon which Relief may be Granted or, in the Alternative, for Summary Judgment.

IT IS SO ORDERED.

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