**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

| | |
|---|---|
| In re: | BAP No. CC-08-1178-DMoPa |
| CYRUS PARTOW, | Bk. No. 05-14150 |
| Debtor. | Adv. No. 05-01417 |
| CYRUS PARTOW, | |
| Appellant, | |
| v. | **M E M O R A N D U M**[1] |
| KIRK TURNER, | |
| Appellee. | |

Argued and Submitted on January 23, 2009
at Pasadena, California

Filed - February 10, 2009

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Theodor C. Albert, Bankruptcy Judge, Presiding

Before: DUNN, MONTALI and PAPPAS, Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Kirk Turner ("Turner") initiated an adversary proceeding against the debtor, Cyrus Partow, to except from discharge a stipulated judgment he obtained against the debtor in state court. At the start of the four-day trial in the adversary proceeding, the debtor moved to dismiss the action for failure to prosecute, which motion the bankruptcy court denied. After taking the matter under advisement, the bankruptcy court determined that the stipulated judgment was nondischargeable under 11 U.S.C. § 523(a)(6).[2]

The debtor appeals, arguing that the bankruptcy court abused its discretion in denying his motion to dismiss for failure to prosecute and erred in applying an incorrect legal standard to determine "willfulness" under § 523(a)(6). We AFFIRM.

## I. FACTS

The stipulated judgment arose from the debtor's involvement in a theft when he was a high school student. As revealed below, the consequences of his crime dog the debtor still.

On November 13, 2000, in the course of his employment as a driver for a beer distributing company, Turner was delivering beer to a convenience store in Laguna Beach, California. Turner parked the delivery truck next to the front door of the store and went into the store to make his delivery, leaving one or two of the bays of the delivery truck open.

---

[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

The debtor and his friend, Erick Battersby ("Battersby"), had driven to the convenience store in the debtor's father's SUV. They noticed the open bay doors of the delivery truck and decided to steal some beer. While Battersby snatched several cases of beer from the delivery truck, the debtor waited in the driver's seat of the SUV with the engine running.

Turner spied Battersby unloading the beer cases into the SUV and sprinted out of the store to stop the theft. As Battersby entered the rear door of the SUV, Turner grabbed the right arm of his shirt sleeve. Seeing Turner close in on Battersby, the debtor yelled and hit the accelerator of the SUV, speeding out of the parking lot.

Turner meanwhile held onto Battersby's shirt sleeve until it tore off. Turner fell to the pavement, and the rear wheel of the SUV rolled over his feet. As the debtor and Battersby raced away in the SUV, they saw Turner on the ground. The debtor did not stop to investigate the extent of Turner's injuries.

Turner managed to write down the license plate number of the SUV. Three weeks later, the police arrested and took the debtor and Battersby into custody, booking them on robbery charges.

Turner subsequently sued the debtor in state court to recover damages arising from his injuries, medical expenses, and loss of income.[3] On September 15, 2003, Turner obtained a

[3] Turner also named the debtor's father, Syd Partow, Battersby, and his father, David Battersby, as defendants in the state court action. Syd Partow settled the state court action with Turner for $25,000. Turner obtained a default judgment against Battersby in the total amount of $752,540.58, and against David Battersby in the total amount of $75,000.

stipulated judgment against the debtor in the amount of $75,000, plus interest. The stipulated judgment provided that it was nondischargeable in bankruptcy by the debtor under § 523(a)(6).[4] Although the debtor agreed to settle the case, he refused to agree to a recital of facts that included an admission by the debtor that he intentionally injured Turner. No findings of fact accompanied the stipulated judgment.

Four months after the debtor filed for chapter 7 bankruptcy relief on June 13, 2005, Turner filed an adversary proceeding against the debtor to except the stipulated judgment from discharge under § 523(a)(6). Because no findings had been made in the state court action, the bankruptcy court set a trial to determine whether the debt owed Turner by the debtor arose from a willful and malicious injury within the meaning of § 523(a)(6).

Prior to the trial, the bankruptcy court held a status conference. At the status conference, the bankruptcy court set the trial for September 20, 2007, and referred counsel to its website for a copy of its trial procedures posted there.[5] It

---

[4] We agree with the bankruptcy court's correct observation that the provision that the stipulated judgment was nondischargeable was not binding on the parties.

[5] The bankruptcy court established its own trial procedures supplemental to the local bankruptcy rules of the Central District of California ("local rules"). The bankruptcy court's trial procedures state, in relevant part:

Trial Briefs: Unless otherwise ordered by the Court, trial briefs are required. Trial briefs shall be filed seven (7) calendar days prior to trial.

Testimony: All direct testimony shall be by declaration unless:

(continued...)

reminded the attorneys for the debtor and Turner to file a joint pretrial statement and a joint pretrial order, as required under the local rules.[6] The bankruptcy court further told counsel that its trial procedures required direct testimony by declaration. It strongly recommended to counsel that they file trial briefs; the bankruptcy court cautioned counsel that "the person who doesn't file a trial brief is at a severe disadvantage." Tr. of July 12, 2007 Hr'g, 6:23-25, 7:1.

---

[5](...continued)
I) the witness is adverse or refuses to give testimony by declaration; or
ii) the testimony is offered to impeach or rebut.

. . .

Plaintiff(s) shall file and serve its/their declarations on counsel for the defendant(s) thirty (30) days before the trial date. Defendant(s) shall serve its/their declarations on counsel for the plaintiff(s) twenty-one (21) days before the trial date.

Evidentiary objections to any declaration must be served and filed at least seven (7) calendar days before the trial date.

[6] Local Bankruptcy Rule 7016-1(b) for the Central District of California provides, in relevant part:

(1) When Required: In any adversary proceeding or contested matter, unless otherwise ordered by the court, attorneys for the parties shall prepare and file a written joint pre-trial order approved by counsel for all parties. Unless otherwise specified by the court, the joint pre-trial order shall be filed and served not less than 14 days before the date set for the trial or pre-trial conference, if one is ordered. Preparation and filing of the pre-trial order shall be the responsibility of the parties' counsel, and it shall be equally the responsibility of the parties themselves if the parties are not represented by counsel. All parties shall meet and confer at least 28 days before the date set for trial or pre-trial conference, if one is ordered, for the purpose of preparing the pre-trial order.

On September 4, 2007, counsel for the debtor filed a direct testimony declaration. Approximately one week later, he filed a unilateral pretrial order and a trial brief. Counsel for Turner filed two direct testimony declarations the day before the trial. He did not file a trial brief.

At the start of the trial, counsel for the debtor moved to dismiss the action for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure ("FRCP 41(b)")[7] and the local rules[8] on the grounds that Turner's attorney did not properly prepare for trial by failing to comply with the local rules and the bankruptcy court's trial procedures.

---

[7] FRCP 41(b), incorporated by Rule 7041, provides:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 – operates as an adjudication on the merits.

[8] Counsel for debtor referenced the local rules in moving to dismiss the action for failure to prosecute, but did not cite to the specific local rule.

Local Bankruptcy Rule 7016-1(g) for the Central District of California provides:

> Failure of counsel for any party to appear before the court at status conference or pre-trial conference or to complete the necessary preparations therefor or to appear at or to be prepared for trial may be considered an abandonment or failure to prosecute or defend diligently, and judgment may be entered against the defaulting party either with respect to a specific issue or as to the entire proceeding.

Counsel for the debtor pointed out that, though the bankruptcy court's trial procedures required direct testimony declarations to be filed thirty days before the trial, Turner's attorney did not file them until the day before the trial. As a result, the debtor's attorney had no opportunity to prepare written evidentiary objections to the direct testimony declarations, as required under the bankruptcy court's trial procedures. Moreover, the debtor's attorney contended, one of the direct testimony declarations contained allegations he had never seen, causing prejudice to the debtor by forcing the debtor's attorney "to shoot from the hip" in making evidentiary objections. Tr. of September 20, 2007 Hr'g, 6:15.

Counsel for the debtor also noted that Turner's attorney failed to participate in preparing a joint pretrial order and to file a trial brief. Thus, Turner's attorney substantially failed to comply with the local rules and the bankruptcy court's trial procedures. Should the bankruptcy court decline to dismiss the action, the debtor maintained, it would "send[] a bad message, that there's no consequence for blatant disregard of the [bankruptcy court's] orders . . . ." Tr. of September 20, 2007 Hr'g, 7:15-17.

The bankruptcy court declined to dismiss the case. It was reluctant to "deny[] [Turner] his day in court," believing that, though there was a "grievous breach of the [bankruptcy court's] procedure" by Turner's counsel, "[t]he rules [were] secondary to justice." Tr. of September 20, 2007 Hr'g, 15:1-2, 16:1-2, 18:3-4. The bankruptcy court allowed the trial to proceed, determining that such noncompliance was not "so fundamental as to

prevent entirely [Turner] from presenting a case." Tr. of September 20, 2007 Hr'g, 21:23-24.

The bankruptcy court conducted the trial over four days, during which the debtor, Battersby, and Turner testified. At the conclusion of the trial, it took the matter under advisement. Shortly thereafter, the bankruptcy court issued its statement of decision, determining the stipulated judgment to be nondischargeable as it arose from a willful and malicious injury inflicted by the debtor to Turner within the meaning of § 523(a)(6). On July 2, 2008, the bankruptcy court entered judgment in favor of Turner.

The debtor appeals.

## II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

## III. ISSUES

(1) Whether the bankruptcy court abused its discretion in declining to dismiss the action for failure to prosecute.

(2) Whether the bankruptcy court erred in its determination of "willfulness" under § 523(a)(6).

## IV. STANDARDS OF REVIEW

"We review de novo whether a particular type of debt is nondischargeable as a willful and malicious injury under § 523(a)(6)." Maaskant v. Peck (In re Peck), 295 B.R. 353, 360

(9th Cir. BAP 2003), quoting Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 258 B.R. 192, 195 (9th Cir. BAP 2001)(internal quotations omitted). See also Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002)("Whether a claim is nondischargeable presents mixed issues of law and fact and is reviewed de novo."). We review de novo a bankruptcy court's conclusions of law, id., and its interpretations of the Bankruptcy Code. See Nichols v. Birdsell, 491 F.3d 987, 989 (9th Cir. 2007).

We review the bankruptcy court's findings of fact for clear error. Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001). A finding of fact is clearly erroneous, even though there is evidence to support it, if we have the definite and firm conviction that a mistake has been committed. Banks v. Gill Distribution Ctrs., Inc. (In re Banks), 263 F.3d 862, 869 (9th Cir. 2001). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).

We review a bankruptcy court's decision on a motion to dismiss an action for lack of prosecution for an abuse of discretion. Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1138 n.10 (9th Cir. 2000). We will not disturb the bankruptcy court's exercise of discretion unless we have a definite and firm conviction that it committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir.

1994), quoting Nealey v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275, 1278 (9th Cir. 1980).

## V. DISCUSSION

### A. The bankruptcy court did not abuse its discretion in declining to dismiss the action for failure to prosecute

The following five factors ("FRCP 41(b) factors") apply in determining whether to dismiss an action for lack of prosecution under FRCP 41(b): (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendant; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions. In re Eisen, 31 F.3d at 1451. "Although beneficial to the reviewing court, [the bankruptcy court] is not required to make specific findings on each of the essential factors." Id. If the bankruptcy court does not make such findings, we review the record independently to determine whether the bankruptcy court abused its discretion. Id., quoting Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986).

The debtor argues that the bankruptcy court abused its discretion in declining to dismiss the action for failure to prosecute. The debtor maintains that the FRCP 41(b) factors weigh in favor of dismissing the action. He particularly emphasizes the prejudice he suffered in his attorney being unable to prepare written evidentiary objections to the new allegations in the untimely-filed Turner declaration. The debtor also stresses the facts that Turner's attorney failed to file a trial

brief and to participate in preparing the pretrial order, despite the requirements set forth in the local rules and the bankruptcy court's trial procedures, as weighing in favor of dismissal.

Reviewing the record before us, the bankruptcy court considered at least three of the FRCP 41(b) factors when it decided not to dismiss the action: the risk of prejudice to the defendant; the public policy favoring the disposition of cases on their merits; and the availability of less drastic sanctions.

In determining whether the defendant has been prejudiced, courts "examine whether the plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case." Malone v. U.S. Postal Serv., 833 F.2d 128, 131 (9th Cir. 1987). Accord Tenorio v. Osinga (In re Osinga), 91 B.R. 893, 895 (9th Cir. BAP 1988)(citing Malone, 833 F.2d at 131). Here, despite the failure of Turner's attorney to submit timely the direct witness declarations and to file a trial brief, counsel for the debtor told the bankruptcy court that he "[knew] this case" and would not "[have] show[n] up at this Court not prepared to try this case." Tr. of September 20, 2007 Hr'g, 20:21-23. The bankruptcy court thus decided to have the parties proceed "as best [they could]." Tr. of September 20, 2007 Hr'g, 21:17. The bankruptcy court also allowed the debtor's attorney a continuing objection to all evidence presented by Turner during the trial. The bankruptcy court understood the prejudice to the debtor and his counsel from the failures of Turner's counsel to comply with the local rules and the bankruptcy court's trial procedures and factored that understanding into its decision to allow the trial to proceed.

With respect to the factor of public policy favoring the disposition of cases on their merits, "courts weigh this factor against the plaintiff's delay and the prejudice suffered by the defendant." In re Eisen, 31 F.3d at 1454. The bankruptcy court expressly considered this factor. Although it understood the frustration of the debtor's attorney in being unable to prepare written evidentiary objections, the bankruptcy court believed that allowing Turner to have his day in court outweighed the prejudice suffered by the debtor.

In considering the availability of less drastic sanctions, courts must make "a reasonable exploration of possible and meaningful alternatives." In re Eisen, 31 F.3d at 1455, citing Anderson v. Air West, Inc., 542 F.2d 522, 525 (9th Cir. 1976)(internal quotations omitted). Otherwise, "if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions," the bankruptcy court will have abused its discretion. Malone, 833 F.2d at 132, quoting United States v. Nat'l Med. Enters, Inc., 792 F.2d 906, 912 (9th Cir. 1986)(internal quotations omitted). The bankruptcy court does not need to explain why alternatives to dismissal are infeasible, though its explanation would be helpful. In re Osinga, 91 B.R. at 895. Here, the bankruptcy court considered a possible monetary sanction against Turner's attorney in lieu of dismissal for his failure to comply with its trial procedures and the local rules. The bankruptcy court decided to schedule a hearing to consider "what the amount of sanctions that should be imposed upon [Turner's attorney] are" so that he would "remember this occasion and try next time to take

rules more seriously for the benefit of all."[9] Tr. of September 20, 2007 Hr'g, 18:7-9, 18:14-15.

Based on the bankruptcy court's reasoned consideration of FRCP 41(b) factors, we conclude that the bankruptcy court did not abuse its discretion in denying the debtor's motion to dismiss for failure to prosecute.

B. The bankruptcy court did not err in its determination of "willfulness" under § 523(a)(6)

The debtor challenges the bankruptcy court's nondischargeability determination on two grounds: (1) the bankruptcy court applied an incorrect legal standard to determine willfulness under § 523(a)(6), and (2) the debtor did not believe that injury to Turner was substantially certain to occur.

1. The bankruptcy court applied the correct legal standard in determining "willfulness" under § 523(a)(6)

Section 523(a)(6) excepts from discharge debts arising from "willful and malicious" injury by the debtor to another person.[10] For an injury to be willful, the debtor must have a subjective motive to inflict injury or must believe that injury is substantially certain to occur as a result of his or her conduct.

---

[9] No such hearing has been scheduled, based on our review of the adversary proceeding docket.

[10] Courts in the Ninth Circuit treat the "malicious" injury requirement as separate from the "willful" injury requirement. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146 (9th Cir. 2002). Accord In re Peck, 295 B.R. at 365. We need not address the "malicious" injury requirement, however, as the debtor does not challenge the bankruptcy court's determination on this point.

Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001). In other words, the debtor must have acted with "actual knowledge that harm to the creditor was substantially certain" to result. In re Su, 290 F.3d at 1146; Ditto v. McCurdy, 510 F.3d 1070, 1078 n.8 (9th Cir. 2007).

The bankruptcy court need not simply take the debtor's word as to his state of mind. Id. at 1146 n.6. "[T]he bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." Id. Accord Nahman v. Jacks (In re Jacks), 266 B.R. 728, 742 (9th Cir. BAP 2001)("[S]ubjective intent may be gleaned from objective factors.").

The debtor contends that the bankruptcy court used an incorrect legal standard to determine "willfulness" under § 523(a)(6). As established by Su, courts within the Ninth Circuit use a subjective approach in determining willfulness, i.e., they look to whether the debtor acted with the desire to injure or a belief that injury was substantially certain to occur. Here, the debtor claims the bankruptcy court used an objective approach, i.e., it looked to whether an objective, reasonable person would have known that his actions were substantially certain to cause injury.

In its statement of decision, the bankruptcy court found that "the debtor had no subjective motive to inflict Turner's injuries . . . [as] Turner was a complete stranger to [him]." Statement of Decision After Trial, 8:24-26. "The debtor's only motive," the bankruptcy court determined, "was to get away and flee the scene of his . . . crime, without getting caught."

Statement of Decision After Trial, 8:26, 9:1. It acknowledged that the debtor testified that "he did not really want to hurt Turner and that his actions were caused by fear." Statement of Decision After Trial, 9:2-3.

However, the bankruptcy court also found that the debtor was aware that Turner was in very close proximity to Battersby when he unloaded the beer cases into the back seat of the SUV. The debtor saw that Turner had closed in on Battersby and knew that Turner had grabbed Battersby's shirt.

The debtor therefore must have known, the bankruptcy court deduced, that Turner was clinging to the SUV by Battersby's shirt as the debtor drove away. Given these circumstances, the bankruptcy court reasoned, "the debtor must have realized that injuries would, in all likelihood, be caused to Turner when the debtor at this same moment accelerated the SUV out of the parking lot at a high rate of speed." Statement of Decision After Trial, 9:10-13. Although the debtor acted out of fear of being caught in the crime, the bankruptcy court concluded, "he was quite willing to act in a way as to likely inflict grievous injury, all in hope of evading his pursuer." Statement of Decision After Trial, 9:23-25.

From these findings, we conclude that the bankruptcy court applied the appropriate legal standard to determine willfulness. The debtor testified that he did not intend to injure Turner, which the bankruptcy court accepted as true. The bankruptcy court then looked to whether the debtor believed that injury was substantially certain to occur as a result of his hasty escape. The bankruptcy court considered circumstantial evidence –

Turner's position relative to the SUV, what the debtor saw before he sped away – to ascertain the debtor's state of mind at the time Turner was injured.

The debtor takes issue with the language used by the bankruptcy court in its determination as to his state of mind. By framing his state of mind as what he "must have realized," the debtor contends, the bankruptcy court applied the objective approach. The debtor equates "must have realized" with "should have known," i.e., what an objective, reasonable person should have known as to the risk of injury in proceeding with his or her conduct – the standard for recklessness.

However, the bankruptcy court's use of the phrase "must have realized" simply refers to what the debtor must have known, i.e., his actual knowledge, nothing more nor less. The findings in its statement of decision reveal that the bankruptcy court applied the subjective approach, having considered the testimony and analyzed the surrounding circumstances as described by the witnesses. From such circumstantial evidence, it deduced that the debtor had actual knowledge that his speedy escape from the store in the SUV was substantially certain to injure Turner.

2. The bankruptcy court did not clearly err in its determination that the debtor acted with actual knowledge that injury to Turner was substantially certain to result from his conduct

The debtor asserts that he neither appreciated nor recognized the risk of injury to Turner that could result from his conduct. At the time of the theft, the debtor was a high school student; as such, he lacked the experience and judgment to

understand fully the risk of injuring Turner in driving away. Moreover, he was panicked and scared; the debtor had no time to analyze or assess the risk of injury to Turner in the few seconds that elapsed between the theft and the getaway.

However, ultimately, given Turner's close proximity to the vehicle, of which the debtor was aware, the bankruptcy court found that the debtor must have known that speeding away in the SUV, with Turner so close, was substantially certain to result in injury to Turner. The bankruptcy court did not clearly err in its findings.

## VI. CONCLUSION

The bankruptcy court did not abuse its discretion in denying the motion to dismiss for failure to prosecute, based on its consideration of relevant FRCP 41(b) factors. The bankruptcy court also did not err in its determination of "willfulness" under § 523(a)(6). The record shows that the bankruptcy court applied a subjective approach to find that the debtor had acted with actual knowledge that injury to Turner was substantially certain to result from his conduct, taking into account circumstantial evidence to ascertain the debtor's state of mind.

We AFFIRM.