UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIVISION

In re Ahmad J. Tukhi, Debtor(s).	Case No.: 8:15-bk-14015-MW Chapter: 7 Adv. No: 8:15-ap-01449
Abdul H. Olomi, Plaintiff(s), v. Ahmad J. Tukhi, Defendant(s).	**MEMORANDUM DECISION AND ORDER AFTER TRIAL** Hearing: Date: April 16-17, 2018 Time: 9:00 a.m. Place: 411 West Fourth Street Courtroom 6C Santa Ana, CA 92701

Nikolaus W. Reed of Law Office of Nikolaus W. Reed for Abdul H. Olomi

Dyke E. Huish of Law Office of Dyke E. Huish and David Dworakowski of Quinn & Dworakowski, LLP for Ahmad J. Tukhi

WALLACE, J.

This adversary proceeding came on for trial on April 16-17, 2018 to determine the dischargeability of a debt allegedly owed to plaintiff Abdul H. Olomi ("Plaintiff") by

defendant-debtor Ahmad J. Tukhi ("Defendant"). Plaintiff alleges that such indebtedness arises out of Defendant's use of an automobile to willfully and maliciously injure him on August 6, 2013 and is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

The Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and General Order No. 13-05, filed July 1, 2013, of the United States District Court for the Central District of California. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

On the record, each of Plaintiff and Defendant have waived jury trial, consented to this Court's final determination of the matters here in controversy under the rule of *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594 (2011) and *Wellness International v. Sharif*, 135 S. Ct. 1932 (2015) and consented to this Court's trial of the matter notwithstanding 28 U.S.C. § 157(b)(5).[1]

FINDINGS OF FACT

Plaintiff is a professional artist and sculptor and, by his own account, is recognized as the best Afghan artist now living.[2] He has received many awards, not just from Afghanistan but also from the Afghan-American community in Orange County, California.[3]

Defendant had been separated from his wife Nassi for six months to one year prior to the events of August 6, 2013 that gave rise to Plaintiff's cause of action in this case.[4] This was a tumultuous time for him, and people in his circle and community knew it.[5] One of the members of that community was Plaintiff, who was somewhat distantly related by marriage to Defendant – Plaintiff's sister was married to Defendant's mother's cousin.[6]

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[1] 1 Reporter's Transcript ("R.T.") at 3, 102-103 ("correct me if I'm wrong on this, Mr. Reed") (the prefixes "1" and "2" refer to the transcript volume). Additionally, Plaintiff and Defendant each expressly consented to this Court's final determination of this adversary proceeding in a Joint Status Report, Docket No. 4, filed February 9, 2016. The Supreme Court of the United States has determined that the right under 28 U.S.C. § 157(b)(5) to have personal injury tort actions heard in a United States District Court can be waived by consent. *Stern v. Marshall,* 564 U.S. 462, 478-482, 131 S. Ct. 2594, 2606-2608 (2011). That is what occurred here. *See also Ridley v. Brock (In re Brock),* Adv. No. 15-2457, 2016 Bankr. LEXIS 2132, at *5 (Bankr. D.N.J. May 25, 2016) ("The Stern Court concluded that personal injury tort claims can be resolved by the bankruptcy court if the court has the consent of the parties involved.")

[2] 1 R.T. at 51.

[3] *Id.*

[4] 2 R.T. at 103.

[5] 2 R.T. at 92.

[6] 2 R.T. at 91.

Even prior to the events of August 6, 2013, Plaintiff and Defendant had not been on good terms. Defendant appeared at a gathering in Orange County where Plaintiff was receiving an award, and the two exchanged unpleasant words relating to Nassi.[7]

On August 6, 2013, Defendant went over to Nassi's residence to check on his children who had been left with a teenage babysitter. Defendant asked the babysitter where Nassi was, and the babysitter told him that Nassi had gone down to the AT&T store in Orange to take care of some phone matters.[8]

When Defendant arrived at the AT&T store, he found Nassi and Plaintiff sitting in Plaintiff's Toyota SUV, which was parked close to an adjacent Walgreen's store. (Defendant was driving a Mercedes S class vehicle). It was approximately 2:00 p.m. and the parking lot was in broad daylight.[9] Defendant pulled up beside Plaintiff's SUV and parked parallel to it.

At this point, a description of the scene is useful. Picture two stores, AT&T and Walgreen's, surrounded by a parking lot. Walgreen's is to the north, AT&T to the south. A person standing in the front of the AT&T store faces north and looks across the parking lot to a wall of the Walgreen's store. Surrounding the Walgreen's store is pavement used for parking or passage through the parking lot. Plaintiff and Nassi were parked adjacent to Walgreen's southern wall in a vehicle facing east. Defendant was parked parallel to Plaintiff and Nassi, also facing east, so that the north to south sequence would be Walgreen's southern wall, Plaintiff's vehicle, Defendant's vehicle, parking and passage area, and the AT&T north-facing front entrance to the store.[10]

The evidence is undisputed (and the parties agree) that Plaintiff and Defendant exchanged angry words through lowered car windows.[11] Following this exchange, Defendant backed up, swung around somewhat and drove forward, hitting Plaintiff's left rear

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[7] 1 R.T. at 54-55.
[8] 2 R.T. at 84-85.
[9] 1 R.T. at 64, lines 13-15.
[10] Exhibit A illustrates these positions. Compass directions are approximate.
[11] 1 R.T. at 64, lines 1-2; 2 R.T. at 107, lines 1-2.

bumper with the right front bumper of Defendant's vehicle. Photographs of car damage admitted into evidence seem to show far more damage to Defendant's vehicle than Plaintiff's vehicle.

What occurred after this collision is the subject of much dispute among Plaintiff, Defendant and two percipient witnesses.

Although Defendant was placed in handcuffs by police and taken into custody, it is undisputed that he was released shortly afterward and was never charged with any crime as a result of these events.

Plaintiff's Testimony.[12]

Plaintiff testified that after the collision described above, he exited his vehicle to see what happened to his bumper.[13] He saw Defendant back up completely and come full speed toward him, leading him to jump into some bushes at the southwestern corner of the Walgreen's store to avoid being hit.[14] Plaintiff jumped back out of the bushes – towards Plaintiff's vehicle –[15] and Defendant's vehicle actually hit the bushes.[16] Plaintiff then hid behind his car (between the car and the south wall of Walgreen's, in other words) and called 911.[17]

Plaintiff sustained physical injuries when he threw himself into the bushes. He hit his arm and head, "[b]ut nothing that put me out of bed, you know, like put me in bed for a long time. It was just some muscle aches . . ." The physical aspects of his injuries lasted three months or four months at the maximum.[18]

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[12] The Court restates Plaintiff's testimony – as it will restate the testimony of other witnesses – not as findings but simply as testimony.

[13] 1 R.T. at 64, lines 16-20.

[14] 1 R.T. at 66, lines 8-15.

[15] 1 R.T. at 68, lines 11-15.

[16] 1 R.T. at 67, lines 2-3.

[17] 1 R.T. at 72.

[18] 1 R.T. at 80, lines 15-25. Plaintiff also contends he suffered serious mental injuries as a result of the August 6, 2013 events.1 R.T. at 84-86. His psychologist, Dr. Snyder, diagnosed him with post-traumatic stress syndrome and major depressive disorder. 1 R.T. at 121.

Plaintiff's perception was that Defendant intentionally tried to run him over three times.[19] However, Plaintiff does not contend that Defendant actually hit him personally with Defendant's car or otherwise (as distinguished from the collision of the two vehicles described above, which both parties agree occurred), only that he attempted to do so, forcing Plaintiff to take the evasive maneuver of jumping into the bushes, where he sustained physical injuries described above.

After Plaintiff jumped into the bushes, Defendant came at Plaintiff's vehicle again and tapped it, lightly this time.[20]

Defendant's Testimony.

Defendant testified that although he certainly hit Plaintiff's vehicle, it was "[a]bsolutely not" intentional.[21] Defendant agreed that Plaintiff exited his vehicle and walked around to the rear of Plaintiff's vehicle after the collision of the two vehicles and says he backed up his car in order to keep Plaintiff in his sight.[22] As Defendant backed up, he saw Plaintiff walking in a direction away from his vehicle, toward the Walgreen's wall and the bushes.[23] Defendant presumably stepped on the gas and his vehicle lurched forward, toward Plaintiff, but he slammed on his brakes immediately.[24] Defendant did not try to hit Plaintiff (and, indeed, never ended up touching him with Defendant's car or otherwise).[25] He was very frustrated and was not paying attention to his driving.[26]

Defendant was placed in handcuffs by the police, taken into custody, taken to the police station and released "immediately."[27]

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[19] 1 R.T. at 92, lines 6-11.
[20] 2 R.T. at 49, lines 1-3.
[21] 2 R.T. at 106, lines 11-19.
[22] 2 R.T. at 108, lines 9-16.
[23] 2 R.T. at 109-110.
[24] 2 R.T. at 111-112. Defendant did not testify that he stepped on the gas, but the Court knows of no way that Defendant's vehicle could have moved toward Plaintiff under these circumstances without Defendant depressing the gas pedal.
[25] 2 R.T. at 114, lines 6-17.
[26] 2 R.T. at 112-113.
[27] 2 R.T. at 116.

David Cirelli's Testimony.

Mr. Cirelli parked in front of the AT&T store on August 6, 2013 (i.e., on the northern side of the store). When he exited his vehicle, he heard arguing and loud words behind him. He went into the AT&T store and on the way back out again he saw Defendant's white vehicle hit Plaintiff's vehicle. He saw Defendant back up only once, and he does not believe that Defendant was trying to hit Plaintiff with Defendant's vehicle.[28] He opined that the speed at which the vehicles impacted "was relatively slow," "wasn't excessive."[29]

Mr. Cirelli did not hear any tires squealing, and he observed only one impact, not more than one as Plaintiff testified. Nothing obstructed his view of these events.[30] He did not see Defendant's vehicle hit the bushes, as Plaintiff testified.[31]

Yesenia Gonzalez's Testimony.

Ms. Gonzalez was employed by AT&T and was present helping a customer in the AT&T store as the events recounted above unfolded. She heard a loud impact, turned around, saw middle finger gestures "and then after the gestures I saw the car going towards the other gentleman very rapidly, and then coming to a stop before hitting him."[32] She saw the car lurch forward.[33] She did not believe Defendant was trying to hit Plaintiff, only scare him.[34]

Ms. Gonzalez did not observe any second, third or fourth impact and was only about 25 feet away from the vehicles, with nothing obstructing her view.[35]

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[28] 1 R.T. at 20, lines 3-6 (" . . . as I recall, I don't believe he was trying to hit him with the car, if that's what you're asking.")
[29] 1 R.T. at 19, lines 15-16.
[30] 1 R.T. at 21-22.
[31] 1 R.T. at 25, lines 2-3.
[32] 1 R.T. at 31, lines 2-11.
[33] 1 R.T. at 43, lines 2-3.
[34] 1 R.T. at 32-33 (lines 1-2 on 33).
[35] 1 R.T. at 38-39.

Credibility of Testimony.

A trier of fact may choose to disbelieve or discount a witness's testimony for a variety of reasons. A trier of fact may believe that the witness is lying or, while not lying, is careless with the truth. If other witnesses, especially witnesses who are perceived as having no "pony in the race" as the expression goes, give testimony that contradicts such witness's testimony, that is yet another reason for a trier of fact to disbelieve such witness.

In Plaintiff's case, all of the factors described above are present, and for these reasons the Court considers Plaintiff's credibility to be greatly impaired with respect to the key aspects of Plaintiff's case.

Plaintiff testified no fewer than six times at trial that he had no recollection of having his deposition taken by Defendant's counsel on June 24, 2016 (less than two years before trial).[36] Yet he also testified at trial – twice – that when being examined at this very deposition (the one Plaintiff denied six times he had any recollection of), Defendant's counsel wouldn't let him answer questions:

> At the deposition, obviously, if they ask me those questions, just like right now, they wouldn't allow me to finish. Just like the way you're not allowing me to finish right now . . . [37]

> But at the deposition, they would ask me questions to the point, and they were like, thank you . . . So I was not allowed to continue, just the way I'm not allowed to continue now.[38]

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[36] 2 R.T. at 4, lines 10-11 ("I have no recollection, sir, of that day whatsoever"); 2 R.T. at 40, line 15 ("I have no recollection of this deposition . . ."); 2 R.T. at 50, line 25 ("I don't recall the deposition"); 2 R.T. at 62, lines 13-14 (" . . .I don't remember the deposition."); 2 R.T. at 69, line 24 ("I don't remember this deposition, counselor"); 2 R.T. at 72, line 5 ("I don't recall the deposition").

[37] 2 R.T. at 34, lines 21-24.

[38] 2 R.T. at 36, lines 4-8.

Defendant's counsel contended at closing argument that by such testimony Plaintiff was caught in a lie.[39] The Court agrees on this point: Plaintiff willfully lied to this Court about his memory of the June 24, 2016 deposition.

The Court also believes that Plaintiff is careless with the truth. He initially testified that he earned $1.1 million for an artwork contract with the military, yet at his deposition he variously testified that he made $300,000 or $500,000 from that contract.[40]

Plaintiff's version of the August 6, 2013 events are contradicted at multiple points by the independent percipient witnesses David Cirelli and Yesenia Gonzalez. Mr. Cirelli did not think Defendant was trying to hit Plaintiff with Defendant's car. Likewise, Ms. Gonzalez did not think Defendant was trying to hit Plaintiff with his car (although she did think Defendant was trying to scare Plaintiff). Both Mr. Cirelli and Ms. Gonzalez testified that Defendant hit Plaintiff's car only once, not more than once as Plaintiff contends.

For these reasons, the Court greatly discounts Plaintiff's credibility and his testimony at trial. Based upon the evidence presented, the Court finds as facts that (1) Defendant collided only once, not more than once, with Plaintiff's vehicle, damaging Plaintiff's bumper; (2) such collision was accidental, not intentional on the part of Defendant; (3) although Defendant's vehicle lurched at Plaintiff, Defendant immediately slammed on his brakes and did not hit Plaintiff; (4) Defendant did not intend to either hit, hurt or scare Plaintiff with Defendant's vehicle or otherwise – he was frustrated and angry and stepped hard on the gas pedal, causing his vehicle to lurch forward, but then immediately slammed on the brakes when he saw he was about to hit Plaintiff; (5) Defendant slammed on the brakes because he did not want to hit or hurt or scare Plaintiff; and (6) Defendant did not believe that injury to Plaintiff or Plaintiff's property was substantially certain to result from his own conduct.

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[39] 2 R.T. at 131.

[40] 2 R.T. at 72.

CONCLUSIONS OF LAW

The issue before the Court is whether Defendant committed any acts which fall within 11 U.S.C. § 523(a)(6), thereby rendering Plaintiff's claim for damages for mental and physical injuries excepted from discharge.

Plaintiff must prove his case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

11 U.S.C. § 523(a)(6): Willful and Malicious Injury

Bankruptcy Code section 523(a)(6) excepts from discharge any debt arising from "willful and malicious injury by the debtor to another entity or to the property of another entity[.]" The creditor must prove both willfulness and malice. *Ormsby v. First Am. Title Co. (In re Ormsby),* 591 F.3d 1199, 1206 (9th Cir. 2010); *Hamilton v. Elite of Los Angeles, Inc. (In re Hamilton)*, BAP Nos. SC-17-1126-FBL, SC-17-1223-FBL, 2018 Bankr. LEXIS 1171 (B.A.P. 9th Cir. April 17, 2018).

A "willful" injury is a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 706 (9th Cir. 2008). The United States Court of Appeals for the Ninth Circuit, following *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), has made it clear that the willful injury requirement under Bankruptcy Code section 523(a)(6) "is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *In re Ormsby, supra,* 591 F.3d at 1206.

Plaintiff's perception that Defendant had a subjective motive to injure him is not controlling here. No matter how sincere Plaintiff's belief that Defendant intentionally tried to frighten and injure him may be, what is determinative is whether Defendant had a subjective motive to inflict injury or whether the Defendant believed that injury was substantially certain to occur as a result of his conduct.

The facts found by this Court, as stated above, preclude the Court from reaching any conclusion of law that Defendant acted "willfully" in injuring Plaintiff or Plaintiff's property. Simply stated, Defendant had no subjective motive to injure Plaintiff or Plaintiff's property

(i.e., Plaintiff's vehicle). The vehicle collision was an accident, not intentional. Although Defendant's vehicle lurched toward Plaintiff, Defendant had no subjective motive to injure or scare Plaintiff, and he slammed on the brakes as soon as he perceived that he was in danger of injuring Plaintiff. Defendant had no belief and did not believe that injury to Plaintiff or Plaintiff's property was substantially certain to result from Defendant's own conduct.

In view of Plaintiff's failure to prove willfulness, the Court need not reach the issue of whether Defendant's conduct was malicious. The Court concludes that Plaintiff's cause of action under 11 U.S.C. § 523(a)(6) fails because Plaintiff has not proven by a preponderance of the evidence that Defendant willfully injured him within the meaning of 11 U.S.C. § 523(a)(6).

CONCLUSION

Judgment will be entered for Defendant. The debt, if any,[41] of Defendant to Plaintiff in respect of any damages to which Defendant may be entitled as a result of the automobile collision and the other events of August 6, 2013 as described above is ordered, decreed and adjudged to be dischargeable.

Defendant shall lodge a form of judgment within 10 days of the date of entry of this Memorandum Decision and Order.

IT IS SO ORDERED.

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Date: May 2, 2018

Mark S. Wallace
United States Bankruptcy Judge

[41] Defendant presumably owed Plaintiff damages for negligently hitting Plaintiff's SUV and possibly also for negligently frightening him in the aftermath of the two vehicle-collision.