

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP No. MB 00-078

**IN RE: MARIAN E. HAMPTON,
Debtor.**

**AHMED MAHIOUS,
Plaintiff/Appellee,**

v.

**MARIAN E. HAMPTON,
Defendant/Appellant.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Carol J. Kenner, U.S. Bankruptcy Judge)**

**Before
HAINES, VAUGHN, CARLO, U.S. Bankruptcy Appellate Panel Judges**

Marian E. Hampton, pro se, on brief for the Appellant.

William G. Small and Berger & Small, on brief for the Appellee.

March 30, 2001

CARLO, U.S. Bankruptcy Judge.

The debtor appeals from a judgment issued by the United States Bankruptcy Court for the District of Massachusetts declaring that a debt based on a judgment in the principal amount of \$30,000.00, plus post-judgment interest thereon, is excepted from discharge under 11 U.S.C. § 523(a)(6) as a debt for willful and malicious injury. For the reasons set forth below, we affirm.

JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Appellate Panel has jurisdiction to review final decisions of the United States Bankruptcy Court pursuant to 28 U.S.C. §§ 158(a) and (b). The bankruptcy court's conclusions of law are reviewed de novo. Grella v. Salem Five Cent Savings Bank, 42 F.3d 26, 30 (1st Cir. 1994). Findings of fact may not be set-aside unless clearly erroneous. See Fed. R. Bankr. P. 8013; Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc., 145 F.3d 463, 469 (1st Cir. 1998). "[D]ue regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed. R. Bankr. P. 8013. See also Servicios Comerciales Andinos, S.A., 145 F.3d at 469 (citing La Esperanza De P.R., Inc. v. Perez Y Cia. De Puerto Rico, Inc., 124 F.3d 10 (1st Cir. 1997)). "'We will conclude that a finding is clearly erroneous only when, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been committed.'" Servicios Comerciales Andinos, S.A., 145 F.3d at 469 (1st Cir. 1998) (quoting Strahan v. Coxe, 127 F.3d 155, 172 (1st

Cir.1997)). Mixed questions of law and fact are reviewed "along a degree-of-deference continuum, ranging from plenary review for law-dominated questions to clear-error review for fact-dominated questions." Johnson v. Watts Regulator Co., 63 F.3d 1129, 1132 (1st Cir. 1995). Accord Servicios Comerciales Andinos, S.A., 145 F.3d at 469; Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 661 (1st Cir. 1997).

BACKGROUND

Marian E. Hampton ("Hampton") filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code on February 24, 1998. Hampton's ex-husband, Ahmed Mahious ("Mahious"), filed a complaint on May 18, 1998, seeking to except from discharge a debt based on a judgment issued by a state district court in Nevada. Mahious alleged that prior to the filing of her petition in bankruptcy, Hampton, a law student, filed an action against him in Nevada seeking the annulment of their marriage. Mahious filed a counterclaim for abuse of process and violation of Rule 11 of the Nevada Rules of Civil Procedure. A trial was scheduled. Hampton sought a continuance, which was denied, and failed to appear at the trial.

The Nevada court dismissed Hampton's claim with prejudice and held a trial on Mahious' counterclaim. The Nevada court found, among other things, that Hampton's complaint: had no basis in law or fact; was frivolous; and filed with improper motive. The court held Hampton in contempt for willfully failing to comply with court orders, discovery, and willfully failing to appear for trial. The

Nevada court dismissed Hampton's complaint with prejudice and granted judgment in favor of Mahious in the amount of \$30,000, largely for attorney's fees and travel related expenses. Hampton unsuccessfully appealed the judgment to the Supreme Court of Nevada.

At the trial in the bankruptcy court on the dischargeability complaint, Hampton appeared pro se and testified extensively regarding the circumstances of her marriage to Mahious. Hampton made allegations of immigration fraud; claiming that Mahious, who was not a citizen of the United States, married her with no intention of continuing the marriage after obtaining an immigration status which would allow him to remain in this country. Hampton attempted to refute the claim of willful and malicious injury by trying to demonstrate that her claim in the Nevada forum was not frivolous; that she believed the Nevada case would be dismissed without prejudice; that it was the only forum in which she could bring her claim; and that her purpose in filing the action was to obtain the annulment of her marriage, but not to cause Mahious to incur legal expenses.

After a trial on the complaint, the bankruptcy court issued a Memorandum of Decision which discusses the history of Hampton's relationship with Mahious and the Nevada court proceedings. The bankruptcy court accepted that there was sufficient cause, in law and fact, to justify the filing of Hampton's complaint in Nevada. The court found, however, that Hampton's intentions toward Mahious at the time of the filing of the complaint in Nevada, were angry

and vindictive. The court also found that Hampton filed her complaint in Nevada to harass and threaten Mahious and without a serious intention to prosecute it. The bankruptcy court chose not to believe Hampton's testimony that she did not expect her complaint in Nevada to be dismissed without prejudice. The Court found that the injury to Mahious was the financial burden of defending against Hampton's complaint.

The bankruptcy court concluded that the injury to Mahious was willful because Hampton knew that he would be forced to incur expenses to defend against it. Likewise, the court concluded that the injury was malicious based on the court's finding that Hampton filed the complaint without the intent to prosecute it. Accordingly, the bankruptcy court declared the debt nondischargeable under 11 U.S.C. § 523(a)(6), as one for willful and malicious injury.

ARGUMENTS AND ISSUES ON APPEAL

On appeal, as in the trial court, most of Hampton's arguments skirt the issues presented by the dischargeability complaint. Rather than focus on the elements, Hampton focuses on the facts, as she sees them, not on the facts found by the trial court. Hampton does argue that her failure to prosecute the Nevada action was due to her attorney's negligence. She indicates that Nevada was the only forum available to her. She contends that her actions were not willful or malicious and that she did not intend to injure Mahious. She argues that she had no ulterior purpose other than the legal redress of her grievance. She contends that the

bankruptcy court erred in finding that she did not have the "wherewithal and the resolve" to prevail in the Nevada action.

DISCUSSION

The bankruptcy court made numerous findings of fact, upon which it based its decision. The court found that Hampton was aware of the trial date in the Nevada action; she knew that her motion for continuance had not been acted upon; she decided not to appear; and her failure to appear was willful. Memorandum of Decision at 6. The bankruptcy court also found that Hampton failed to appear at the trial because Nevada was "a very distant and 'untenable' forum." Id. at 6. The court found that Hampton did not have the wherewithal or resolve to see the action through to completion. Id. at 12.

These findings are not clearly erroneous. Hampton testified that she was aware of the trial date and that she had sought a continuance. Trial Transcript, March 24, 2000 at 168-171. A letter from Hampton to her employer was also admitted into evidence in which Hampton indicated her awareness of the trial date, indicated that she had requested a continuance and that she would let her employer know if the date changed. Supplemental Appendix of the Appellee, Exhibit 3. Hampton testified that she did not attend the trial. Trial Transcript, March 24, 2000 at 171. She further testified that she was willing to risk a dismissal of the action by not showing up. Trial Transcript, March 24, 2000 at 172. Hampton testified that Nevada was a very distant and untenable forum. Id. She indicated that she had witnesses to present at

trial and Nevada was not the best forum. Id. She stated that she wanted to file the action in Massachusetts, where the parties lived and where the events took place. Id. Based on the bankruptcy court's findings and the record, the bankruptcy court's conclusion that Hampton filed the action in Nevada without the intent to prosecute it, is not clearly erroneous.

Moreover, the bankruptcy court did not commit error in inferring from the facts, as found, that Hampton understood that the Nevada case could be dismissed with prejudice based on her failure to appear. The court stated:

I do not believe that Ms. Hampton expected that her nonappearance would result in dismissal of her complaint *without* prejudice. First, this belief is inconsistent with the evidence that she was seeking and hoping for a continuance. More importantly, her alleged belief defies rational expectation. She may have hoped that the complaint and counterclaims would be dismissed without prejudice, but she cannot have believed with any certainty that they would be. In view of the existence of the counterclaim, of her failure to prosecute the complaint, and of the fact that the trial had already been twice rescheduled, it was likely that her complaint would be dismissed with prejudice and, especially in view of her failure to appear, that judgment would enter against her on the counterclaims; these were risks she understood. . . .

Memorandum of Decision at 7.

The bankruptcy court found that Hampton's intentions toward Mahious at the time of the filing of the complaint in Nevada, were angry and vindictive. Memorandum of Decision at 7. The court also found that Hampton filed her complaint in Nevada to harass and threaten Mahious. Id. at 8. The court found that Hampton filed the complaint to force Mahious to expend funds to defend against

it. Id. at 10.

These findings are not clearly erroneous. Numerous pages of Hampton's testimony detail her anger toward Mahious. She testified that she was very angry and that she had reported him to the United States Immigration and Naturalization Service ("INS"). Trial Transcript, March 24, 2000 at 159-160. Hampton was angry about Mahious' actions during their marriage and after. Trial Transcript, March 24, 2000 at 161. Hampton admitted to leaving telephone messages for Mahious indicating that she was going to "bury" him and make him sorry that he ever met her. Trial Transcript, March 24, 2000 at 161. Based on the telephone threats, Mahious also testified that he believed that Hampton filed the complaint in Nevada to harass him and get him in trouble with the INS. Trial Transcript, March 24, 2000 at 90. From this testimony, the bankruptcy court's finding that Hampton had animus and an ulterior motive in filing the annulment action was not clearly erroneous.

Based on Hampton's ulterior motive and her intention not to prosecute the action in Nevada, the bankruptcy court properly concluded that Hampton had committed the tort of abuse of process under Nevada law. Likewise, the finding that Hampton had filed the action with the intent to harass Mahious and to cause him to expend funds to defend in a distant forum clearly violate Rule 11 of the Nevada Rules of Civil Procedure.

The bankruptcy court summarized the requirements for concluding that an injury is willful and malicious as follows:

Section 523(a)(6) of the Bankruptcy Code states, "[a] discharge under section 727...of the this title does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The word "willful" in this exception from discharge modifies the word "injury" and therefore requires that the Debtor intend not only her act but the consequences of it, the injury itself. *Kawaauhau v. Geiger*, 118 S.Ct. 974, at 978 (1998). An injury is malicious if it is wrongful and inflicted "without just cause or excuse, in conscious disregard of one's duty." *Printy v. Dean Witter Reynolds*, 110 F.3d 853, 859 (1st Cir. 1997). Malicious thus contains two related requirements: (1) the injury itself must be objectively wrongful, in the sense of lacking just cause or excuse; and (2) the debtor must have committed it with *conscious disregard* of his or her duty--that is, the debtor had to know or appreciate that the injury was wrongful when he or she committed the act that caused it. Malice does not require ill will toward the creditor.

Memorandum of Decision at 9-10 (emphasis in original).

Without citation, Hampton argues that the statute requires that she acted with the express intent to harm Mahious and that the actions "must have gone to a higher level of culpability." Appellant's Brief at 24-25. We agree with the bankruptcy court's citation and interpretation of 11 U.S.C. § 523(a)(6) and the supporting case law and conclude that Hampton had to intend to harm Mahious; the injury must have been objectively wrongful, without just cause or excuse; and Hampton had to appreciate that the injury was wrongful.

The court found that the injury to Mahious was the financial burden of defending against Hampton's complaint. Memorandum of Decision at 10. The court found that Mahious was forced to incur the expenses since his immigration status was dependent upon him having entered into a valid marriage. *Id.* at 10. The Court found

the requisite intent to commit the injury in that Hampton fully appreciated this when she filed the complaint and during the pendency of the case. Id. Moreover, Hampton understood the wrongfulness of filing a complaint without the intent to prosecute it. Id.

These findings are supported by the record. With respect to the financial burden of defending against the complaint, Mahious testified that he paid his lawyer in Nevada over \$30,000. Trial Transcript, March 24, 2000 at 105. By Hampton's own admission, Mahious' attorney in Nevada charged at least \$300 per hour. Trial Transcript, March 24, 2000 at 9. Hampton does not challenge the finding that Mahious' immigration status was dependent upon him having entered into a valid marriage. Hampton testified that prior to filing the annulment complaint she had told Mahious that he would never be able to become a citizen of the United States. Trial Transcript, March 24, 2000 at 162. By its very nature an annulment complaint challenges the validity of a marriage and seeks a determination that the marriage is void. Likewise, Hampton does not dispute that Mahious became a legal resident of the United States through his marriage to her. Accordingly, the bankruptcy court properly found that Mahious was forced to incur the legal expenses to defend against the action. Finally, since Hampton was a law student when she filed the complaint, the Court reasonably inferred that Hampton understood the wrongfulness of filing a complaint without the intent to prosecute. We conclude that the bankruptcy court's findings are not clearly erroneous.

The injury to Mahious was objectively wrongful since it resulted from a tort and violation of Rule 11 of the Nevada Rules of Civil Procedure. In conjunction with the bankruptcy court's findings that Hampton intended to injure Mahious and that she appreciated that the injury was wrongful, the court properly concluded that the injury was willful and malicious within the meaning of 11 U.S.C. § 523(a)(6).

CONCLUSION

The bankruptcy court properly applied 11 U.S.C. § 523(a)(6). The facts, as found by the bankruptcy court clearly establish a non-dischargeable obligation for willful and malicious injury under the Code. The judgment is AFFIRMED.