

NOT FOR PUBLICATION

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

BAP NO. MB 12-081

**Bankruptcy Case No. 10-23408-WCH
Adversary Proceeding No. 11-01097-WCH**

**MARK C. MORSE and LISA M. MORSE,
Debtors.**

**AUTOMOTIVE FINANCE CORPORATION,
Plaintiff-Appellee,**

v.

**MARK C. MORSE and LISA M. MORSE,
Defendants-Appellants.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)**

**Before
Haines, Deasy, and Godoy,
United States Bankruptcy Appellate Panel Judges.**

Patrick M. Culhane, Esq., on brief for Appellants.

Barry S. Scheer, Esq. and Lisa M. Scalisi, Esq., on brief for Appellee.

September 11, 2013

Per Curiam.

Chapter 13 debtors, Mark C. Morse and Lisa M. Morse, appeal from the bankruptcy court's order granting summary judgment in favor of Automotive Finance Corporation ("AFC") on its complaint asserting that the debt owed to it is excepted from discharge pursuant to § 523(a)(6) of the Bankruptcy Code.¹

During the course of their chapter 13 case, AFC commenced an adversary proceeding seeking a determination that its guaranty claim against each of the Morses was excepted from discharge under §§ 523(a)(2), (4), and (6) (Counts I through III, respectively). The bankruptcy court granted AFC's motion for partial summary judgment with respect to Count III. The Morses appealed. Thereafter, the bankruptcy court entered a final order in which it entered judgment for AFC on Count III and indicated that, as a result, the remaining counts were moot.

We note that as the judgment was final as to all counts, we have jurisdiction to consider this appeal. See 28 U.S.C. § 158(a)(3). We also note that we review an order granting summary judgment *de novo*. In re Olympic Mills Corp., 477 F.3d at 14 (citing Razzaboni v. Schifano (In re Schifano), 378 F.3d 60, 66 (1st Cir. 2004)). A grant of summary judgment is appropriate if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Before addressing the issue of material fact, we must consider the threshold question of whether AFC is entitled to relief under § 523(a)(6) as a matter of law, an issue that was not raised below or addressed in the briefs. We need look no further than § 1328(a)(2) for the answer. That

¹ Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, et seq. References to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure.

section provides, with inapplicable exceptions, that after a debtor has completed payments under the plan, "the court shall grant the debtor a discharge of all debts provided for by the plan . . . except any debt -- (2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a)." The statute notably excludes § 523(a)(6).² Thus, a debt arising from willful and malicious injury to property can be subject to a nondischargeability proceeding in a chapter 7 case per § 523(a)(6) but cannot receive the same treatment in an open, pending chapter 13 case.

We therefore conclude that the bankruptcy court erred in granting summary judgment in favor of AFC under Count III as AFC was not entitled to relief under § 523(a)(6).³ Accordingly, we (1) **REVERSE** the entry of summary judgment and **REMAND** Count III with instructions to dismiss the count without prejudice to AFC's right to revive the cause of action should the court issue a Rule 4007(d) notice; and (2) as they are no longer moot, **VACATE** the judgment with respect to Counts I and II and **REMAND** them for proceedings consistent with this opinion.

² The chapter 13 analog, § 1328(a)(4), provides an exception for a civil action award as a "result of willful or malicious injury by the debtor that caused personal injury . . . or death" Such claims are not present in this case.

³ Under § 1328(b), the bankruptcy court may grant a discharge to a debtor who has not completed payments under the plan. Under § 1328(c), if a debtor obtains such a discharge, debts arising under subsection 523(a) are excepted. Under Bankruptcy Rule 4007(d), when a debtor moves for a discharge under § 1328(b), the court will enter an order setting the deadline for a complaint under § 523(a)(6). The docket reflects that the debtors have not sought such a discharge and no such deadline has been set.