UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re: Case No. 02-00122-DMD RHONDA LYNN GILDERSLEEVE, Debtor.	Chapter 7
WILLIAM DAVIS, as next best friend and parent on behalf of W. (B.) D. Minor Child, Plaintiff, v. RHONDA LYNN GILDERSLEEVE, Defendant.	Adv. No. 02-90029-DMD

MEMORANDUM ON PLAINTIFF'S MOTION TO REOPEN CASE

This adversary proceeding was dismissed, without prejudice, on August 14, 2003. The plaintiff, William Davis, filed a motion to reopen this case and vacate the order of dismissal on January 24, 2005. The defendant opposes this motion. For the reasons stated below, I find that the motion should be denied. An order will be entered accordingly.

Factual Background

On August 22, 2000, the defendant, Rhonda Lynn Gildersleeve, pled *nolo contendere* to one count of sexual abuse of a minor in the fourth degree. Gildersleeve was a high school teacher and the minor involved had been one of her students. The Alaska district court subsequently sentenced her to serve 360 days with 180 days suspended, required her to pay a fine of $5,000, and ordered her to pay restitution to the victim and his

family.[1] The plaintiff in this adversary proceeding, William Davis, commenced a civil action in state court against Gildersleeve in August, 2001.[2] Other defendants in the civil action included the Matanuska-Susitna School Board and School District and Colony High School.

Gildersleeve filed a chapter 7 petition on February 11, 2002. Davis was listed as a creditor on Gildersleeve's Schedule F,[3] and was served, care of his attorney Mr. Rupright, with notice of the bankruptcy filing.[4] The first page of the notice stated that the deadline for filing complaints objecting to discharge or dischargeability of certain debts was May 13, 2002.[5] The back page of the notice provided general explanations regarding the impact of a chapter 7 bankruptcy upon creditors, and included the following information:

Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.[6]

On May 8, 2002, Davis initiated the instant adversary proceeding against Gildersleeve. His complaint alleged that Gildersleeve, a school teacher, had sexually molested and assaulted one of her students, minor child W. (B.) D. Davis prayed for an award of actual and punitive damages and a finding that any damages so awarded be

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[1] *See* Deft.'s Response to Reply, filed Feb. 20, 2005 [Docket No. 26], Ex. A.

[2] *Id.*, Ex. B.

[3] *See* Sched. F - Creditors Holding Unsecured Nonpriority Claims, filed Feb. 11, 2002, in Main Case No. 02-00112-DMD [Docket No. 1].

[4] *See* BNC Certificate of Mailing - Meeting of Creditors, filed Feb. 14, 2002, in Main Case No. 02-00112-DMD [Docket No. 2].

[5] *Id.*

[6] *Id.*

excepted from discharge on the grounds of fraud, breach of fiduciary duty, or for willful and malicious injury, pursuant to 11 U.S.C. § 523(a)(2), (a)(4) and (a)(6).

The debtor's discharge was entered in her bankruptcy case on May 15, 2002.[7] Notice of the discharge was served on all creditors, including Davis.[8] Subsequent to the entry of discharge, three scheduling and planning conferences were held in this adversary proceeding. The first one was on September 17, 2002.[9] Rupright appeared on behalf of Davis. He informed the court that he had contacted Gildersleeve's homeowners and auto insurance carrier, State Farm, about Davis's claims and was hopeful that a settlement would be offered by State Farm. He acknowledged that Gildersleeve didn't have many assets, which was why he was investigating her insurance coverage. Rupright asked that the hearing be continued for about 120 days to give State Farm time to review its policies and let him know whether they would be "stepping up to the plate" and offering a settlement to his client. The court agreed to continue the hearing to January 14, 2003.

At the continued hearing on January 14th, Rupright informed the court he hadn't had much success with Gildersleeve's insurance company. He said State Farm had concluded there was no coverage for Gildersleeve under the auto insurance policy, but still hadn't reached a conclusion as to coverage under the homeowners insurance policy. He also said that there was applicable state law that was contra to State Farm's position on the vehicle policy. He asked for one more continuance to try to resolve the matter with State Farm, indicating that if a settlement weren't reached, the Davis family "might have to step

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[7]The discharge did not impact Davis's claim at this point because this adversary proceeding was still pending.

[8]*See* BNC Certificate of Mailing - Order of Discharge, filed May 17, 2004 in Main Case No. 02-00112-DMD [Docket No. 7].

[9]The summarization of the September 17, 2002, January 14, 2003, and March 12, 2003, hearings in this proceeding were made from the court's review of the audiotape transcripts made on those days.

into Mrs. Gildersleeve's shoes" regarding the insurance company so that they could litigate coverage. The hearing was continued to March 12, 2003.

At the hearing on March 12, Rupright told the court that he had been unsuccessful with Gildersleeve's insurance company, which had refused to defend her. Rupright said he would agree to dismiss the adversary proceeding in exchange for the stay being lifted so that he could go back into state court and proceed against Gildersleeve's insurance company. He assured the court and Gildersleeve's counsel that his client wouldn't be moving against "anything in the bankruptcy." He said if Gildersleeve failed to defend the state court action, he would take action against her insurance company. The court asked Rupright whether he shouldn't instead consider obtaining a judgment of nondischargeability, rather than a dismissal, in this adversary proceeding. After further discussion with the court and Gildersleeve's counsel, Mr. Carney, Rupright agreed that he would instead seek a judgment that any debt Gildersleeve had against his client would be nondischargeable, and provide a covenant not to execute against Gildersleeve in exchange for her assignment of any claims she might have against her insurance company to Davis. Carney indicated he would stipulate to this. Rupright agreed to prepare the stipulation and proposed judgment and send it to Carney for his review. The parties asked for 30 days to get this done. The scheduling and planning conference was continued, without date, to give the parties time to prepare the settlement paperwork.

Four months passed and no settlement paperwork was submitted to the court. On July 14, 2003, the court issued an order regarding its intent to dismiss the case, without prejudice, for failure to prosecute.[10] The order advised that the case would be dismissed without further notice or hearing unless an objection was filed within 10 days. Neither

[10] *See* Docket No. 12.

Carney nor Rupright filed a response. An order and judgment of dismissal, without prejudice, were entered on August 14, 2003,[11] and the case was thereafter closed.

Rupright apparently proceeded against Gildersleeve in the state court action after the adversary proceeding was dismissed.[12] Carney appeared on Gildersleeve's behalf in the action and moved for dismissal on the grounds that further proceedings against her were barred by her discharge. After the state court granted the motion,[13] Rupright filed a motion to reopen this adversary proceeding on January 24, 2005. Gildersleeve opposes the motion. The matter has been submitted to the court on the briefs.

Analysis

Davis asks that this case be reopened and the judgment of dismissal, without prejudice, vacated. He contends the bankruptcy court lacks jurisdiction to discharge Davis's claim against Gildersleeve, because the claim is a non-core state law claim and intentional torts such as child molestation can never be discharged. He seeks relief under 28 U.S.C. § 1334(b), 11 U.S.C. §§ 350, 523(a), and Fed. R. Civ. P. 60(b), arguing that, since he did file a timely adversary action against Gildersleeve, she has been on notice of Davis's claims and will not be prejudiced if this action is reopened.

At the outset, it should be noted that 11 U.S.C. § 350 is inapplicable in this situation. Section 350 pertains to the closing and reopening of a debtor's main bankruptcy case, rather than to adversary proceedings. Accordingly, Davis's motion to reopen will be

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[11] *See* Docket Nos. 13, 14.

[12] *See* Deft.'s Response to Reply, filed Feb. 20, 2005 [Docket No. 26], Ex. C.

[13] *See* Order from Superior Court, attached as App. A to Deft.'s Opp'n to Mot. to Reopen the Adversarial Case, filed Feb. 10, 2005 [Docket No. 22], and as Ex. 1 to Pltf.'s Reply to Deft's. Opp'n, filed Feb. 18, 2005 [Docket No. 24].

treated as one for relief from judgment under Fed. R. Civ. P. 60(b), made applicable to bankruptcy cases by Fed. R. Bankr. P. 9024.

1. Jurisdiction of the Bankruptcy Court

Davis's jurisdictional arguments will be addressed first. There is no dispute that sexual molestation is an intentional tort that could be excepted from discharge as a willful and malicious injury under 11 U.S.C. § 523(a)(6). However, such exception is not automatic. A creditor holding a claim against a debtor on account of a willful and malicious injury *must* seek a determination of its dischargeability from the bankruptcy court. 11 U.S.C. § 523(c)(1) provides:

> (c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor *shall* be discharged from a debt of a kind specified in paragraphs (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.[14]

A proceeding to determine dischargeability of a debt is a core proceeding,[15] and federal courts have exclusive jurisdiction to hear § 523(a)(6) determinations.[16] If a creditor with adequate notice of a debtor's bankruptcy filing fails to seek a timely determination of dischargeability under § 523(a)(2), (4), (6) or (15) from the bankruptcy court, that creditor's

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[14]11 U.S.C. § 523(c)(1) (emphasis added).

[15]28 U.S.C. § 157(b)(1), (2)(I).

[16]*McGhan v. Rutz (In re McGhan)*, 288 F.3d 1172, 1176 (9th Cir. 2002).

claim will automatically be discharged.[17] This is so even if the claim is for damages on account of a serious intentional tort, such as murder[18] or sexual molestation.[19] Once the claim has been discharged, a creditor is barred from further prosecution of the claim as a personal liability against the debtor in any forum, including state court.[20]

Davis's claims in this court are brought under § 523(a)(2), (a)(4) and (a)(6). Under § 523(c), this court has the exclusive jurisdiction to determine the dischargeability of these claims.[21] The effect of the dismissal of Davis's complaint in this proceeding was to discharge his claims against Gildersleeve, and bar him from prosecuting his claims in any other forum.

2. Relief From Judgment under Fed. R. Civ. P. 60(b)

A party may obtain relief from a judgment under Fed. R. Civ. P. 60(b) on the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the

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[17] *Id.*

[18] *Jones v. Hill (In re Hill)*, 811 F.2d 484, 486-87 (9th Cir. 1987).

[19] *McGhan*, 228 F.3d at 1176-77.

[20] 11 U.S.C. § 524(a), (c)(1); *McGhan*, 288 F.3d at 1176.

[21] The liquidation of Davis's claim, as opposed to the determination of its dischargeability, would have been referred to the United States District Court, however. *See* 28 U.S.C. § 157(b)(2)(B), (b)(5).

> judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment . . . .[22]

A motion for relief from judgment must be made within "a reasonable period" and, if made on the grounds stated in (1), (2) or (3) of the rule, must be brought not more than one year after the judgment was entered.[23]

Aside from Davis's jurisdictional arguments, which are without merit, his grounds for seeking relief from judgment under Rule 60(b) are unclear. He expresses outrage that Gildersleeve could discharge a sexual molestation claim in bankruptcy, asserting that she knowingly used bankruptcy for an improper purpose – to discharge an intentional tort claim. He says Gildersleeve was on notice of his claim and will not be prejudiced if this case is reopened, especially since this court didn't have jurisdiction to discharge his claim in the first place.[24] He also asserts Gildersleeve obtained dismissal of this adversary proceeding by misrepresenting that a settlement could be reached.[25]

There is nothing in the record to support Davis's claims of misrepresentation on the part of Gildersleeve or her counsel. Additionally, since more than a year has passed, no relief from the judgment can be provided on the grounds of mistake, inadvertence, excusable neglect, newly discovered evidence or fraud.[26] The judgment has not been satisfied or released, nor is it void. The bankruptcy court had jurisdiction to enter the judgment of dismissal. Finally, there is no basis for relief under Rule 60(b)(6).

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[22]Fed. R. Civ. P. 60(b).

[23]*Id.*

[24]*See* Davis's Reply to Gildersleeve's Opp'n, filed Feb. 18, 2005 (Docket No. 24), at p. 6-7.

[25]*Id.* at p. 4.

[26]Fed. R. Civ. P. 60(b).

> The Rule 60(b)(6) catchall provision applies only when the reason for granting relief is not covered by any of the other reasons set forth in Rule 60. It "has been used sparingly as an equitable remedy to prevent manifest injustice" and "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Thus, a party seeking to reopen a case under Rule 60(b)(6) "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion."*[27]

Davis can satisfy the first prong of the test for relief under Rule 60(b)(6). He has suffered injury because an intentional tort claim has been discharged. However, he cannot satisfy the second prong of the test, because the dismissal of this adversary and discharge of his claim against Gildersleeve were not due to circumstances beyond his control. Davis had due notice of Gildersleeve's bankruptcy filing and did, in fact, file a timely complaint objecting to discharge. His counsel attended three hearings before this court and indicated to both the court and Gildersleeve's counsel that he would not be seeking damages from Gildersleeve personally, but from her insurers. At the third hearing, the parties reached an agreement that Gildersleeve would stipulate to a judgment of nondischargeability of Davis's claim in exchange for a covenant not to execute against her, and Davis would proceed against her insurers in state court. Davis's counsel agreed to prepare the settlement documents within 30 days of the hearing. This proceeding was dismissed four months later, after notice to counsel for both Davis and Gildersleeve, because settlement documents which Davis's counsel had agreed to prepare were not submitted. Davis did not seek to set aside the dismissal of this proceeding until 17 months later.

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[27] *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (citations omitted, emphasis added).

3. Only Davis's Civil Claims Against Gildersleeve Have Been Discharged

The dismissal of this adversary proceeding resulted in the discharge of Davis's civil claims against Gildersleeve, as asserted both in this forum and the state forum. Gildersleeve's bankruptcy discharge does not, however, encompass the criminal fines and restitution obligations imposed upon her in *State of Alaska v. Gildersleeve*, Case No. 3PA-01-00129 CR. Unlike claims for willful and malicious injury, which a creditor must affirmatively seek to preserve in the bankruptcy court,[28] these kinds of debts are automatically excepted from discharge.[29] Gildersleeve must still pay the restitution ordered by the state court notwithstanding her bankruptcy discharge.

Conclusion

I conclude that there are no exceptional circumstances justifying relief from judgment in this case. Davis was well aware of Gildersleeve's bankruptcy and of the deadline for preserving his claim against her. He failed to preserve and prosecute his claim in the appropriate forum – the bankruptcy court – and only returns to this court now after an unsuccessful attempt to litigate his claim in state court after Gildersleeve's discharge. His counsel's erroneous contentions regarding this court's lack of jurisdiction are not a basis for Rule 60(b)(6) relief.[30] The motion to reopen will therefore be denied. An order and judgment will be entered consistent with this memorandum.

DATED: March 15, 2005

DONALD MacDONALD IV
United States Bankruptcy Judge

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[28] 11 U.S.C. § 523(c)(1).

[29] 11 U.S.C. § 523(a)(7); *Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986).

[30] *Community Dental Services v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).