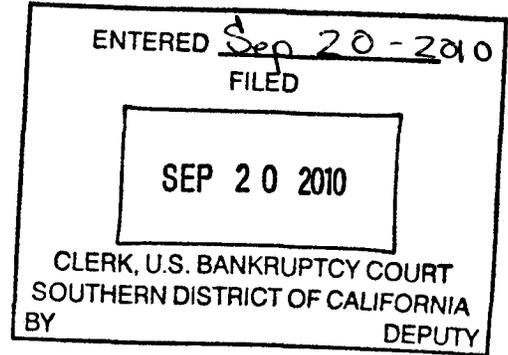


WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

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In re)	Case No. 07-03241-PB7
)	Adv. No. 07-90591
MURPHY F. CUDNEY and)	
KRISTY K. CUDNEY,)	
)	MEMORANDUM DECISION
Debtors.)	
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SANDRA WAITS,)	
)	
Plaintiff,)	
)	
v.)	
)	
MURPHY F. CUDNEY and)	
KRISTY K. CUDNEY,)	
dba ANCIRA GUEST HOME,)	
)	
Defendants.)	
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This matter came on regularly for trial on plaintiff Waits' complaint asserting that certain debts owed to her by the Cudneys are nondischargeable, as well as for a correlative money judgment on those claims. At the conclusion of the plaintiff's case, after plaintiff rested, defendants moved for judgment.

1 The Court recessed the proceedings and, upon return, ruled that
2 1) plaintiff failed to meet her burden of showing any conduct
3 by Murphy Cudney that would make any debt allegedly owed by
4 him to plaintiff nondischargeable, so judgment should enter in
5 Mr. Cudney's favor on all counts; 2) plaintiff failed to show
6 that Kristy Cudney's offer of employment to Ms. Waits constituted
7 an interference with contractual relationship that was in any
8 way actionable under the willful and malicious requirements of
9 11 U.S.C. § 523(a)(6); 3) plaintiff failed to show any conduct
10 by Ms. Cudney that somehow caused the Department of Corrections
11 to withdraw its offer of employment to Ms. Waits in any way
12 constituting an intentional interference with prospective
13 economic advantage actionable under 11 U.S.C. § 523(a)(6);
14 4) plaintiff failed to show that installation of surveillance
15 cameras was willful and malicious within the meaning of
16 § 523(a)(6) given the event described briefly by Ms. Waits on
17 or about May 24th; 5) plaintiff failed to show that installation
18 of the cameras was willful and malicious within the meaning of
19 11 U.S.C. § 523(a)(6) even if it somehow constituted a violation
20 of Penal Code section 632 for unlawful surveillance; 6) nor did
21 the installation and brief use of the surveillance cameras
22 constitute an invasion of privacy that was willful and malicious
23 within the meaning of 11 U.S.C. § 523(a)(6); 7) plaintiff failed
24 to meet her burden of establishing that termination of Ms. Waits'
25 employment was a wrongful termination conducted willfully and
26 maliciously within the meaning of § 523(a)(6); 8) the Court

1 reserved ruling on whether Ms. Cudney fraudulently induced
2 Ms. Waits into entering the employment agreement; and 9) the
3 Court indicated plaintiff had made a sufficient showing such
4 that it would support a judgment for plaintiff for conversion of
5 Ms. Waits' personal property for a period of time if not rebutted
6 by Ms. Cudney.

7 Trial thereafter resumed as to the remaining claims 8 and 9.
8 At the conclusion of the trial, the parties were invited to
9 submit their closing arguments in writing. They have done so,
10 and the matter was thereafter taken under submission.

11
12 Fraudulent Inducement

13 Section 523(a)(2)(A) of Title 11, United States Code,
14 provides:

15 (a) A discharge under section 727, 1141,
16 1228(a), 1228(b), or 1328(b) of this title does
not discharge an individual debtor from any debt -

17 (2) For money, property, services, or an
18 extension, renewal or refinancing of credit,
to the extent obtained by -

19 (A) False pretenses, a false
20 representation, or actual fraud, other
21 than a statement respecting the debtor's
or an insider's financial condition

. . . .

22 In applying § 523(a)(2)(A), courts in the Ninth Circuit employ a
23 five-part test:

- 24 (1) that the debtor made . . . representations;
25 (2) that the debtor knew the representations were
false when made;
26 (3) that the debtor made the representations with
the intention and purpose of deceiving the

1 creditor;
2 (4) that the creditor relied on such
3 representations; and
4 (5) that the creditor sustained the alleged loss
5 and damage as the proximate result of the
6 misrepresentations having been made.

7 In re Hashemi, 104 F.3d 1122, 1125 (9th Cir. 1997). The level of
8 reliance required is less than "reasonable", but it must be
9 "justifiable". Field v. Mans, 516 U.S. 59, 70 (1995).

10 In the present case, there are two instances of fraudulent
11 inducement asserted by plaintiff. The first involves what she
12 contends she was offered that induced her to leave her former
13 employment to go to work for Ms. Cudney. The second occurred
14 later, when plaintiff received an offer to go to work for the
15 Department of Corrections, but turned it down after Ms. Cudney
16 induced her to stay. The facts surrounding what was offered by
17 Ms. Cudney in both instances are in dispute.

18 Ms. Waits' version is that Ms. Cudney offered \$250 per
19 resident, per month, with the home rated for a maximum of 6
20 residents. In addition, as was customary, she would be provided
21 with the master bedroom and private bath, meals, and some private
22 living room space. At issue is whether Ms. Cudney offered a
23 percentage of the profits of the business, whether she offered
24 some portion of a medical insurance premium, and whether she
25 offered Ms. Waits participation in a 401(k) plan, then or later.

26 The testimony established that Ms. Waits put no money into
the business. She was, however, an experienced home care worker,
having worked at it for almost 30 years with her previous

1 employer, Ms. Turman. Ms. Waits' son, Troy, testified he met
2 with Ms. Cudney and his mother prior to the home opening and that
3 he recalled that Ms. Cudney was offering an opportunity to
4 acquire a 20% interest in the business. He said he advised his
5 mother to earn it through using her experience. Ms. Cudney
6 denies offering a percentage of the business. After considering
7 all the testimony and documentary evidence, including the
8 contested employment agreement signed by Ms. Waits which is
9 silent on the subject, the Court is persuaded that if any offer
10 of a percentage of the business was made at all, it was an offer
11 of a percentage of profits generated by the business, and any
12 such offer was as to some undefined point in the future. If
13 there was an offer at all, it did not include any interest in the
14 home itself, which Ms. Cudney had paid towards acquiring. One of
15 the reasons why the Court has reservations about any offer is the
16 notion that if Ms. Waits was to get to participate in the profit
17 side of the business - if there ever was one - there was no
18 corresponding decrease in her base pay. She was receiving \$1,000
19 per month from Ms. Turman for handling 6 residents, while
20 Ms. Cudney offered, and paid, \$250 per resident per month. In
21 the last analysis, Ms. Waits testified she would have taken the
22 job with Ms. Cudney whether or not she had been offered a 20%
23 profit participation. The Court concludes she did not rely on
24 the alleged offer in deciding to work for Ms. Cudney.

25 More in dispute is whether Ms. Cudney offered to match the
26 \$250 per month that Ms. Turman was paying to carry Ms. Waits on a

1 policy with Kaiser for certain medical benefits. In all
2 probability, payment of the medical premium was discussed.
3 Ms. Waits testified that Ms. Cudney made it clear that she could
4 not afford medical insurance, so Ms. Waits talked to Ms. Turman,
5 who was willing to keep Ms. Waits on her policy, and Ms. Waits
6 paid the premium payment to Ms. Turman. That is credible,
7 especially since Ms. Waits was still working for Ms. Turman in
8 a relief capacity. What remains, though, is the question of
9 whether Ms. Cudney offered to pay the medical premium. Ms. Waits
10 testified that in May she received a Mother's Day card from
11 Ms. Cudney containing \$250 or \$260 in cash, which she took to be
12 a medical premium payment. So far as the record shows, there was
13 no similar payment in March or April, nor any complaint that it
14 was not paid. Ms. Waits' wages were timely paid by direct
15 deposit with no amount included for the medical insurance
16 premium. On the other hand, the business payroll journal showed
17 a one-time entry on May 14 for "\$260 cash for insurance", which
18 appears to be the cash in the Mother's Day card. From the
19 foregoing, the Court finds and concludes that there was no
20 agreement at the outset that Ms. Waits' compensation each month
21 would include payment of a medical insurance premium of
22 approximately \$250 - \$260 per month. There may have been
23 discussion that at some unspecified point in time in the future
24 the business might support such a payment. However, the
25 plaintiff has failed to show that a present-tense offer was made
26 that compensation would include payment on a monthly basis of

1 any medical insurance premium. Indeed, Ms. Waits testified on
2 cross examination that what was said was that when the house was
3 full, Ms. Cudney might be able to pay full benefits.

4 The final area of alleged inducement is the claim that
5 Ms. Cudney offered to set up a 401(k) program so as to start
6 building a retirement for Ms. Waits. The Court is persuaded that
7 if the subject was broached, it was not until after Ms. Waits had
8 already committed to work for Ms. Cudney and had already started
9 work. In March, 2006, after Ms. Waits had started, she received
10 a call offering her a position at the Donovan Correctional
11 facility. Ms. Waits apparently considered taking it while
12 maintaining her position with Ms. Cudney, similar to her earlier
13 employment with Ms. Turman when she worked full time at Sycuan
14 for 9-1/2 years, at NASSCO, and at an auto jobber supply
15 facility. Her work for Ms. Cudney required her to be at the
16 home from 6 p.m. to 9 a.m. Ms. Waits testified she discussed
17 the Donovan offer with Ms. Cudney and explained she was
18 interested in planning toward retirement. It was in that context
19 that Ms. Waits said Ms. Cudney proposed the possibility of a
20 401(k) if Ms. Waits would stay. Ms. Waits testified on recross
21 that the 401(k) came up after the Donovan offer was made, and
22 that she knew there had to be a full house before it was
23 possible. It was never a full house while she was there.

24 For all the foregoing reasons, the Court finds and concludes
25 that Ms. Cudney made no knowingly false representations to
26 Ms. Waits to induce her to come to work for her, or to turn down

1 the Donovan offer after Ms. Waits had started work. Accordingly,
2 plaintiff has failed to meet her burden of establishing a
3 violation of 11 U.S.C. § 523(a)(2)(A). Judgment on that claim
4 shall therefore enter in favor of defendant Cudney.

5
6 Willful and Malicious Conduct

7 Ms. Waits' remaining claim is that Ms. Cudney denying
8 Ms. Waits access to recover her personal belongings after her
9 termination constituted a conversion of her personal property.

10 Section 523(a)(6) provides:

11 (a) A discharge under section 727, 1141,
12 1228(a), 1228(b), or 1328(b) of this
13 title does not discharge an individual
14 debtor from any debt -

14

15 (6) for willful and malicious
16 injury by the debtor to another
17 entity or to the property of
18 another entity

17 Cases have made it clear that the "willful" requirement is
18 separate and distinct from the "malicious" requirement, In re
19 Barboza, 545 F.3d 702, 706 (9th Cir. 2008). Willfulness requires
20 a "deliberate or intentional injury, not merely a deliberate or
21 intentional act that leads to injury." Kawaauhau v. Geiger, 523
22 U.S. 57, 61 (1998). "A 'malicious' injury involves '(1) a
23 wrongful act, (2) done intentionally, (3) which necessarily
24 causes injury, and (4) is done without just cause or excuse.'" In re Su, 290 F.3d 1140, 1146-47 (9th Cir. 2002).

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1 The basic facts are that Ms. Waits brought her bedroom set,
2 her clothing, knicknack shelves and her computer when she moved
3 into the house on February 28 or March 1, 2006. When she
4 reported for work on May 31, 2006, at about 6 p.m. she was told
5 her employment was terminated, that she should pack a bag and
6 turn over her set of keys. She testified she went up, packed a
7 few things over about 15 minutes, and left, forgetting her
8 pajamas. Ms. Cudney testified that both she and her husband had
9 trucks and she offered to help Ms. Waits remove her belongings.
10 She said Ms. Waits responded that she was not ready, and would
11 contact her to make arrangements.

12 Approximately the next day, June 1, Ms. Waits returned to
13 the house with her son and a deputy sheriff. She was allowed
14 entrance by Ms. Cudney's son, she went up to the bedroom, brought
15 down some pillows and left. The following day, June 2, attorney
16 McMillan called Ms. Cudney about a number of questions, including
17 recovery of Ms. Waits' property. Ms. Cudney sent Mr. McMillan a
18 letter by fax on June 3. On June 5 she hired her own attorney,
19 and arrangements were subsequently made to pick up her belongings
20 on June 11, which was done. According to Ms. Waits, she
21 discovered around October of that year when she unpacked that her
22 Bulova watch was missing. It was a gift from her sons of
23 significant emotional value, and probably cost around \$200.

24 From the testimonial and documentary evidence presented at
25 trial, the Court is unable to find that Ms. Cudney had any intent
26 to injure Ms. Waits by maintaining possession of her personal

1 property. It seems plausible that Ms. Cudney did offer use of
2 their trucks on May 31 to move her possessions because they
3 wanted Ms. Waits gone. Ms. Cudney had arranged for other staff
4 to take the residents on an outing while Ms. Waits was informed
5 of her termination. It is equally plausible that Ms. Waits
6 needed time to figure out where she would move the items,
7 especially the bedroom set. Ms. Waits was given an opportunity
8 to pack a bag or more the evening of May 31. She was provided
9 access the next day, but took only some pillows. Arrangements
10 needed to be made to move the furniture, and they were. While it
11 is true that Ms. Waits did not have possession of some of her
12 belongings from the evening of May 31 to June 11, the Court is
13 unable to find or conclude that she was deprived of possession by
14 the willful and malicious conduct of Ms. Cudney as those
15 requirements are defined for purposes of nondischargeability
16 under 11 U.S.C. § 523(a)(6).

17 Notwithstanding the Court's ruling at the close of the
18 plaintiff's case, in her closing argument Ms. Waits asserted
19 arguments for money damages for various wage claims. Those
20 claims are not tied to nondischargeable conduct attributable to
21 willful and malicious conduct of Ms. Cudney. Ms. Waits asserted
22 reliance on In re Jercich, 238 F.3d 1202 (9th Cir. 2001), but the
23 facts in that case are substantially different from those found
24 by the court in the instant case. Moreover, the scope of the
25 Jercich decision has since been explained and refined in Lockerby
26 v. Sierra, 535 F.3d 1038 (9th Cir. 2008). See also In re

1 Weinberg, 410 B.R. 19 (9th Cir. BAP 2009). Plaintiff's attempt
2 to bootstrap wage claims onto conduct which the Court has found
3 did not support nondischargeability is unavailing.

4
5 Conclusion

6 For all the foregoing reasons, the Court finds and concludes
7 that plaintiff has failed to establish by a preponderance of
8 evidence that Ms. Cudney 1) made knowingly false representations
9 to Ms. Waits to induce her to come to work or remain at work for
10 Ms. Cudney; or 2) that Ms. Cudney engaged in a willful and
11 malicious withholding of Ms. Waits' personal property.
12 Accordingly, a judgment shall enter in favor of Ms. Cudney and
13 against the allegations of Ms. Waits.

14 Counsel for Ms. Cudney shall prepare and lodge a separate
15 form of judgment consistent with the foregoing within twenty (20)
16 days of the date of service of this Memorandum Decision.

17 IT IS SO ORDERED.

18 DATED: SEP 20 2010

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20 
21 PETER W. BOWIE, Chief Judge
22 United States Bankruptcy Court
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