



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re:

RICHARD L. NUSS, JR.,
Debtor.

BANKRUPTCY NO. 18-04493-CL7

ABBEY SCHLAGETER,
Plaintiff.

ADVERSARY NO. 18-90189-CL

v.

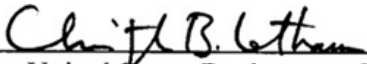
RICHARD L. NUSS, JR.,
Defendant.

Date of Hearing: 07/19/2019
Time of Hearing: 9:00 a m.
Name of Judge: Christopher B. Latham

FINDINGS, CONCLUSIONS, AND ORDER AFTER TRIAL

IT IS HEREBY ORDERED as set forth on the continuation page(s) attached, numbered two (2) through eleven (11).

DATED: August 13, 2019


Judge, United States Bankruptcy Court

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This dispute arises from the tumultuous ending of a romantic relationship. Plaintiff Abbey Schlageter obtained a domestic violence restraining order (“DVRO”) against her ex-boyfriend, debtor-defendant Richard L. Nuss, Jr. That order also incorporated the parties’ stipulated agreement for Defendant to pay Plaintiff a total of \$20,316 in attorney’s fees and costs under California Family Code (“FC”) §§ 6342 and 6344 (the “Stipulated Judgment”). Almost a year later, Defendant filed for Chapter 7 bankruptcy.

Plaintiff seeks to except the \$20,316 debt from discharge under § 523(a)(6).¹ She also requests dismissal of Defendant’s Chapter 7 bankruptcy case because, she says, he filed it in bad faith. After carefully considering the testimony and other admitted evidence at trial, the court now holds that Stipulated Judgment **nondischargeable** under § 523(a)(6). But it **denies** Plaintiff’s motion to dismiss under § 707(b)(3)(A).

Jurisdiction and Venue

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 1334(b) and 157(b)(2)(I). Venue is proper under 28 U.S.C. § 1409(a).

Overview and History

The State Court Proceedings

In March 2016, Plaintiff applied for a DVRO against Defendant in the Alameda County Superior Court. *See* Plaintiff’s Trial Ex. 1; *see also* Case No. AF16809394 (the “Family Court Case”).² Specifically, she requested an order requiring Defendant to move out of the parties’ shared abode, and to stay away from her and her home, work, school, and vehicle. *Id.* The grounds for the application were that Defendant had physically, sexually, and verbally abused Plaintiff when the two were a couple. *Id.* Two days later, the family court denied her request for a temporary restraining order (“TRO”), but set the matter for hearing in April 2016. Defendant’s Trial Ex. 1. Plaintiff then submitted a supplemental declaration that detailed her domestic violence allegations. Plaintiff’s Trial Ex. 3.

The family court entered a TRO after the April 2016 hearing. *See* the Family Court Case; *see also* Defendant’s Trial Ex. 3, p. 6 (May 5, 2016 letter from Plaintiff’s lawyer). And it renewed the TRO seven times between April 2016 and May 2017. *See* the Family Court Case. The parties

¹ Unless otherwise noted, all statutory citations are to the Bankruptcy Code, Title 11 of the United States Code. And all “Rule” and “Bankruptcy Rule” references are to the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure, respectively.

² The court takes judicial notice of the state court’s docket. **FED. R. EVID. 201(b)**; *see also* *Porter v. Ollison*, 620 F.3d 952, 955 n.1 (9th Cir. 2010) (citation omitted).

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also agree that Defendant violated that order. *See* Defendant's Trial Ex. 2 (Plaintiff's September 1, 2016 police report). He was convicted of disobeying the TRO under **California Penal Code § 273.6(a)**. *See* Case No. 16-CR-017673 (the "Criminal Case");³ *see also* Plaintiff's Trial Ex. 2. He served approximately 45 days in county jail for that misdemeanor offense. *Id.*

In September 2017 – following Defendant's release from custody – the family court granted Plaintiff's application and entered a DVRO. Plaintiff's Trial Ex. 2. In addition to a five-year stay-away provision, the order incorporated the court-approved Stipulated Judgment. *See id.* at pp. 8-10. Under it, the parties agreed that Plaintiff would receive: (1) \$12,545 in attorney's fees and costs under FC § 6344; (2) \$2,178 for medical expenses under FC § 6342; and (3) \$5,593 for lost earnings under § 6342. *Id.* at pp. 8-9. Furthermore, Defendant promised to satisfy the judgment by making monthly payments of \$250 between October 2017 and September 2020. *Id.* at p. 9. Any remaining balance was due on September 30, 2020. *Id.*

Finally, the parties agreed that the "financial award shall be enforceable as a civil judgment only and shall not subject [Defendant] to criminal penalties solely for failure to pay." *Id.* Plaintiff testified that she has not received any payments from Defendant.

Defendant's Bankruptcy Case

Defendant filed a voluntary Chapter 7 petition on July 31, 2018 (Bankr. **ECF No. 1**). He listed his address as: "Retaliation fear. Address not disclosed. Escondido, CA 92025." *Id.* at p. 2. But he included a P.O. box for a mailing address. *Id.* Defendant scheduled \$9,904 in assets. *Id.* at pp. 10-14. And he listed \$41,976 in unsecured debts, including \$16,000 owed to Plaintiff and \$24,793 in student loans. *Id.* at pp. 18-22. He also disclosed a \$4,293 secured car loan. *Id.* at p. 17.

Schedule I states that Defendant's monthly gross income is \$3,148. *Id.* at p. 25. Subtracting \$587 in payroll deductions and \$2,455 in monthly expenses, his Schedule J shows a monthly net income of \$106. *Id.* at pp. 25-28. In addition, Defendant averred that his "current monthly income" was \$484.17.⁴ *Id.* at p. 39; *see also* *Hamilton v. Lanning*, **560 U.S. 505, 510** (2010) (current monthly income "is calculated by averaging the debtor's monthly income during what the parties refer to as the 6-month lookback period, which generally consists of the six full months preceding the filing of the bankruptcy petition.") (citing **11 U.S.C. § 101(10A)(A)**). His annual income for § 707(b)(2)'s means test is thus \$5,810.04 (Bankr. ECF No. 1, p. 40).

A month after the petition date, the Chapter 7 Trustee filed a report of no distribution (Bankr. ECF No. 13). Debtor has not yet received a discharge (*see* Bankr. ECF No. 20).

³ *See, supra* note 2.

⁴ Debtor clarified that he was unemployed from January 2018 through May 2018 (**ECF No. 1, p. 41**). He began a job in June 2018, where he makes \$3,148 per month. *Id.*; *see also id.* at p. 25.

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The Adversary Proceeding

Plaintiff timely brought this adversary proceeding seeking to hold the Stipulated Judgment nondischargeable under § 523(a)(6) (ECF No. 1). She also moved to dismiss Defendant's Chapter 7 case as a bad faith filing under § 707(b)(3)(A). At the conclusion of the discovery period, the court set a trial date and entered a scheduling order. *See id.*; *see also* ECF No. 14. The latter required the parties to file and serve their lists of trial exhibits and witnesses by June 28, 2019 (ECF No. 14). It cautioned that any exhibit not listed would be excluded from evidence. *Id.* Likewise, any witness not disclosed would be precluded from testifying. *Id.*

Despite the court's warning, neither party filed an exhibit list or a witness list (*see* ECF No. 16). Instead, they stipulated on the record that both parties could testify and offer any and all exhibits. *See id.* The court acceded to their agreement and proceeded to trial.

Factual Background and Findings

Having carefully considered the testimony and other evidence, the court makes the following factual findings.

The Underlying Conduct

The parties began dating in 2015, and moved in together soon after. Plaintiff had been diagnosed with post-traumatic stress disorder ("PTSD") before she met Defendant. She also suffered periodically from debilitating anxiety attacks, which usually rendered her temporarily immobile. Plaintiff testified that she informed Defendant of her medical conditions when they first started dating. At trial, he acknowledged that fact, and testified that he had witnessed her anxiety attacks before.

In February 2016, Plaintiff and Defendant returned home after a night out. They had both been drinking. Plaintiff asserts that she began to have a PTSD-related anxiety attack. And, she says, Defendant knew she was in that state. During her anxiety attack, however, he had sex with her. He disagrees. He says the parties were only slightly drunk, and that Plaintiff consented to sexual activity. And he denies being aware that she was suffering an anxiety attack.

Based on the totality of the evidence, the court finds Plaintiff more credible than Defendant. First, it accepts her testimony that she was having an anxiety attack. She was in the best position to know that fact. And she recalls the evening with specific particularity. That the family court entered the DVRO also strengthens the court's conclusion that Defendant committed at least one act of domestic violence. *See* CAL. FAM. CODE § 6340. Moreover, the court finds that Defendant knew she was not merely intoxicated. Indeed, text messages he sent her soon after the night in question reveal as much. *See* Plaintiff's Trial Exhibit 5, p. 1.

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Since Plaintiff was in a debilitated state, she was in no position to consent to Defendant's actions. And she could not verbally or physically resist them. In addition, Defendant apologized to Plaintiff several times by text message. *See id.* at pp. 3, 5, 8-9. Although these communications are not necessarily an admission of guilt, they corroborate Plaintiff's narrative and bolster her credibility. Defendant asserted at trial that the texts were just "banter." The court is not persuaded. There is no indication Plaintiff was making such serious allegations in a jovial tone; quite the contrary. The subject matter and anguished nature of the parties' discussion is no laughing matter.

The court therefore concludes that Defendant sexually assaulted Plaintiff. The parties broke up after this incident.

The Restraining Order and Stipulated Judgment

As explained, the family court initially denied Plaintiff's TRO request. *See* Defendant's Trial Ex. 1. Defendant's claims that this shows his innocence. Not so. That court simply wanted more evidence before granting relief. Indeed, it entered a TRO after considering Plaintiff's supplemental declaration and holding a further hearing on the matter. *See* the Family Court Case; *see also* Plaintiff's Trial Ex. 3. Also, as noted above, a jury found Defendant guilty of violating the TRO. *See* the Criminal Case. Following his release from jail, the family court entered the DVRO – including the Stipulated Judgment. *See* Plaintiff's Trial Ex. 2; *see also* the Family Court Case. Defendant did not appeal the restraining order. Nor has he sought to modify the Stipulated Judgment.

Defendant testified that he did not intentionally violate the TRO. Specifically, he claims that Plaintiff entrapped him into doing so. That is, Plaintiff allegedly stalked him, showed up at places where he was, and then reported him to law enforcement. Thus, he says, his violations were Plaintiff's doing. The court is skeptical of this story.

More significantly, however, it controverts the jury's guilty verdict in the criminal case. To convict under Penal Code § 273.6(a), the jury necessarily had to find that Defendant intentionally and knowingly violated the TRO. *See* CAL. PENAL CODE § 273.6(a) ("Any intentional and knowing violation of a protective order . . . is a misdemeanor . . ."). Since Defendant cannot collaterally attack the criminal conviction, his argument on this point is not well taken.⁵ *See, e.g., Rein v. Providian Fin. Corp.*, 270 F.3d 895, 902 (9th Cir. 2001).

⁵ At all events, whether Defendant violated the TRO intentionally or unintentionally is immaterial to Plaintiff's claims. To the extent he argues the Stipulated Judgment arose because of his criminal conviction, the court disagrees. The state court awarded Plaintiff damages under FC §§ 6342 and 6344. *See* Plaintiff's Trial Ex. 2. The former statute permits recovery for lost earnings and out-of-pocket expenses incurred "as a direct result of the abuse inflicted . . . or any actual physical injuries sustained from the abuse." CAL. FAM. CODE § 6342(a) (emphasis supplied). And the latter awards attorney's fees and costs to the party prevailing on the DVRO application. CAL. FAM. CODE § 6344(a). Thus, the Stipulated Judgment relates to the underlying assault, not to Defendant's violation of the TRO.

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Defendant also suggests he had no intention of paying Plaintiff the \$20,316 owed under the Stipulated Judgment. Rather, he testified that his state court counsel advised him to sign the stipulation and “deal with the matter later.” This is because, Defendant says, he dreaded being sent back to jail and feared that Plaintiff would continue to harass him unless he agreed to the Stipulated Judgment (*cf.* Bankr. ECF No. 1, p. 2 (writing “Retaliation fear. Address not disclosed.” as his address)).⁶

Defendant did not, however, seek to revise or vacate the Stipulated Judgment. Instead, he opted to bring the underlying Chapter 7 case and attempted to discharge the debt. Indeed, on cross-examination, he admitted that he filed for bankruptcy to avoid paying Plaintiff. The stipulated judgment is therefore a valid, final judgment.

Legal Analysis and Conclusions

For the following reasons, the court will award Plaintiff judgment on her § 523(a)(6) claim. But it denies her § 707(b)(3)(A) motion to dismiss Defendant’s underlying Chapter 7 case. It addresses each claim in turn.

Nondischargeability Under Section 523(a)(6)

Legal Standard

A creditor bears the burden of proving, by a preponderance of the evidence, that the particular debt falls within one of § 523(a)’s exceptions to discharge. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). Under 11 U.S.C. § 523(a)(6), debts for willful and malicious injuries are nondischargeable. A plaintiff asserting § 523(a)(6) must demonstrate that the injury was both malicious and willful. *Ormsby v. First Am. Title Co. of Nev. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010); *see also Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 711 (9th Cir. 2008). The elements are analyzed separately. *See, e.g., In re Barboza*, 545 F.3d at 706. And both must be proven. *In re Ormsby*, 591 F.3d at 1206.

The word “willful” in (a)(6) modifies the word “injury,” indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. . . . [T]he (a)(6) formulation triggers in the lawyer’s mind the category intentional torts, as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend the consequences of an act, not simply the act itself.

Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998) (emphasis in original).

⁶ To the extent Defendant argues the stipulation should be vacated because he agreed to it under duress or by undue influence, the court declines to do so. He did not plead these affirmative defenses. Nor did he put forward any evidence to prove the elements of either claim under California law.

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Thus, “tortious conduct is a required element for a § 523(a)(6) nondischargeability finding.” *In re Rodriguez*, 568 B.R. 328, 339 (Bankr. S.D. Cal. 2017) (citing *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th Cir. 2008)); see also *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1205 (9th Cir. 2001). Further, conduct “is only tortious if it constitutes a tort under state law.” *Lockerby*, 535 F.3d at 1041 (citing *In re Jercich*, 238 F.3d at 1206). A criminal violation or tort-like statutory violation also suffices for this element of § 523(a)(6). *In re Riley*, BAP No. CC-15-1379-TaLKi, 2016 Bankr. LEXIS 2243, at *7 n.6 (B.A.P. 9th Cir. June 8, 2016).

The “willful” injury requirement is met only when the debtor has a subjective motive to inflict injury or when he believes that injury is substantially certain to result from his conduct. *Carillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002). The debtor “must have intended the consequences of the action, not just the action itself.” *In re Thiara*, 285 B.R. 420, 427 (B.A.P. 9th Cir. 2002). The willfulness standard “focuses on the debtor’s state of mind and precludes application of § 523(a)(6)’s nondischargeability provision short of the debtor’s actual knowledge that harm to the creditor was substantially certain.” *Id.* at 432 (citing *In re Su*, 290 F.3d at 1146). Further, “the debtor’s actual knowledge can be found through circumstantial evidence.” *Id.* (citing *In re Su*, 290 F.3d at 1146 n.6 (“In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action.”)).

“A ‘malicious’ injury involves ‘(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.’” *In re Jercich*, 238 F.3d at 1209. “Malice may be inferred based on the nature of the wrongful act.” *In re Ormsby*, 591 F.3d at 1207 (citation omitted). Before malice may be inferred, however, the willful injury must be established. *In re Ormsby*, 591 F.3d at 1207 (citing *In re Thiara*, 285 B.R. at 434). Additionally, “post-*Geiger*, the ‘done intentionally’ element of a ‘malicious’ injury brings into play the same subjective standard of intent which focuses on the converter’s knowledge of harm to the creditor.” *In re Thiara*, 285 B.R. 420 at 434; see also *In re Jercich*, 238 F.3d at 1209. Malice “does not require a showing of biblical malice, i.e., personal hatred, spite or ill-will.” *Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 791 (9th Cir. 1997) (emphasis in original) (citation omitted). “Nor does it require a showing of an intent to injure, but rather it requires only an intentional act which causes injury.” *Id.*

The sole element Plaintiff does not have the burden of proof on is whether Defendant acted with just cause or excuse. See *In re Hagele*, BAP No. EC-15-1033-JuDTa, 2016 WL 3965899, at *6 (B.A.P. 9th Cir. July 18, 2016) (“[J]ust cause or excuse is in the nature of an affirmative defense. . . . [A] debtor must first put forth the just cause or excuse.”) (citing *In re Jercich*, 238 F.3d at 1208). “And evidence of specific intent to injure can negate just cause or excuse.” *In re Rodriguez*, 568 B.R. at 340 (citations omitted).

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Legal Discussion and Analysis

To succeed on her claim, Plaintiff has to prove by a preponderance of the evidence that Defendant's actions that led to the Stipulated Judgment satisfy § 523(a)(6)'s three elements. *Grogan*, 498 U.S. at 291; see also *Suarez v. Barrett (In re Suarez)*, 400 B.R. 732, 736-37 (B.A.P. 9th Cir. 2009), *aff'd*, 529 F. App'x 832 (9th Cir. 2013). That is, she must demonstrate that Defendant's domestic violence was tortious, willful, and malicious. See, e.g., *Lockerby*, 535 F.3d at 1040-41. The court concludes that she has.

First, it is beyond cavil that domestic violence is a tort under California law. See CAL. CIV. CODE § 1708.6 (Tort of domestic violence); see also *Pugliese v. Super Ct.*, 146 Cal. App. 4th 1444, 1448 (2007). Additionally, the court finds that Defendant believed that injury was substantially certain to result from his conduct. He knew Plaintiff was suffering a PTSD-related anxiety attack, but nevertheless proceeded to have his way with her. And the court finds that injury is an obvious and natural consequence of such conduct. Plaintiff therefore proved that Defendant acted willfully.⁷

As for the maliciousness element, the nature of Defendant's actions strongly suggests that malice exists. See *In re Ormsby*, 591 F.3d at 1207 ("Malice may be inferred based on the nature of the wrongful act."). His actions were plainly intentional, wrongful, and necessarily caused injury. It is not a close call. Finally, Defendant did not provide any justification or excuse for his actions. His denial of the assault is insufficient to constitute an affirmative defense. See, e.g., *Area 55, LLC v. Sure Fit Home Decor, LLC*, No. 3:19-cv-90-LAB(BLM), 2019 U.S. Dist. LEXIS 126191, at *1 (S.D. Cal. July 26, 2019) ("Affirmative defenses deny plaintiff[']s rights to recover, even if the allegations in the complaint are true.") (internal citation and quotation omitted); see also *id.* (the defense that the defendant did not materially breach the agreements, "is a denial of the allegations of the claim and not an affirmative defense."). Accordingly, Plaintiff has also satisfied the malice prong of § 523(a)(6).

For these reasons, the court finds that Defendant acted willfully and maliciously when he assaulted Plaintiff. And since all of § 523(a)(6)'s elements have been met, it holds the Stipulated Judgment is **nondischargeable** in its entirety.

Dismissal for a Bad Faith Filing Under Section 707(b)(3)(A)

Legal Standard

Under § 707(b), the court may dismiss an individual Chapter 7 case if the individual's debts are primarily consumer debts and the case would be an abuse of the Bankruptcy Code. 11 U.S.C. § 707(b)(1); see also *Aspen Skiing Co. v. Cherrett (In re Cherrett)*, 873 F.3d 1060, 1064 (9th Cir.

⁷ Since the court finds that Defendant believed injury was substantially certain to occur, it need not decide whether he subjectively intended to inflict injury. See *In re Su*, 290 F.3d at 1142.

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2017). If a presumption of abuse under § 707(b)(2)'s means test does not arise or is rebutted, a Chapter 7 case may be dismissed as abusive if the debtor filed the case in bad faith. 11 U.S.C. § 707(b)(3)(A); see also *In re Miller*, BAP No. CC-15-1328-KiTaKu, 2016 Bankr. LEXIS 3716, at *18-19 (B.A.P. 9th Cir. Oct. 13, 2016).

The Ninth Circuit has not established a bad faith standard under § 707(b)(3)(A). The Bankruptcy Appellate Panel ("BAP"), however, has identified 10 nonexclusive factors to consider when determining if a Chapter 7 petition was filed in bad faith. See *In re Miller*, 2016 Bankr. LEXIS 3716, at *19. They are:

1. Whether debtor has a likelihood of sufficient future income to fund a chapter 11, 12 or 13 plan which would pay a substantial portion of the unsecured claims;
2. Whether debtor's petition was filed as a consequence of illness, disability, unemployment, or other calamity;
3. Whether debtor obtained cash advances and consumer goods on credit exceeding his or her ability to repay;
4. Whether debtor's proposed family budget is excessive or extravagant;
5. Whether debtor's statement of income and expenses misrepresents debtor's financial condition;
6. Whether debtor made eve of bankruptcy purchases;
7. Whether debtor has a history of bankruptcy petition filings and dismissals;
8. Whether debtor has invoked the automatic stay for improper purposes, such as to delay or defeat state court litigation;
9. Whether egregious behavior is present; and
10. Whether the debtor misrepresented facts, unfairly manipulated the Bankruptcy Code or otherwise filed the petition in an inequitable manner.

Id. (first citing *In re Mitchell*, 357 B.R. 142, 154-55 (Bankr. C.D. Cal. 2006); and then citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999)).⁸ Fraudulent intent is not required for a finding of bad faith, and no single factor is considered dispositive. See *In re Johnson*, BAP No. EC-13-1094-JuTaKu, 2014 Bankr. LEXIS 2726, at *16 (B.A.P. 9th Cir. June 6, 2014).

The moving party bears the burden of proof to support a § 707(b) motion by a preponderance of the evidence. See *Aspen Skiing Co. v. Cherrett*, 523 B.R. 660, 669 (B.A.P. 9th Cir. 2014), *aff'd*, 873 F.3d 1060. But only the court or the United States Trustee may initiate a

⁸ *In re Leavitt* articulated four factors courts should consider when deciding if cause exists to dismiss a Chapter 13 case with prejudice. 171 F.3d at 1224. The *In re Mitchell* court substantially adopted three of them in its nine-factor test for Chapter 7 dismissals. Compare 357 B.R. at 155 with *In re Leavitt*, 171 F.3d at 1224. Since the BAP "has utilized both tests in *Mitchell* and *Leavitt* when considering bad faith dismissals under § 707(b)(3)(A)[,]" the court combines them here. See *In re Miller*, 2016 Bankr. LEXIS 3716, at *21 (collecting cases).

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§ 707(b) matter if the debtor's current monthly income, "when multiplied by 12, is equal to or less than" the applicable median family income. 11 U.S.C. § 707(b)(6).

Legal Discussion and Analysis

In her complaint, she alleges that Defendant "continued to go on expense [sic] trips, attend concerts and flaunt the money he was earning." ECF No. 1, ¶15. Moreover, she points to Defendant's admission at trial that he never intended to perform under the Stipulated Judgment. So, she says, his bankruptcy case was filed in bad faith to avoid paying the debt owed to her.

As an initial matter, Plaintiff lacks standing to bring a § 707(b) motion.⁹ As explained, Defendant's current monthly income was \$484.17 on July 31, 2018 (*see* Bankr. ECF No. 1, p. 39). *See also* 11 U.S.C. § 101(10A)(A); *Lanning*, 560 U.S. at 510. That multiplied by 12 yields \$5,810.04 (*see* Bankr. ECF 1, p. 40). The median income for a household of one person in California on the petition date was \$54,787 – nearly \$49,000 more than Defendant's annual income. *See also* DEP'T OF JUSTICE, CENSUS BUREAU MEDIAN FAMILY INCOME BY FAMILY SIZE: CASES FILED BETWEEN MAY 1, 2018 AND OCTOBER 31, 2018, INCLUSIVE (2018), https://www.justice.gov/ust/eo/bapcpa/20180501/bci_data/median_income_table.htm. On that basis alone, the court must deny Plaintiff's motion. 11 U.S.C. § 707(b)(6).

Even if the court could decide the motion, however, it would deny it on the merits. There is no indication that factors three, six, seven, or eight apply to Defendant. And Plaintiff presented no evidence suggesting that Defendant misrepresented his financial condition. His petition further shows that he was unemployed five out of the six months preceding the bankruptcy filing (Bankr. ECF No. 1, p. 41). Moreover, there is no evidence that Defendant's budget is excessive or extravagant. *See id.* at pp. 27-28. Plaintiff did not even attempt to prove that he took expensive trips or flaunted his money (*cf.* ECF No. 1). So factors two, four, and five strongly weigh in Defendant's favor.

As for factor one, Defendant's net monthly income would only yield, at most, \$6,360 over five years, a less than 15% dividend to unsecured creditors (*see* Bankr. ECF No. 1, p. 28). And there is nothing in the present record to suggest that Defendant's income will substantially increase in the future. Consequently, the first factor also weighs strongly against a finding of abuse.

Plaintiff's primary argument is that Defendant signed the Stipulation Judgment without intending to perform under it. And he tried to use the bankruptcy to discharge the debt. True, Plaintiff may have asserted nondischargeability under § 523(a)(2)(A) had she timely pled that cause. *Rubin v. West (In re Rubin)*, 875 F.2d 755, 759 (9th Cir. 1989) ("[A] promise made with a positive intent not to perform or without a present intent to perform satisfies [the false representation requirements of] § 523(a)(2)(A)."). But she did not, and so waived that claim. FED.

⁹ The court refers to Plaintiff's § 707(b) claim as a motion because it does not fall under Rule 7001's enumerated list of adversary proceedings. *See also* 11 U.S.C. § 707(b)(1) ("[T]he court, on its own motion or by a motion by . . . may dismiss a case . . .") (emphasizes supplied).

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R. BANKR. P. 7004(c); *Perle v. Fiero*, (*In re Perle*), 725 F.3d 1023, 1026 (9th Cir. 2013). The court recognizes that using bankruptcy to perpetrate fraud is inequitable and egregious. But the Bankruptcy Code establishes a procedure to protect creditors from such abuse. And § 523(a)(2) actions would be rendered unnecessary if a debtor's fraud as to one creditor were enough to dismiss an entire bankruptcy case.

Defendant's fraudulent behavior thus may tilt factors nine and ten in Plaintiff's favor. That being said, the court does not consider these considerations particularly persuasive here. Consequently, only two factors suggest Defendant filed the underlying bankruptcy case in bad faith. The remaining eight either weigh heavily in his favor or are inapplicable. The court therefore finds that Defendant did not file his Chapter 7 petition in bad faith. And it **denies** Plaintiff's motion to dismiss on that basis as well.

Conclusion

Plaintiff has proven all of § 523(a)(6)'s elements by a preponderance of the evidence. Her claim for \$20,316 against Defendant therefore is **nondischargeable**.

The court, however, **denies** her § 707(b)(3)(A) motion to dismiss the underlying bankruptcy. She lacks standing to bring such a request. Moreover, she failed to prove Defendant filed the case in bad faith.

A separate judgment will issue.

IT IS SO ORDERED.