

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
98 JUN 23 PM 3: 27
DISTRICT OF SOUTH CAROLINA

IN RE:

Benjamin Lee Parker,

Debtor.

Insurance Reserve Fund of the South Carolina
Budget and Control Board,

Plaintiff,

v.

Benjamin Lee Parker,

Defendant.

C/A No. 98-00383-W

Adv. Pro. No. 98-80038-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Defendant/Debtor's motion for summary judgment is granted.

Columbia, South Carolina,
June 23, 1998.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on 6-24-98, to:

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DISTRICT OF SOUTH CAROLINA

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ORDER

Chapter 7

THIS MATTER comes before the Court upon the Defendant/Debtor's motion for summary judgment.¹ Based upon the arguments presented, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.²

FINDINGS OF FACT

Benjamin Lee Parker ("Mr. Parker" or "Debtor"), through his attorney John T. McMillan, filed a Federal lawsuit against the Lexington County Department of Social Services and the

¹ The motion was originally filed as a motion to dismiss; however, because the Plaintiff submitted evidence outside of the pleadings, with the consent of the Debtor, the Court gave the parties notice that the motion would be treated as a motion for summary judgment and gave the parties ten (10) additional days to supplement the record. However, there were no other documents or exhibits submitted within that time period.

² The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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South Carolina Department of Social Services and several employees of these agencies alleging various claims including emotion outrage, abuse of process, false arrest, malicious prosecution, negligence, fraud and violation of civil rights. Following the dismissal of the Federal lawsuit at the summary judgment stage, Mr. Parker filed a similar lawsuit in State Court which was also dismissed on a motion for summary judgment.

On August 30, 1993, the Honorable George W. Jefferson of the Eleventh Judicial Circuit of the State of South Carolina ("State Court"), issued an exhaustive twenty-eight (28) page opinion finding that the State Court lawsuit was frivolous and that sanctions should be assessed against Mr. Parker and his attorney, Mr. McMillan, pursuant to the South Carolina Tort Claims Acts which provides in part as follows:

In any claim, action, or proceeding to enforce a provision of this chapter, the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well- grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

South Carolina Code Ann. § 15-78-120(c). After the Supreme Court of South Carolina affirmed Judge Jefferson's August 30, 1993 Order, on September 26, 1996, Judge Jefferson issued another

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Order titled "Order for Sanctions" assessing sanctions in favor of the Insurance Reserve Fund of the South Carolina Budget and Control Board (the "Fund" or "Plaintiff") against Mr. Parker and Mr. McMillan, jointly and severally, for the costs and reasonable attorney's fees expended by the Fund in defending the State Court lawsuit.

The total expense incurred and later paid by the Insurance Reserve Fund through 30th August, 1993 was \$47,760.68. The total legal expenses and costs incurred by the Insurance Reserve Fund from 31st August, 1993 through 21st November, 1995 was \$14,697.57, making a total of legal fees and expenses from the date the State Court action was instituted through 21st November, 1995 of \$62,228.25.

Order of September 26, 1996, page 5.

On January 16, 1998, the Debtor filed a voluntary Chapter 7 petition. The debt of \$62,228.25 is the only obligation listed as owed to the Fund by the Debtor. On March 3, 1998, the Fund filed the within complaint objecting to the dischargeability of the State Court judgment pursuant to 11 U.S.C. § 523(a)(7) and (a)(17).³ By separate Order of the Court, judgment has been entered in favor of the Debtor on the § 523(a)(17) allegations.

CONCLUSIONS OF LAW

The Debtor takes the position that there are no genuine issues of material fact and that summary judgment must be issued on the remaining § 523(a)(7) cause of action. This Court agrees. Section 523(a)(7) of the Bankruptcy Code excepts from discharge a debt that is a fine or penalty for the benefit of a governmental unit unless the debt is compensation for an actual pecuniary loss. Section 523(a)(7) provides as follows:

³ Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.



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

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of his subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

11 U.S.C. § 523(a)(7). It is evident, and the Debtor does not seem to contest, that based upon the language of the Orders of the State Court, this debt is penal in nature as it was intended to punish the Debtor and his attorney for prosecuting frivolous lawsuits and that the award was unquestionably for the benefit of the State. However, once the debt has been determined to be a penalty, such as this one, the Court must also make the determination of whether the debt is compensation for an actual pecuniary loss.

Even if the costs associated with conviction can be considered penal for the purposes of § 532(a)(7), however, there is still the difficult question of whether or not the costs assessed against Thompson have been charged solely to recoup the cost of prosecution to the Commonwealth. In other words, are the costs, even if penal still "compensation for pecuniary loss?" If they are, then they are dischargeable under the Bankruptcy Code.

In re Thompson, 16 F.3d 576 (4th Cir. 1994). In making this determination of whether the debt is compensation for a pecuniary loss, the Court will look to three factors. First, the language of the Orders of the State Court makes it clear that the award imposed was to reimburse or compensate the Fund for the costs and attorney's fees incurred in defending the frivolous lawsuit.

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making a total of legal fees and expenses from the date the State Court action was instituted through 21st November, 1995 of \$62,228.25.

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Secondly, the very purpose of the Insurance Reserve Fund of the South Carolina Budget and Control Board, which among other things is to defend and insure State agencies and their employees in Tort Claims Act lawsuits, supports a finding that the award of the State Court is intended to reimburse the Fund for its actual pecuniary expenses incurred in defending a frivolous lawsuit. See generally South Carolina Code Ann. § 1-11-140.

Finally, the language of the section of the South Carolina Tort Claims Act under which the sanctions were ordered makes it clear that this award was in the nature of compensation for actual expenses.

...If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, **which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.**

South Carolina Code Ann. § 15-78-120(c) (emphasis added). It appears clear that the State Court was attempting to penalize the Debtor for prosecuting a frivolous Tort Claims Act lawsuit but at the same time was trying to defray the costs incurred by the Fund in defending the lawsuit and when this is the intent, the debt is not excepted from discharge pursuant to § 523(a)(7).

Motley also contends that the \$10 service fee is dischargeable because section 523(a)(7) provides that a debt is nondischargeable "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C.A. § 523(a)(7)

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(West 1979) (emphasis added). The service fee is imposed "whenever the Department directs a sheriff to effect service of a decision, order, or notice." Va.Code Ann. § 46.2-370 (1989). The fee is intended "to partially defray the cost of administration incurred by the Department and the Commissioner." *Id.* Because the service fee is in the nature of a penalty and is assessed to defray the administrative cost associated with serving the notice, it is not excluded from the discharge provisions by section 523(a)(7).

Williams v. Motley, 925 F.2d 741 (4th Cir. 1991).

While the Court is concerned about discharging this debt as the Orders of the State Court make it clear that the award was in part to uphold the dignity of the legal process, as the Bankruptcy Court for the Western District of Texas has stated, based upon the statutory construction of § 523(a)(7), this Court does not have much leeway.

The language of § 523(a)(7) is clear. In order to be nondischargeable the fine or penalty must be "payable to and for the benefit of a governmental unit". Further, it must not be compensatory in nature. In this case, the Rule 11 sanctions are not payable to a government unit but to a private litigant. Further, they are clearly compensatory in nature as they represent attorney's fees incurred by Wash in the defense of the frivolous action brought by Moebius. The fact that one of the purposes for which the sanction was awarded was to uphold the dignity of the legal process in federal court as well as the court itself does not allow this Court to dispense with the other stated requirements of § 523(a)(7). Accordingly, the debt in question is dischargeable under § 523(a)(7).

In re Wood, 167 B.R. 83 (Bkrcty. W.D.Tex. 1994).

The courts that have found similar debts to be non-dischargeable pursuant to § 523(a)(7) have either not considered the "compensation for actual pecuniary loss" language of § 523(a)(7), something that this Court does not feel it can do, were criminal restitution cases, which are clearly distinguishable from the within sanction award of costs and attorney's fees for bringing a

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frivolous lawsuit (See In re Thompson, 16 F.3d at Fn 7.) or involved debts arising out of attorney disciplinary proceedings, which this Court also feels is distinguishable from the facts within. In attorney disciplinary proceedings, the State is acting in its on-going regulatory capacity to regulate the practice of law for the benefit of the public. In its discretion, the State may suspend or revoke an attorney's license to practice law, a privilege granted by the State, or may sanction the attorney by a public reprimand or monetarily. In the instant case however, the State, through the South Carolina Insurance Reserve Fund, is acting as a litigant which, as a result of a specialized statute designed to protect the public coffers, may recover its costs of defending a lawsuit against its insured which has been determined to be frivolous. Despite the understandable public policy argument offered by the Plaintiff, the Court can not rewrite either of the clear and unambiguous State or Federal statutes and therefore it is the finding of the Court that the Debtor's obligation to the Plaintiff is to compensate the Fund for attorney's fees and costs incurred in defending the frivolous State Court litigation and therefore is not excepted from discharge pursuant to § 523(a)(7). To hold otherwise would be to give no meaning to a portion of the statute. For all of the reasons stated within and because there are no remaining issues of fact, it is therefore,

ORDERED, that the Debtor's motion for summary judgment is granted.

AND IT IS SO ORDERED.

Columbia, South Carolina,

June 23, 1998.


UNITED STATES BANKRUPTCY JUDGE



CERTIFICATE OF MAILING

The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on 6-24-98, to:

Smith
mckay
3 to chambers



Deputy Clerk