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JUDGE: M. A. Mahoney
PARTIES: Ronald Ray Werstler, Lori Michelle Werstler, Nettie B. Phillips, Wayne M. Hartung
CHAPTER: 7
ATTORNEYS: F. L. Coley, L. D. Edge, Jr.
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

RONALD RAY WERSTLER
LORI MICHELLE WERSTLER

Case No. 99-12497-MAM-7

Debtors.

NETTIE B. PHILLIPS
WAYNE M. HARTUNG

Plaintiffs,

v.

Adv. No. 99-1227

RONALD RAY WERSTLER
LORI MICHELLE WERSTLER

Defendants.

ORDER AND JUDGMENT DECLARING DEBTS IN THE AMOUNT OF $221.00 TO BE NONDISCHARGEABLE AND REMAINING DEBTS TO BE DISCHARGEABLE

F. Luke Coley, Mobile, Alabama, Attorney for Plaintiffs
Larson D. Edge, Jr., Mobile, Alabama, Attorney for Debtors

The plaintiffs, Nettie B. Phillips and Wayne M. Hartung, brought this adversary proceeding requesting debts owed them by the debtors, Ronald Ray and Lori Michelle Werstler, be declared nondischargeable. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the debts arising from damage to plaintiffs' rental property are declared nondischargeable in the amount of $221.00 and these debts are otherwise declared to be dischargeable.

FACTS

On November 15, 1995, the plaintiffs, Wayne M. Hartung and Nettie B. Phillips, entered into a lease agreement for the rental of a house located at 1612 Andover Boulevard, Mobile, Alabama, with Gary A. Werstler and Ronald Ray Werstler. The premises were occupied by the debtors, Ronald Werstler and his wife, Lori Michelle Werstler, and their three children.

The lease required one-half of the first month's rent, the last month's rent, and a $550 security deposit upon execution. The lease included an attachment with the following provisions: no vehicles are to be parked on the lawn; no pets, and in the event debtors retain a pet, they agree to pay a $500.00 pet fee and are subject to eviction; carpets must be steam cleaned by a specialist the day after debtors vacate at their expense; the lawn must be left clean, without any debris; and no physical or structural changes can be made without consent from the plaintiffs.

Approximately eight months prior to renting to the debtors, the plaintiffs installed new carpeting, linoleum flooring and vinyl counter tops and made other improvements. Both parties agreed the home was in excellent condition when the Werstlers began their occupancy. Mrs. Werstler did testify that the yard had bare areas when the lease began in 1995.

In February 1997, the debtors informed the plaintiffs that the air-conditioning unit was leaking. Plaintiffs had the unit repaired within three to four days. When Mrs. Werstler called Mrs. Phillips about the air-conditioner, she told her that the carpet in front of the unit was wet. Mrs. Werstler contends that the leakage from the unit also damaged the carpet in a hallway and a bedroom. Mr. Hartung stated the he was never told about the water damage.

Mr. Hartung visited the house in February 1997 to oversee other repairs. At this time, Mr. Hartung saw a tree house in the backyard of the premises. Plaintiffs prohibited tree houses on the premises for liability insurance reasons. The debtors had requested a variance in the lease

on several occasions to permit the construction of a tree house for their children. Mr. Hartung had denied each request. Other than the tree house, the home and yard were in good condition in February 1997 according to Mr. Hartung.

In July 1997, Mr. Hartung visited the property again. He testified that the tree house had not been removed. He saw two pot-bellied pigs, two dogs, and two cats. There was considerable damage to the yard, including damage to the lawn that Mr. Hartung thought was caused by motor oil. A car was parked on the lawn, and there were two mud holes in the lawn. Mr. Hartung contends that the holes resulted from the pigs wallowing. Mrs. Werstler explained that the holes were caused by her children's mud fights or lack of sunlight due to tree coverage.

The plaintiffs' attorney drafted a letter dated August 1, 1997, notifying the debtors that they were in violation of the lease terms. The letter demanded that certain conditions be met. If not met, the debtors would be evicted. These conditions included: removal of all pets; removal of the tree house; repair of a gate and lattice; filling of the holes in the yard; planting new sod in all bare areas; removal and replacement with fresh sod of any grass damaged by oil; treatment of the yard by a licensed pest control professional; removal of swings, the birdhouse and the flag holder from the shutter; the patio, utility room and exterior of house had to be power washed; and the yard had to be mowed. The debtors were given until August 8, 1997, to meet these conditions. The notice was sent via certified mail. It is not clear when debtors received the notice.

According to Mr. Hartung, the conditions were not satisfied by the August 8, 1997 deadline. Mrs. Werstler stated that the lawn was mowed, the tree house, the animals, the swings, the flagholder and birdhouse were removed, but the remaining conditions were not met either

because the plaintiffs did not provide sufficient time or because the demand was not the debtors' responsibility. Mrs. Werstler requested more time from Mr. Hartung to satisfy the conditions.

The Werstlers were notified by letter dated August 13, 1997 to vacate the premises by September 2, 1997. They remained in the house until October 1997, claiming that they were entitled to live in the home in September to account for the final month's rent paid at the inception of the lease. Mr. Hartung contends that the debtors did not vacate until evicted by the sheriff in October. Mr. Hartung stated that when he confronted Mr. Werstler after the eviction, he refused to pay for any damages and stated that he would file bankruptcy if Mr. Hartung sought to collect from him.

Plaintiffs provided 26 photographs detailing the lease violations and damages allegedly caused by debtors. These included exterior damages Mr. Hartung claims to have observed in July 1997 and interior damage which was photographed in October 1997. October 1997 was the first time Mr. Hartung had been inside the home since February 1997. The photographs show stained carpets throughout the house. Mr. Hartung and Mrs. Phillips stated that the carpet smelled of urine and had feces on them. They also claim that some of the stains were from dark paint. Mrs. Werstler claims that the stains were due to the air-conditioner leaking. Some of the leakage spread to her oriental rug, causing the carpet dye to run and leave paint-like stains. She admitted that there was feces, but she claims to have been unaware of this because it was hidden under her children's bed. She stated that she was unable to properly clean and maintain the house for a period of time when she was going through a difficult pregnancy. The pictures also show fourteen nail holes on a wall within a two-foot area and stained and torn linoleum flooring and vinyl counter tops. Mrs. Werstler claims that the holes resulted from their attempts to find a stud to support a book shelf. She asserted that the damage to the flooring occurred when her

family was moving furniture into the home. Damage to a towel rack, doorway and door is also depicted in the photographs. Mrs. Werstler contends that this was from normal wear and tear.

Mr. Hartung testified that the garbage disposal and some windows were broken when the Werstlers vacated the premises. Mrs. Werstler admitted that her children broke one window while playing baseball. She contends that she never used the disposal during her tenancy because she did not know how and its damage could not have been caused by her or her family. Mr. Hartung also testified that a pipe connected to the hot water heater was intentionally damaged. Mrs. Werstler did not know how this happened.

On September 17, 1998, Mrs. Phillips and Mr. Hartung were awarded a judgment in the District Court for the County of Mobile, Alabama against Mr. Ronald Werstler in the amount of $6,441.25 plus costs. The judgment was appealed to the Circuit Court of Mobile County, Alabama. Mr. Werstler failed to appear at trial and the Circuit Court awarded plaintiffs a default judgment in the amount of $6,529.25.

Plaintiffs provided this Court the following itemized list of damages alleged to have been caused by the Werstlers:

$88 Lawn Filling Fee

$600 Unpaid Rent for October 1997

$500 Pet Fee

$2,548 Carpet and Vinyl Repair

$55.56 Unsuccessful Carpet Cleaning

$43.66 Water Charge for Repairs

$350 Yard Repair Work

$225 Sod Purchase

$169 Plumber Charge

$192.29 Paint and Materials

$66.83 Missing Fixtures

$42.99 Change Locks

$34.77 Repair Broken Door

$109.92 Repair Garbage Disposal

$14.89 Supplies from Lowes

$69.84 Replace Broken Window

$22.41 Cleaning Supplies

$450 Labor

$20 Mover Charge

$5,603.16 TOTAL

The debtors filed a joint petition for relief pursuant to chapter 7 of the Bankruptcy Code on July 20, 1999. Plaintiffs filed this adversary proceeding on October 15, 1999 asserting that the damages described above should be declared nondischargeable as they arise from willful and malicious damage to their property caused by the debtors.

LAW

Plaintiffs seek to have the Werstlers' debts arising from damage to the rental property declared nondischargeable pursuant to 11 U.S.C. § 523(a)(6). This provision states that a debt is nondischargeable if it results from "willful and malicious injury by the debtor to another entity or to the property of another entity." The plaintiffs bear the burden of proving each element of the case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). Plaintiffs must show that the Werstlers acted willfully and

maliciously when they damaged the rental property and they must prove the amount of damages caused by these actions.

The recent Supreme Court case of *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) is the starting part for this inquiry. In *Geiger*, the Supreme Court held that for purposes of § 523(a)(6), willful requires "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Id*. 118 S. Ct. at 977. The definition of malicious in § 523(a)(6) was not addressed by the Court. The Eleventh Circuit has defined malicious to mean "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1164 (11th Cir. 1995) (cite omitted).[1]

The plaintiffs sought to prove at trial that all of the damage occurred sometime after February 1997. The implication was that the damage was intentionally done in response to the plaintiffs' prohibition of a tree house or their eviction notice. The Court believes that the Werstlers were upset for those reasons, but this is not sufficient to prove that they intentionally and maliciously damaged the rental property or failed to pay rent. The plaintiffs must prove that

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[1]Bankruptcy Judge William A. Hill opined in *Security Bank v. Wehri (In re Wehri)*, 212 B.R. 963 (Bankr. D.N.D. 1997) that the definition of malicious seemed to be subsumed by the Eighth Circuit's expanded definition of willful in *Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848, 852 (8th Cir. 1997), *aff'd*, 523 U.S. 57. *See, Ehrman v. Feist (In re Feist)*, 225 B.R. 450, 454-56 (Bankr. D.N.D. 1998). This concern is justified in the Eighth Circuit based on the similarity between its definition of malicious (intending or fully expecting to injure the plaintiff) and *Geiger's* expanded definition of willful and the fact that the *Geiger* originated in that Circuit. *See*, *id.* However, because the Supreme Court did not specifically address the definition of malicious in *Geiger* and because this Circuit's definition differs from the Eighth Circuit's, this Court finds that willful and malicious are separate prongs of § 523(a)(6) and adopts the definition of malicious applied by the Eleventh Circuit in *Walker*. Moreover, despite Judge Hill's concerns, he also found that willful and malicious are separate prongs of the § 523(a)(6) test. *Feist*, 225 B.R. at 455.

the Werstlers deliberately caused each item of damage for no just reason or through excessive action even in the absence of spite or ill will. This is difficult to prove. Mrs. Phillips, Mr. Hartung and Mrs. Werstler were all credible witnesses. The Court carefully observed them and found most of each of their stories reasonable. They approached each issue with different points of view and facts. As to the unpaid rent, there was no evidence regarding this debt, other than its existence, and it is therefore dischargeable. Below, the Court will address each claim of property damage in turn.

The Court finds that the damage to the carpeting was at least in part because the air-conditioning unit malfunctioned. This was not the fault of the Werstlers. There were pet feces on the carpet, but the failure to clean this was a mistake according to Mrs. Werstler. Although extremely careless and unsanitary, the Court cannot find that this act was intentional or malicious under § 523(a)(6). Therefore, the debt incurred to replace the carpet was only partially the fault of the Werstlers and although this fault may have been careless, it was not intentional and willful. The carpet damage debt is dischargeable.

Similar to the carpet, the tear in the linoleum flooring was caused by careless or reckless, but not intentional, conduct of the Werstlers while moving furniture. Stains on the flooring or the counter tops were not explained by either party. The Court finds that plaintiffs failed to satisfy their burden of proof with respect to this damage. Therefore, the debts incurred to clean or replace the linoleum and vinyl counters are dischargeable.

Mrs. Werstler admitted that a window was left broken when the Werstlers vacated the premises. She explained that this was caused by her children playing ball. The Court found this testimony credible. Accordingly, the window replacement debt was not the result of a willful and malicious act and it is therefore dischargeable.

The Werstlers admittedly possessed a cat, two dogs and two pigs while living at the rental property. The lease clearly forbids pets and requires a $500 pet fee if pets are obtained. The Court is troubled by the Werstlers' blatant disregard for the lease terms, particularly since the animals included not only everyday house pets, but two farm animals. This arguably is a wrongful act done without excuse, i.e., malicious. That being said, the Court does not believe that the animals were kept with the intent to cause damage to plaintiffs' property. The Werstlers have three children. Based on Mrs. Werstler's testimony, the Court finds that the pets were most likely obtained as companions for the children, rather than as a method to damage the rental property. Therefore, the $500 pet fee and any other debts arising from pet damage are determined to be dischargeable.

The plaintiffs also failed to link damage to the hot water heater pipe, locks, walls, doors, disposal or fixtures to any willful and malicious act of the debtors. The nail holes in the wall were once again the result of reckless conduct. The Werstlers should have used another technique to locate a wall stud. However, the holes were not from an intentional or malicious act. Mr. Hartung speculated as to how these other damages were caused. For example, he stated that somebody must have intentionally struck the hot water heater pipe to break it in the manner he observed. Mrs. Werstler denied Mr. Hartung's conclusions. In light of the conflicting testimony and the speculative nature of Mr. Hartung's conclusions, the Court finds that plaintiffs failed to meet their burden to prove these damages were caused by willful and malicious acts of the debtors.

As to the damage to the yard, most of the bare spots can be explained by the children playing and lack of sunlight underneath the tree. The mud holes are peculiar. If the debtors dug the holes or permitted the pigs to, then this may be a willful and malicious act done to damage

plaintiffs' property. However, the Court cannot determine from the pictures alone if the holes were the result of mud fights between children or pigs wallowing. This Court is not an expert on identifying pig troughs. Additionally, there is conflicting testimony regarding the cause of the holes. The Court after observing the witnesses cannot say that one was more credible than the other on this point. The evidence is at best in equipoise. Thus, plaintiffs have failed to meet their burden of proof and the Court finds the holes were not intentionally and maliciously done to harm plaintiffs' property.

One of the photographs shows damage to the lawn from oil or something more than normal wear and tear. Mr. Hartung testified that he had seen a vehicle parked on the lawn. This obviously supports his contention that the oil was caused by someone draining motor oil from a vehicle parked on the lawn. Mrs. Werstler believed that the alleged oil spot was caused by the children. Her testimony regarding this spot seemed less positive than other parts of her testimony. From the photograph, the spot appears to have been caused by more than children playing. The Court finds that the spot more likely than not was caused by motor oil. The lease clearly forbids vehicles on the lawn. There was no excuse for changing oil on the lawn, i.e., it was malicious. Additionally, the Court found Mr. Hartung's testimony regarding the oil to be credible. Mrs. Werstler's testimony was questionable and Mr. Werstler did not offer an explanation for the oil spot. Thus, the Court finds by a preponderance of the evidence that the debtors intentionally drained the oil to damage the lawn, i.e., it was willful. Therefore, the Court finds that the debt arising from the portion the lawn damaged by oil to be nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code. The Court finds that this damage accounted for approximately one-third of the expenses necessary to repair the lawn.

Accordingly, one-third of the lawn filling fee, yard repair work and sod purchase, which amounts to $221.00, is determined to be a nondischargeable debt.

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The debts of Ronald Ray and Lori Michelle Werstler to Nettie B. Phillips and Wayne M. Hartung arising from damage to the rental property located at 1612 Andover Boulevard, Mobile, Alabama, are declared nondischargeable in the amount of $221.00, and

2. The remaining debts of Ronald Ray and Lori Michelle Werstler to Nettie B. Phillips and Wayne M. Hartung arising from damage to the rental property located at 1612 Andover Blvd., Mobile, Alabama, are declared to be dischargeable.

Dated: March 31, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE