

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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JOHN DAVID KAYSER  
Debtor.

Bankruptcy No. L92-00760W  
Chapter 7

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JAMES KAYSER  
Plaintiff

Adversary No. L92-0119W

vs.

JOHN DAVID KAYSER  
Defendant.

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### ORDER RE: MOTION FOR SUMMARY JUDGMENT

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The matter before the court is the motion for summary judgment of Plaintiff James Kayser to determine the dischargeability of debts owed by Defendant John Kayser. Telephonic hearing was held January 8, 1993. James Kayser filed a brief after the hearing. John Kayser has not resisted the motion. The court now issues its ruling including findings of fact and conclusions of law. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

#### FINDINGS OF FACT

On June 4, 1990, Defendant John Kayser entered a plea of guilty to the crime of first degree theft, a Class "C" felony, for theft of corn and soybeans belonging to James Kayser. John Kayser was sentenced under Iowa Criminal Code § § 714.1(1) and 714.2(1) in a criminal judgment issued September 10, 1990. He was given a suspended prison sentence and three years' probation, and was ordered to pay \$6,853.56 in restitution to Plaintiff James Kayser.

James Kayser filed a civil suit against John Kayser in Buchanan County, Case No. CE 2403, asking for actual and punitive damages resulting from the grain theft. On February 10, 1992, James Kayser obtained summary judgment against John Kayser for actual damages in the amount of \$15,487.29, with credit for \$3,062.60 which he had received in insurance proceeds, and for \$1,060 which John Kayser had paid as restitution in the criminal case. The court set the punitive damages claim for trial.

John Kayser filed a Chapter 7 bankruptcy petition April 16, 1992.

#### DISCUSSION

Plaintiff James Kayser moves for summary judgment and requests the court to find the state court civil damages nondischargeable under either Bankruptcy Code § 523(a)(4), which excepts from discharge debt for embezzlement or larceny, or § 523(a)(6), debt for "willful and malicious injury by the debtor to another entity or to the property of another entity."

Summary judgment is appropriate in a case if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Once the movant has properly supported his motion, the nonmovant may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); United States v. Copper, 709 F.Supp. 905, 906 (N.D. Iowa 1988).

Plaintiff James Kayser must show the debt is nondischargeable by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654, 661 (1991).

Punitive damages are nondischargeable if they stem from the same conduct giving rise to nondischargeable compensatory damages. In re Miera, 926 F.2d 741, 745 (8th Cir. 1991); Benson v. Richardson, 1990 WL 290144 at 170 (N.D. Iowa, July 16, 1990); cf. In re Day, 137 B.R. 335 (Bankr. W.D. Mo. 1992) (declining to extend the rule to the § 523(a)(2) exception). A complaint seeking punitive damages is a debt or claim. Benson v. Richardson at 164. A claim is a right to payment whether or not it has been reduced to judgment, is liquidated, or is unliquidated. 11 U.S.C. § 101(5). Plaintiff's claim for punitive damages is unliquidated since it is not yet reduced to judgment.

The punitive civil damages sought against Defendant John Kayser stem from the same conduct giving rise to the compensatory damages already awarded. Moreover, the reduction of the civil judgment by the amount of restitution paid in the criminal case shows that the civil damages stem from the same conduct giving rise to the criminal theft judgment. If James Kayser shows the compensatory damages come within an exception to discharge under Section 523, the unliquidated punitive damages will also be held nondischargeable.

The doctrine of issue preclusion (collateral estoppel) will bar relitigation of factual issues by the bankruptcy court already decided by the state courts. In re Miera, 926 F.2d 741 (8th Cir. 1991); In re Spray, 131 B.R. 134 (Bankr. N.D. Iowa 1991). The elements of issue preclusion are:

1. the issue sought to be precluded must be the same as that involved in the prior action;
2. the issue must have been litigated in the prior action;
3. the issue must have been determined by a valid and final judgment; and
4. the determination must have been essential to the prior judgment.

Miera, 926 F.2d at 743. If the criminal and civil judgments against John Kayser determined the issues necessary to find the civil damage awards nondischargeable, issue preclusion will apply so that James Kayser is entitled to summary judgment. Spray, 131 B.R. at 135.

Under Bankruptcy Code § 523(a)(4), debt for larceny is nondischargeable. The federal common law definition of larceny applies for purposes of dischargeability under Section 523(a)(4). In re Rose, 934 F.2d 901, 903 (7th Cir. 1991). Larceny is the "fraudulent and wrongful taking and carrying away the property of another with intent to convert such property to the taker's use without the consent of the owner." In re Graziano, 35 B.R. 589, 594 (Bankr. E.D.N.Y. 1983); 3 Collier on Bankruptcy 523.14.

The civil and criminal judgments against John Kayser establish that the debt owed to James Kayser arose from a larceny. John Kayser was convicted of first degree theft, which involves taking "possession or control of the property of another ... with the intent to deprive the other thereof." Iowa Criminal Code § 714.1(1). The "fraudulent taking" element of larceny requires an intent to deprive.

See Savonarola v. Beran, 79 B.R. 493, 496 (Bankr. N.D. Fla. 1987)(discussing the fraudulent appropriation element of the related crime, embezzlement). Therefore, the Iowa theft statute is consistent with the federal common law definition of larceny. Moreover, a fraudulent taking can also be inferred from John Kayser's conduct and from the circumstances of the situation. Id. John Kayser took grain belonging to James Kayser without his consent. The crime involved continuous activity over a lengthy period of time rather than a single episode. Criminal judgment, p. 2. John Kayser sold the grain at co-ops in more than one location, causing actual damage to James Kayser in an amount more than \$15,000.00.

Under Bankruptcy Code § 523(a)(6), debt for "willful and malicious injury by the debtor to another entity or to the property of another entity" is nondischargeable. Conduct is "willful" if it is done in a "headstrong and knowing" manner. In re Long, 774 F.2d 875, 881 (8th Cir. 1985). Malice involves a heightened level of culpability that goes beyond recklessness. Malicious conduct is "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause . . . harm." Miera, 926 F.2d at 743-44; Long, 774 F.2d at 881.

The judgments against John Kayser also establish that the debt owed to James Kayser arose from a willful and malicious injury. The criminal judgment against John Kayser established that he acted with the "intent to deprive" James Kayser of his property. The continuous conduct of John Kayser was targeted at James Kayser. John Kayser knew that his conduct was certain to cause harm to James Kayser; he also knew the extent of the harm he would cause by the market value of the grain he hauled to the grain co-ops.

Plaintiff James Kayser has shown by a preponderance of the evidence that the actual damages and unliquidated punitive damages owed him by John Kayser are nondischargeable under either Bankruptcy Code Section 523(a)(4) or 523(a)(6).

### ORDER

IT IS ORDERED that Debtor John Kayser's obligation to pay compensatory damages and punitive damages, when they become liquidated, in Buchanan County District Court Case No. CE 2403 is nondischargeable.

SO ORDERED THIS 29th DAY OF January, 1993.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on \_\_\_\_\_ I mailed a copy of this order by U. S. mail to: James T. Peters, Gary F. McClintock and U. S. Trustee.