

In the United States Bankruptcy Court

for the Northern District of Iowa

TERRY G. KUNCE
Debtor(s).

Bankruptcy No. 97-02031F
Chapter 7

PROGRESSIVE INSURANCE COMPANIES
Plaintiff(s)

Adversary No. 97-9195F

vs.

TERRY G. KUNCE
Defendant(s)

DECISION

Progressive Insurance Companies (Progressive) asks that Terry Kunce's debt to it be excepted from discharge. Trial was held February 26, 1998 in Fort Dodge. Michael S. Roling appeared for plaintiff; R. Patrick Eich appeared for defendant. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Findings

[O]n or about October 27, 1996, a collision occurred between [Kunce] and Aaron Nicholas Pieper, a Progressive insured, causing property damage ... to Aaron Nicholas Pieper. Defendant's chemical breath test revealed a .199 alcohol content.

Joint Pre-Trial Statement (docket no. 9) ¶ 3. The Joint Pre-Trial Statement quoted above originally indicated that the parties had agreed that the accident had caused personal injury and property damage to Pieper. At the outset of the trial, counsel stipulated that whether Pieper had received bodily injuries was disputed. Progressive contends Pieper was injured. Kunce denies it.

Defendant admits he was intoxicated at the time of the accident. He had no motor vehicle liability insurance. Pieper's policy with Progressive included uninsured motorist coverage. Progressive and Pieper settled Pieper's claim for personal injury under that coverage. Progressive paid Pieper \$1,300.00 to settle Pieper's claim. Agents of Progressive believed that Pieper did receive personal injuries in the accident, and they settled with him on that basis. Pieper's uninsured motorist coverage did not include coverage for property damage to his motor vehicle.

Progressive then pursued recovery from Kunce. They reached a settlement. On April 22, 1997, Kunce signed an agreement promising to pay Progressive \$1,300.00 at the rate of \$75.00 a month (Exhibit 5). The agreement was to settle Progressive's claims against Kunce arising out of the motor vehicle accident which had occurred in October 1996. The parties recognized that the agreement was the compromise of "doubtful and disputed claims." *Id.* In the agreement, Kunce recognized that Progressive was the subrogee of Aaron Pieper.

I.

Progressive seeks a determination that its claim against Kunce is not dischargeable under § 523(a)(9) of the Bankruptcy Code. That section states:

A discharge under section 727 ... does not discharge an individual debtor from any debt ... for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol....

11 U.S.C. § 523(a)(9).

Progressive contends that it has proven all the elements of the exception. Kunce argues that Progressive's complaint must be dismissed because it is not a real party-in-interest entitled to file the action and because there was no admissible evidence to prove that the claim involved personal injury.

II.

In Iowa, a cause of action for tort may be assigned. Wagner v. Farmers Coop. Elevator Co. (In re Wagner), 144 B.R. 430, 441 (Bankr. N.D. Iowa 1991)(citing Vimont v. Chicago & N.W. Ry. Co., 64 Iowa 513, 21 N.W. 9, 10 (1884) aff'd, 173 B.R. 916 (N.D. Iowa 1884). Pieper's claim against Kunce was either partially or completely assigned to Progressive. Progressive has a stake in Kunce's bankruptcy and the discharge of the claim. It is a real party-in-interest. Even if he believes Pieper is also a party-in-interest, Kunce has not moved to require his joinder.

III.

I agree with Kunce's contention that Progressive has not proven its claim. In order to have its claim excepted from debtor's discharge, Progressive must prove that the claim is for personal injury. It has proven only that it believed its claim arose out of personal injury and that it settled Pieper's insurance claim on that belief. That is not proof by preponderance of evidence that Pieper received bodily injuries in the accident with Kunce. Progressive has failed to prove its claim is for personal injury. Accordingly,

IT IS ORDERED that the complaint of Progressive Insurance Companies against Terry C. Kunce is dismissed with prejudice. Judgment shall enter accordingly.

SO ORDERED THIS DAY OF MARCH 1998.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to Michael Roling, R. Patrick Eich and U.S. Trustee.