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6 UNITED STATES BANKRUPTCY COURT
7 DISTRICT OF ARIZONA
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9 In re) Chapter 7
10 MARGARET RODRIGUEZ,) No.04-01605-GBN
11 Debtor.)
12 _____)
13 SABRINA CARTER,) Adversary No. 04-00753-GBN
14 vs. Plaintiff,)
15 MARGARET RODRIGUEZ,) FINDINGS OF FACT,
16 Defendant.) CONCLUSIONS OF LAW
AND ORDER
_____)

17 The adversary complaint of Dr. Sabrina Carter, M.D.
18 ("Plaintiff"), seeking a declaration of non dischargeability of
19 her bankruptcy claim of \$250,000 for false and defamatory
20 communication was tried to this court as a bench trial on November
21 8, 2004 and January 14, 2005. Post trial briefing was completed on
22 February 11, 2005. An interim order was entered on March 29, 2005
23 announcing the court's decision.

24 The court has considered sworn witness testimony,
25 admitted exhibits, adversary pleadings and the facts and circum-
26 stances of this case. The following findings and conclusions are
27 now entered:
28

FINDINGS OF FACT

1 1. Ms. Margaret Rodriguez ("Debtor" or "Defendant") was
2 hired as a patient coordinator and laser technician by Advanced
3 Laser Clinics of Scottsdale, L.L.C. ("Advanced") in its
4 Scottsdale, Arizona office on December 4, 2000. Ms. Christine
5 Egner also worked at Advanced as a technician. Across the hallway
6 was an anti-aging clinic operated by James Maxfield. Plaintiff was
7 the medical director for Maxfield's clinic as well as his girl
8 friend. In October or November of 2001 discussions began concern-
9 ing debtor and Ms. Egner transferring their employment to a laser
10 skin care business Maxfield was going to open.

11 Debtor has provided sworn testimony in state court that
12 Maxfield and plaintiff requested that debtor and Ms. Egner obtain
13 Advanced's patient charts for use in his new clinic. Her sworn
14 testimony is that at Maxfield's direction, while still employed at
15 Advanced, she and Christine typed and mailed letters to Advanced's
16 clients, soliciting their business at the new clinic, signing the
17 letters "Margaret & Christine." The competing clinic, Ultimate
18 Skin & Laser Institute ("Ultimate"), was scheduled to open in
19 Scottsdale on March 4, 2002. Debtor's sworn testimony is that with
20 plaintiff's knowledge and consent, she and Christine Egner copied
21 Advanced's appointment book before terminating their employment on
22 March 5, 2002. Subsequently, allegedly with knowledge and consent
23 of plaintiff and Maxfield, they called Advanced's clients and
24 solicited their business. Additionally, debtor gave sworn
25 testimony that Ms. Egner informed her that she and Maxfield took
26 medical and office supplies, sufficient to open Ultimate, from
27 Advanced over a weekend. Finally debtor's sworn testimony is that
28 shortly before she left Advanced, allegedly at the request of

1 Maxfield and plaintiff, debtor processed unauthorized refunds from
2 Advanced's customers for their use in treatments at Ultimate.
3 Debtor then left her employment at Advanced, giving the company
4 one day's notice.

5 Plaintiff, Maxfield and Ms. Egner deny these allega-
6 tions. Admitted exhibit ("Ex.") 1, testimony ("Test.") of Margaret
7 Rodriguez, Dr. Sabrina Carter, James Maxfield and Christine Egner.

8 2. Besides her work at Ultimate, debtor was personally
9 employed by plaintiff to transport her daughters to ballet class
10 twice a week and for other child care. Relations at the new
11 business quickly deteriorated, either between debtor and plaintiff
12 (test. of Dr. Carter) or between debtor and Maxfield. Test. of Ms.
13 Rodriguez. Following a confrontation with Maxfield, debtor left
14 her employment at Ultimate in early April of 2002. She called for
15 her last paycheck on a Friday. Dr. Carter spoke with debtor by
16 telephone at 5:00 P.M., thereby learning that debtor was terminat-
17 ing her employment. Plaintiff and Maxfield were in a vehicle
18 leaving the city. Debtor was told to return on Monday. She did so,
19 but felt her last paycheck was six hundred dollars short, lacking
20 compensation for her child care work for plaintiff. Debtor left a
21 telephone message for Maxfield that she "...didn't want to get
22 ugly, but things would get ugly..." if she did not get paid.¹
23 This they certainly did, for everyone involved. Rodriguez and

24
25 ¹Debtor's bankruptcy testimony is that she only meant she would
26 complain to labor regulators. Mr. Maxfield's and plaintiff's
27 recollection is that debtor also said in a recorded message
28 that "He would be more sorry than she was" if she was not paid.
Debtor's testimony is she meant he would be sorry that she would
never again work for him. (It's not clear Mr. Maxfield is sorry
about that.)

1 Carter test.

2 3. After leaving Ultimate, Ms. Rodriguez appeared at the
3 premises of Advanced. Whether it was her former workplace or a
4 corporate headquarters is not established. Ms Rodriguez told
5 Advanced's Mark Skarloff in person and Patrick Par² by phone
6 "everything" contained in an affidavit she subsequently signed on
7 April 9, 2002 at the office of Advanced attorney Douglas Tobler.
8 She was extremely angry at the time she spoke to Advanced's
9 personnel. She states she approached Advanced because they had
10 withheld her final pay check. Test. *Id.* She states she was
11 threatened with prosecution for her admitted conduct in copying
12 Advanced's files and customer lists and soliciting Advanced's
13 clients. The affidavit was drafted by attorney Tobler. Neither
14 Skarloff, Par nor Tobler was called by plaintiff as witnesses. The
15 court has no direct evidence concerning the precise conversations
16 debtor had with these individuals. While she was not a named party
17 to the litigation, there was no contrary evidence presented that
18 debtor was not threatened with litigation if she was not
19 cooperative with Advanced. Rodriguez test., Ex. 1.

20 4. On April 17, 2002, Advanced, through attorney Tobler,
21 filed a verified complaint and application for injunctive relief
22 against plaintiff, Maxfield, Ultimate and Ms. Egner, alleging
23

24 ²From materials attached to defendant's *pro se* answer, it
25 appears Par is the Chief Operating Officer of Advanced Laser
26 Clinics, Inc., managing member of Advanced Laser Clinics of
27 Scottsdale, L.L.C. See Maricopa County Superior Court Complaint CV
28 2002-006723 at verification, adversary docket ("Dkt.") item 3 at
exhibit. The court will judicially notice these documents in its
own files. Plaintiff never established Mr. Skarloff's identity or
relationship with Advanced.

1 breach of fiduciary duty, breach of contract, misappropriation of
2 trade secrets, conversion, unfair competition and intentional
3 interference with contractual relations. A temporary restraining
4 order was issued on an unknown date, restraining defendants from
5 calling or contacting Advanced's clients or utilizing Advanced's
6 client files or client appointment book. The Court declined
7 however, to restrain Ultimate's competition with Advanced in laser
8 hair removal or skin abrasion services. Plaintiff has not provided
9 a complete record of this litigation. At an April 29, 2002
10 Superior Court evidentiary hearing, Ms. Rodriguez was called to
11 testify on behalf of Advanced. Dr. Carter, Maxfield and others
12 testified on behalf of themselves and the other defendants.

13 Following an April 30, 2002 continued hearing, Superior
14 Court Judge Colleen McNally issued a May 6, 2002-preliminary
15 injunction that continued to restrain defendants from contacting
16 plaintiff's clients or using its files or client appointment book,
17 without prohibiting defendants from competing directly with
18 Advanced. Although defendants raised issues to impeach Ms.
19 Rodriguez's credibility, that court found "... her version of the
20 events to be much more plausible and believable than that
21 testified to by defendants".

22 The Superior Court docket reflects a May 23, 2003 notice
23 of settlement and stipulated dismissal of the case on September
24 16, 2003. Dr. Carter complains debtor instigated the litigation by
25 furnishing her April affidavit to Advanced and provided perjured,
26 slanderous testimony to Superior Court. However, instead of
27 further litigating debtor's allegations in that venue, Dr. Carter,
28 represented by counsel, settled the entire state court litigation,

1 paying Advanced \$125,000 to \$150,000 of her own funds. Dr. Carter
2 did so, although she was a part time medical consultant and not
3 the owner of Ultimate. Her testimony is that she did so because
4 (1) she felt the Superior Court would believe debtor instead of
5 her and the other defendants, (2) the state court had enjoined
6 Ultimate from operating its business and (3) she was concerned
7 about her professional reputation. Although Ultimate is Mr.
8 Maxfield's company, Dr. Carter personally signed medical equipment
9 leases as a favor to Maxfield. It is her testimony that Ultimate
10 had no cash flow and she had to settle "with a gun to her head."
11 Aspects of plaintiff's testimony are hard for this fact finder to
12 credit. The state court's May 6, 2002 ruling, rendered a year
13 prior to the notice of settlement, indicates the state court had
14 already determined debtor to be more credible than Dr. Carter. The
15 same order made clear the court refused to enjoin Ultimate's
16 competition with Advanced. The only proscription was that Ultimate
17 could not serve Advanced's customers or use Advanced's files and
18 customer lists. Dkt. 3 at answer exhibits, minute entry for April
19 29, 2002 and ruling of May 6, 2002; Ex. 1, Ex. 3, Test. of Dr.
20 Carter *id.*

21 5. Plaintiff Carter complains debtor's April affidavit
22 and debtor's testimony again appeared in litigation. Plaintiff's
23 divorce had been pending since January of 1997. A decree was not
24 entered until September 16, 2004. Plaintiff blames a child custody
25 dispute and repeated continuances granted her former husband for
26 much of the delay. Debtor's April affidavit was filed in the
27 divorce case. Debtor testified in February of 2003 before a
28 special master, as part of an effort by the former husband to

1 prove plaintiff was an unfit mother. Plaintiff characterizes
2 debtor's testimony and affidavit as outrageous lies. Although
3 plaintiff's divorce counsel did not ask that the transcript be
4 sealed, no further evidence of this testimony or the result of the
5 litigation was introduced by plaintiff. Accordingly the fact
6 finder has no information on precisely what debtor said or whether
7 her testimony was found credible by that court. Test. *Id.*

8 6. Finally, plaintiff complains that debtor made
9 slanderous statements to private investigator Guy White.³ Debtor
10 advises she was telephoned by White, who stated he wanted to
11 discuss what she had personally observed concerning plaintiff's
12 children, instances of abuse of plaintiff by Maxfield and
13 Maxfield's temper. Debtor's testimony is that she believed she was
14 helping the children by communicating her belief that plaintiff
15 was an abused woman. She was unaware White recorded some of their
16 four or five telephone conversations. She subsequently learned
17 White was not an impartial investigator, trying to protect the
18 children, but instead was employed by plaintiff's former husband
19 in divorce litigation. Her belief that plaintiff was an abuse
20 victim was based on personal observations of Maxfield raging and
21 swearing. She never saw him strike anyone, however. Debtor also
22 assumed abuse from plaintiff's bandaged nose. She denies knowing
23 plaintiff had an elective rhinoplasty. She claims she was told by
24 plaintiff on a Utah trip of her domestic abuse. Plaintiff
25

26 ³Her unverified adversary complaint identified a single
27 instance of slanderous statements to White on June 12, 2002.
28 Complaint ¶ 4(c) at p. 2, dkt. 1. No trial evidence of dates or
specifics of the statements was introduced into evidence.

1 allegedly did not answer when Ms. Rodriguez directly inquired if
2 Maxfield was her abuser.

3 Debtor also informed White that she repeatedly observed
4 plaintiff drinking to excess and acting morose at social situa-
5 tions. This would include being a "sloppy drunk" at a party held
6 for Mr. Maxfield. Debtor concedes she also drank too much on this
7 occasion and had to be retrieved by her boyfriend. White was not
8 called as a witness. It is unclear precisely which statements
9 given to White were also presented to the divorce court through
10 either White, a recording or debtor's own testimony. Rodriguez
11 test.

12 7. Plaintiff denies being abused, drinking to excess or
13 acting improperly at a social celebration of Maxfield's birthday
14 at the Marco Polo restaurant on an unspecified date. She is
15 confident that debtor was aware of her elective surgery. James
16 Maxfield, who was served with a subpoena in plaintiff's divorce by
17 White, denies that plaintiff acted strangely at his party or that
18 she has a drinking problem. Steven Lee Gage, a social friend of
19 plaintiff and Maxfield, testified he didn't observe plaintiff
20 crying or drunk at the party. As a former police officer, he is
21 not aware that plaintiff is abused or has a drinking problem.
22 Robert Mekoski, a social friend of plaintiff and Maxfield,
23 attended the party and saw no evidence of drunken or "crazy"
24 behavior or abuse. Christine Egner, a three-year employee with
25 Ultimate, testified she was a named defendant in the Advanced
26 litigation, denied participating in efforts to steal Advanced
27 property, files or customer lists. While clients of Advanced
28 became Ultimate clients, she did not sign a non compete clause for

1 Advanced. She denies observing "crazy" or drunken behavior by
2 plaintiff. Michael D. DeMaria, a close friend of plaintiff and
3 Maxfield, saw no questionable party behavior. Test. of Carter,
4 Maxfield, Gage, Mekoski, Egner and DeMaria.

5 8. Debtor filed a voluntary Chapter 7 bankruptcy case in
6 the Phoenix division of the District of Arizona on February 2,
7 2004. She is a single mother, living paycheck to paycheck. This
8 court finds her to be an excitable witness, whose credibility is
9 occasionally suspect, who concedes she has difficulty with dates.
10 She denies any motive to injure plaintiff. Her asserted reasons
11 for frequent appearances in litigation involving plaintiff is her
12 desire to be paid, threats of prosecution if she failed to
13 cooperate with Advanced and concern for plaintiff's children.
14 Plaintiff can offer no better motive for debtor's alleged lies or
15 malice toward her than to speculate debtor simply became unhappy
16 with her situation at Ultimate or had unrequited feelings for
17 Maxfield.⁴

18 Debtor's statements to Advanced, regarding copying and
19 theft of Advanced's property are not just prejudicial to plain-
20 tiff, but include admissions of culpable conduct on her own part.
21 Her statements were previously found credible by the Superior
22 Court, who entered a temporary restraining order "...primarily on
23 the strength of the affidavit of Margaret Rodriguez..." and after
24 an evidentiary hearing found "...her version of events to be much
25 more plausible and believable than that testified to by Defen-

26
27 ⁴Her adversary complaint stated the reasons for defendant's
28 alleged campaign of fraud and deceit were unknown to plaintiff.
Complaint *id.* ¶ 4(a) at p. 2.

1 dants." Test. of Rodriguez and Carter, Preliminary injunction
2 ruling of May 6, 2002, *id.*

3 9. On May 11 of 2004, plaintiff filed a *pro se* bank-
4 ruptcy adversary complaint alleging debtor commenced a campaign of
5 fraud and deceit on April 2, 2002 to discredit, defame and
6 humiliate plaintiff, including statements that Dr. Carter was
7 pursuing criminal activity and conduct suborning theft. Dr. Carter
8 also alleged a June 12, 2002-statement to Guy White that "...Dr.
9 Carter was mentally unstable and a drunk." The complaint sought
10 \$250,000 in non dischargeable damages as a willful and malicious
11 injury. See generally, Complaint at pgs. 2-4, *id.* Although
12 plaintiff subsequently retained counsel, the complaint was not
13 amended.

14 Dr. Sabrina Carter testified she is a licensed
15 physician with seven years of professional experience. Her
16 medical field is child neurology. Although unemployed at the time
17 of her testimony, she reports prior employment as an independent
18 contractor at a state child rehabilitative facility, as well as
19 part time work at the laser skin care clinic. She appears to be a
20 calm, thoughtful, responsible professional. It is difficult to
21 picture her publicly behaving in an intoxicated, emotional,
22 erratic or thieving manner as plaintiff alleges. However, her
23 testimony justifying her six-figure settlement of a case
24 allegedly based on complete fabrication, following an evidentiary
25 hearing where her counsel presented her side of the story to a
26 judicial officer is difficult to accept. Apparently Ultimate's
27 customer list was sufficiently similar to Advanced's to support
28 debtor's allegations, in the eyes of the superior court. Further,

1 attached to debtor's affidavit is a February 20, 2002 written
2 solicitation to (presumably) Advanced's clients announcing
3 "...Margaret & Christine('s)..." availability for services at
4 Ultimate, consistent with debtor's testimony.

5 Contrary to plaintiff's testimony, Ultimate was not
6 enjoined from operating or soliciting business. Clearly the state
7 court merely enjoined the use of Advanced's files and appointment
8 book and prohibited solicitation of Advanced's customers. She
9 insists there was no such wrongful conduct. It is difficult to
10 appreciate why she had to pay such a large settlement "...to allow
11 the business (which she did not own) to reopen." Test., Prelimi-
12 nary injunction ruling *id.*, Ex. 1 at attachment.

13 10. During trial of this adversary, it finally occurred
14 to the undersigned that plaintiff's bankruptcy litigation was
15 actually a remarkable collateral attack on one, if not two, state
16 court proceedings. Accordingly, the court *sua sponte* required
17 plaintiff to show cause why her complaint should not be dismissed
18 due to immunity and collateral estoppel principles on November 8,
19 2004.⁵ Minutes of November 8, 2004, dkt. 9. Plaintiff responded
20 in writing and at a hearing that she was seeking redress for
21

22 ⁵This court is under no obligation to serve as the *pro se*
23 defendant's advocate or treat her more favorably than the
24 represented plaintiff. *In re Stober*, 193 B.R. 5, 9 (Bankr.D. Az.
25 1996), *citing Jacobson v. Filler*, 790 F.2d 1362 (9th Cir. 1986).
26 Defendant's answer and testimony inartfully raised the issue of
27 immunity by reference to her participation in prior litigation.
28 See, e.g. dkt. 3 and exhibits. A *pro se* pleading that raises an
immunity defense goes to the heart of plaintiff's cause of action
for a wrongful act done without just cause or excuse. Conclusion
of law 5, *infra*. Plaintiff's burden of proof required her to deal
with the answer's allegations, including immunity. The court acted
to frame this important, but imprecisely raised issue.

1 statements voluntarily made to Advanced's agents Par and Skarloff
2 "...before any litigation was filed or even contemplated."
3 Response of December 8, 2004 at pgs. 1-2 and 4, dkt. 10; Minutes
4 of December 10, 2004, dkt. 11. Plaintiff also argued that state
5 law did not grant a privilege to private investigator White.
6 Response *id* at pgs. 3-4. Given the privileges possibly applicable,
7 this court required that plaintiff's proof of the alleged
8 defamatory statements be very specific as to what was said and the
9 context in which the statements were made, given debtor's
10 imprecise recollection of dates and her sworn testimony that the
11 statements were provided under threat of litigation from Advanced.
12 The court advised (and reiterated) that in its judgment the
13 testimony of Par, Skarloff and White would be very important to
14 the court's ability to find specific statements were malicious and
15 made independently of the litigation process. Plaintiff's counsel
16 responded that all these individuals were on plaintiff's witness
17 list, consideration was being given to calling one or several and
18 at least one was a Maricopa county resident. Counsel was given 30
19 days to decide whether to call these witnesses. December 10 audio
20 transcript.

21 At the continued trial plaintiff called neither Par,
22 Skarloff nor White. Accordingly, the fact finder has little
23 ability to determine the circumstances, instances and contents of
24 debtor's statements and no evidence impeaching her claim that her
25 statements were not malicious, made within the context of
26 threatened litigation (which commenced shortly thereafter) or to
27 a private investigator under the belief she was assisting
28 plaintiff's children. Minutes of January 14, 2005, dkt. 12.

1 11. To the extent any of the following conclusions of
2 law should be considered findings of fact, they are hereby
3 incorporated by reference.

4 **CONCLUSIONS OF LAW**

5 1. To the extent any of the above findings of fact
6 should be considered conclusions of law, they are hereby incorpo-
7 rated by reference.

8 2. Jurisdiction of defendant's bankruptcy case is vested
9 in the United States District Court for the District of Arizona.
10 28 U.S.C. §1334(a)(1994). That court has referred all cases under
11 Title 11 of the United States Code and all adversary proceedings
12 and contested matters arising under Title 11 or related to a
13 bankruptcy case to the United States Bankruptcy Court for the
14 District of Arizona. 28 U.S.C. §157(a)(1994), Amended District
15 Court General Order 01-15. The adversary proceeding having been
16 appropriately referred, this court has core bankruptcy jurisdic-
17 tion to enter a final order determining the dischargeability of
18 plaintiff's claim. 28 U.S.C. §157(b)(2)(I). Neither of the
19 litigants has argued to the contrary.

20 3. This court's conclusions of law are reviewed *de novo*
21 and its factual findings are reviewed for clear error. Rule 8013,
22 *F.R.Br.P., Hanf v. Summers (In re Summers)*, 332 F. 3d 1240, 1242
23 (9th Cir. 2003). The appellate court accepts the bankruptcy court's
24 findings, unless upon review, it is left with the definite and
25 firm conviction that a mistake has been committed. *Ganis Credit*
26 *Corp. v. Anderson (In re Jan Weilert RV, Inc.)*, 315 F. 3d 1192,
27 1196 (9th Cir.) amended by 326 F. 3d 1028 (9th Cir. 2003).

28 4. The standard of proof required of a plaintiff in

1 dischargeability litigation is the preponderance of the evidence.
2 This standard applies to all dischargeability proceedings without
3 exceptions. *Branam v. Crowder (In re Branam)*, 226 B.R. 45, 52
4 (Bankr. 9th Cir. 1998) *aff'd* 205 F.3d 1350 (9th Cir. 1999).
5 Plaintiff's complaint does not specify the precise subsection of
6 11 U.S.C. §523 (a) she invokes. However, the complaint and
7 plaintiff's closing brief both argue that debtor intended a
8 willful and malicious injury. Dkt. 1 at pgs. 2-3, dkt. 16 at pgs.
9 6-7.

10 5. A Chapter 7 bankruptcy will not discharge an
11 individual's liability for willful and malicious injury to another
12 or another's property. 11 U.S.C. §523(a)(6) (2002). Properly
13 proven, a slanderous statement can constitute a non dischargeable
14 §523(a)(6) claim. *Jett v. Sicroff (In re Sicroff)*, ___F.3d ___
15 2005 WL 665251 (9th Cir. 2005). The word "willful" in the statute
16 modifies the word "injury," indicating that non dischargeability
17 requires a deliberate or intentional injury, not merely a
18 deliberate or intentional act that leads to injury. Debts arising
19 from reckless or negligent injury do not fall within §523(a)(6).
20 The statute triggers the category of intentional torts, as
21 distinguished from negligent or reckless torts. Intentional torts
22 generally require that the actor intend the consequences of an
23 act, not merely the act itself. *Kawaauhau v. Geiger*, 523 U.S. 57,
24 61, 118 S.Ct. 974, 977 (1998)(Medical malpractice judgment of
25 \$355,000 for physician's substandard medical care, resulting in
26 amputation of plaintiff's leg, held dischargeable).

27 It must be shown not only that debtor acted willfully
28 and maliciously, but also that debtor inflicted the injury

1 willfully and maliciously, rather than recklessly or negligently.
2 The willful injury requirement is met when plaintiff demonstrates
3 either that debtor had a subjective motive to inflict the injury
4 or debtor believed injury was substantially certain to occur as a
5 result of her conduct. *Petralia v. Jercich (In re Jercich)*, 238 F.
6 3d 1202, 1207-08 (9th Cir. 2001).

7 The "willful" and "malicious" prongs of the statutory
8 requirements are not to be conflated. The bankruptcy court is
9 required to make findings on each. A malicious injury involves (1)
10 a wrongful act, (2) done intentionally, (3) which necessarily
11 causes injury and (4) is done without just cause or excuse.
12 *Carrillo v. Su (In re Su)*, 290 F. 3d 1140, 1146-47 (9th Cir. 2002).

13 Here, plaintiff is only able to speculate what debtor's
14 motives would be for the alleged campaign of lies. Finding of fact
15 8, *id.* No evidence was presented establishing that debtor believed
16 her statements were false, much less that she believed they would
17 injure plaintiff. Debtor insists she was truthful. At least one
18 judicial officer has found her testimony to be credible. *Id.*
19 Plaintiff's proof is insufficient to establish a wrongful act,
20 much less an intentional wrongful act by the requisite standard.
21 Maliciousness has not been established.

22 As to willfulness, evidence of motive and of a defen-
23 dant's subjective intent to injure is always a difficult proof.
24 Nonetheless, a logical way to begin would be to establish the
25 surrounding circumstances of the alleged statements, including
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27
28

1 debtor's demeanor and actions⁶. A simple way to establish this
2 would be to call the three known witnesses to the statements, as
3 well as the attorney or paralegal who prepared the affidavit
4 plaintiff considers false and slanderous. This plaintiff did not
5 do. She has failed to establish, by a preponderance of the
6 evidence, liability under §523(a)(6).

7 6. Conclusion of law 5, *id.*, eliminates plaintiff's
8 complaint and cause of action. There are additional deficiencies
9 in plaintiff's factual and legal case, however. Witnesses in
10 judicial proceedings have absolute immunity from civil suits
11 arising from their testimony during depositions and trials.
12 *Darragh v. Superior Court County of Maricopa*, 900 P.2d 1215, 1217-
13 18 (Ariz. App. 1995). For purposes of applying the judicial
14 witness immunity rule, a judicial proceeding includes the period
15 before an action is filed, if during that period, litigation is
16 seriously contemplated. *Darragh, id.* at 1218. (Applying absolute
17 immunity to contents of an initial and an updated appraisal, both
18 prepared prior to the filing of an eminent domain proceeding).⁷
19 The defamatory content of the communication need not be strictly
20 relevant to the judicial proceeding, but need only have some
21

22 ⁶In addition to what a debtor may admit to knowing, the
23 bankruptcy court may consider circumstantial evidence that tends
24 to establish what the debtor must actually have known when taking
the injury-producing action. *In re Sicroff, id.* at p. 4.

25 ⁷Since no Advanced officer was called as a witness, it is
26 unknown if debtor's visit was the initiating factor for the
27 litigation (although it appears she was the star of the show) or
28 if Advanced was already considering litigation. Advanced would
independently know its technicians left on short notice, that some
clients were not returning and if debtor's testimony is accurate,
that office and medical supplies were missing.

1 reference to the subject matter of the proposed litigation. *Green*
2 *Acres Trust v. London*, 141 Ariz. 609, 613, 688 P.2d 617, 621
3 (Ariz. 1984). There must be some connection between the recipient
4 of the communication and the proposed litigation. Thus, a private
5 meeting in a law office between lawyers and an invited reporter,
6 resulting in a published story defaming plaintiff is not privi-
7 leged:

8 The reporter played no role in the actual litiga-
9 tion other than that of a concerned observer.
10 Since the reporter lacked a sufficient connection
11 to the proposed proceedings, public policy would
12 be ill served if we immunized the communications
13 made to the reporter by the lawyer defendants.
14 The press conference simply did not enhance the
15 judicial function and no privileged occasion
16 arose. Accordingly, the lawyer Defendants were not
17 absolutely privileged to publish the oral and
18 written communications to the newspaper reporter.

19 *Green Acres Trust, id.* at 623.

20 Shortly before litigation was filed against plaintiff,
21 debtor had a conversation with two of Advanced's officers, one of
22 whom signed a verified complaint against plaintiff eight days
23 later. Debtor then appeared at the office of Advanced's attorneys
24 and signed an affidavit subsequently used in the litigation. Did
25 the conversation(s) and the recipients have reference or connec-
26 tion to the proposed litigation? Evidently. Is there a possibil-
27 ity, however slight, that the conversation and its recipients had
28 no connection to the proposed litigation, yet plaintiff was
nonetheless slandered maliciously and willfully? We'll never know.
Plaintiff was clearly informed the court was concerned her
litigation implicated debtor's absolute immunity as a judicial
witness. Plaintiff was warned at the December 10 hearing to
produce definitive evidence of the contents and circumstances of

1 debtor's publication, including the recipients of the statements.
2 She did not do so. Every indication to this fact finder is that
3 the statements were given in connection with an existing or
4 seriously considered litigation and made to recipients connected
5 to the legal action.

6 Subsequently the affidavit appeared in plaintiff's
7 divorce litigation, probably to her detriment. Debtor was again
8 a witness. It's unlikely she was a friendly witness. We do not
9 know the particulars⁸. On unknown dates, presumably before the
10 domestic relations trial, debtor had conversations with a private
11 investigator working for plaintiff's adversary. Debtor's testimony
12 is that at first she believed White was simply a friend, concerned
13 as debtor says she was, with the children's welfare. Plaintiff
14 presented no contrary evidence. Apparently at some point during
15 these telephone conversations, Ms. Rodriguez learned White's
16 actual role as the former husband's agent. She apparently kept
17 talking. We don't know what was said. Lacking definitive evidence
18 concerning the substance, sequence and circumstances of these
19 conversations, the court cannot make a definitive finding that the
20 statements were completely independent of the judicial proceeding
21 and do not implicate the *pro se* defendant's absolute immunity.
22 Again, the fact finder sees every indication of a connection with
23 a pending case and a recipient connected to that case.

24
25 ⁸Possibly part of debtor's domestic relations testimony was
26 that plaintiff behaved strangely at Maxfield's surprise party and
27 was battered or abused by Maxfield. It's unclear that claiming
28 another is a victim of domestic abuse is slanderous. Regardless,
plaintiff called five personal friends or employees to rebut this
contention, as well as the party behavior allegations in
bankruptcy court.

7. In summary, the court concludes plaintiff failed to establish her cause of action for a willful and malicious injury by a preponderance of the evidence. It is difficult to believe that plaintiff, a well educated medical professional, could have engaged in all the conduct ascribed to her by debtor. It is difficult to believe debtor, a single mother of modest means, had the motive or inclination to engage in the extended campaign of perjury and slander plaintiff contends. Doubtless counsel tried the case professionally, given the available resources of his client. We should all move on.

ORDER

Plaintiff's complaint and cause of action are dismissed with prejudice. Each party will bear their own costs and fees. A judgment will subsequently issue and the clerk will then close this case.

DATED this 13th day of April, 2005.

Scotch Whisky

George B. Nielsen, Jr.
United States Bankruptcy Judge

Copies mailed this 13th day
of April, 2005, to:

David G. Bray
MARISCAL, WEEKS, MCINTYRE, & FRIEDLANDER
2901 N. Central Avenue, #200
Phoenix, AZ 85012-2705
Attorney for Plaintiff

Ms. Margaret Rodriguez
2727 E. Beverly
Phoenix, AZ 85040
Pro Se Defendant

By /s/ Rachael M. Stapleton