UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	BKY 4-92-7888
SCOTT DENNIS BROZEK, Debtor.	
BRADLEY SCOTT HAMRE, Plaintiff, -v.-	ADV 4-93-99
SCOTT DENNIS BROZEK, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR SUMMARY JUDGMENT

At Minneapolis, Minnesota, October 26, 1993.

The above-entitled matter came on for hearing before the undersigned on the 2nd day of August, 1993, on plaintiff's motion for summary judgment. Appearances were as follows: James Westphal for plaintiff Bradley Hamre; and Jerome Rudawski for debtor Scott Brozek.

FINDINGS OF FACTS

Plaintiff Bradley Hamre ("Hamre") is the victim of a hit and run motor vehicle accident that occurred on April 28, 1991. The debtor Scott Brozek ("Debtor") was operating the motor vehicle that struck Hamre. Immediately after the accident, Debtor fled the scene, drove home, switched cars and returned to the scene of the accident where Debtor was subsequently arrested. Upon arrest and within two hours of when Debtor was driving the motor vehicle, Debtor submitted to an intoxilyzer test that indicated a .10 alcohol concentration.

Debtor pled guilty to the offense of hit-and-run involving personal injury as a result of his operation of a motor vehicle. All other charges, including driving while intoxicated ("DWI"), were dismissed. On August 14, 1992, Hamre was awarded default judgment against Debtor in the amount of $250,000.00 in Hennepin County District Court. The district court concluded that "at the time of the accident Defendant Brozek was intoxicated." See Hamre v. Brozek, No. 92-12383.[1] On November 30, 1992, Debtor filed a petition for relief under chapter 7 of the Bankruptcy Code, and received a discharge on April 8, 1993. Subsequently, Hamre filed this adversary proceeding to have the judgment excepted from discharge pursuant to sections 523(a)(6) and 523(a)(9) of the Code. Hamre now moves for summary judgment based upon section 523(a)(9).

CONCLUSIONS OF LAW

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c), as incorporated by Bankruptcy Rule 7056, provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party on summary judgment bears the initial burden of showing that there is an absence of evidence

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[1] Neither party has asserted that the civil default judgment collaterally estops Debtor from arguing that Debtor's actions were not unlawful.

to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The burden then shifts to the non-moving party to produce evidence that would support a finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986). This responsive evidence must be probative, and must "do more than simply show there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

B. Position of the Parties

Hamre argues that the debt in not dischargeable under section 523(a)(9) of the Code which provides that "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, a drug, or another substance." 11 U.S.C. § 523(a)(9). Hamre relies on section 169.121(1)(e) of the Minnesota statutes which provides: "It is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state . . . when the person's alcohol concentrations measured within two hours of the time of driving is .10 or more." Minn. Stat. § 169.121(1)(e) (1992). Hamre asserts that all the Code requires is the conduct be unlawful and that under Minnesota law Debtor's conduct was deemed unlawful when he tested .10 within two hours of the accident.[2]

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[2] Hamre also argues that Minnesota's implied consent law provides another basis of unlawful conduct that mandates a denial of discharge under section 523(a)(9). See Minn. Stat. § 169.123

Hamre further contends that Debtor cannot escape the provisions of section 523(a)(9) simply because he entered a guilty plea to hit-and-run and was not convicted of DWI. Hamre relies on the holding in State Farm Mut. Auto. Ins. Co. v. Wright (In re Wright), 66 B.R. 403 (Bankr. S.D. Ind. 1986) that a guilty plea to a lesser included offense when charged with DWI does not diminish the applicability of section 523(a)(9). Id. at 407.

According to Debtor, the debt is dischargeable because all charges relating to DWI were dismissed. Debtor is essentially asserting that the term "unlawful" as used in section 523(a)(9) is synonymous with "conviction", and therefore section 523(a)(9) is not applicable since it does not encompass hit-and-run accidents. Debtor distinguishes the Wright decision by noting that he did not plead guilty to a "lesser included offense." Rather, the hit-and-run was an independent criminal charge in which the elements do not include intoxication. Furthermore, Debtor interprets Wright as requiring direct evidence of intent to injure in order for a debt to be determined non-dischargeable. See Wright, 66 B.R. at 406.

Finally, at the hearing Debtor raised the factual issue of whether Debtor was intoxicated at the time of the accident. Debtor maintains that he became intoxicated after the accident when he went home, drank and then returned to the scene. Debtor argues

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(1992). According to Hamre, the revocation of Debtor's drivers license also suggests that Debtor was intoxicated during the accident. Because I grant the motion for summary judgment based upon 523(a)(9), I find it unnecessary to consider this argument.

that because he was only convicted of a hit-and-run, there is no evidence that the accident was a result of intoxication -- a prerequisite to the application of section 523(a)(9).

C. Nondischargeability under Section 523(a)(9)

After having considered the evidence presented and arguments of counsel, I conclude that the civil judgment against Debtor is not dischargeable under section 523(a)(9) and that summary judgment is appropriate.

To determine nondischargeability of a debt under section 523(a)(9), the court must determine by a preponderance of the evidence that the debtor was legally intoxicated. Whitson v. Middleton, 898 F.2d 950, 952 (4th Cir. 1990); Simpson v. Phalen (In re Phalen), 145 B.R. 551, 554 (Bankr. N.D. Ohio 1992). Thus, the disposition of this controversy rests primarily on whether Debtor's conduct "was unlawful because the debtor was intoxicated." In determining legal intoxication, the court must apply state law. Whitson, 898 F.2d at 952; State Farm Mutual Automobile Ins. Co. v. Kupinsky (In re Kupinsky), 133 B.R. 993 (Bankr. S.D. Ill. 1991). Under Minnesota law Debtor's conduct was unlawful: Debtor was operating a motor vehicle; Debtor's alcohol concentration was .10; and the alcohol concentration was measured within two hours of the accident. These facts are not in dispute.

Yet Debtor urges the court to hold that, absent a criminal conviction for DWI, Debtor's conduct was not unlawful. This argument is without merit. In 1990, Congress amended section 523(a)(9) to remove the requirement that liability be reduced to

judgment. Therefore, while the existence of a judgment is still relevant, the absence of a judgment is immaterial and the bankruptcy court alone may conclude that the debtor was legally intoxicated under the laws of the state where the accident occurred. Whitson, 898 F.2d at 952; see also Phalen, 145 B.R. at 555 (holding that debtor's violation of state drunk driving laws led to a finding by a preponderance of the evidence that debtor was legally intoxicated and therefore finding the debt nondischargeable). Based upon the foregoing analysis, I hold that Debtor violated Minn. Stat. § 169.121(1)(e) and therefore Debtor's conduct was unlawful.[3]

Furthermore, I find it persuasive that the state district court which awarded the judgment also concluded that Debtor was intoxicated when Debtor struck Hamre with his vehicle. It is this civil judgment that Debtor seeks to discharge, not any liability that arose out of the proceedings involving the plea bargain.

Contrary to Debtor's argument, there is no requirement that there be direct evidence of intent to injure for a debt to be nondischargeable under section 523(a)(9). Only section 523(a)(6) requires evidence of intent to injure. Wright, 66 B.R. at 407. At issue here is section 523(a)(9). Additionally, a debtor may not

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[3] This result is consistent with the type of conduct section 523(a)(9) was intended to cover. When Congress enacted section 523(a)(9), Congress intended to: "(1) deter drunk driving; (2) to ensure that those who cause injury by driving while intoxicated do not escape civil liability through bankruptcy laws; and (3) to protect victims of drunk driving." Konieczka v. Hodak (In re Hodak), 119 B.R. 516, 519 (Bankr. W.D. Pa. 1990) (citing In re Hudson, 859 F.2d 1418, 1423 (9th Cir. 1988).

escape section 523(a)(9) by simply pleading guilty to a lesser included offense.[4] Id. While Debtor is correct that a hit-and-run charge is not a lesser included offense of drinking while intoxicated, the argument is based purely on semantics. It seems irrational to conclude that a debtor may not escape liability by pleading guilty to a lesser included offense, but may escape liability by pleading guilty to a totally separate offense. This distinction is also irrelevant in that the basis of today's holding is unrelated to Debtor's plea bargain, but instead is grounded in the fact that Debtor's conduct was unlawful pursuant to Minnesota law.

Finally, Debtor now asks this court to deny Hamre's motion for summary judgment by attempting to raise a factual issue of whether Debtor was intoxicated at the time of the accident. Hamre has met the burden of establishing that there is a lack of evidence to support the defendant's case. Hamre has submitted, among other documents, certified copies of the police investigation report and intoxilyzer test and the order for judgment from the state district court. Debtor then has the burden of producing evidence that would support a finding in his favor on the defenses. Such evidence is to be viewed in the light most favorable to Debtor's case, and all

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[4] Wright also rejected plaintiff's argument that debtor be denied a discharge under 523(a)(9) because there was no evidence that the debtor's intoxication caused the plaintiff's injury. Under Indiana law, intoxication is defined only for the purposes for driving while intoxicated and proof of intoxication is tied to the level of alcohol in the blood. Because blood tests were not performed there was not sufficient evidence to establish that the accident occurred as a result of driving while intoxicated. Wright, 66 B.R. at 406.

reasonable inferences are to be drawn in Debtor's favor. United Mortgage Corp. v. Mathern, 137 B.R. 311, 322 (Bankr. D. Minn. 1992). Debtor has not met this burden. Debtor has failed to submit any evidence or an affidavit that would indicate he became intoxicated after the accident occurred. While Debtor alludes to witnesses that are available to testify regarding Debtor's state of mind that evening, Debtor has not produced these witnesses. Furthermore, the police investigation report makes no reference to Debtor's contention that he went home and drank. As a result, I conclude that Debtor was intoxicated at the time of the accident.

ORDER FOR JUDGMENT

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. Hamre's motion for summary judgment is GRANTED; and

2. The judgment dated August 14, 1992 in the amount of $250,000.00 is excepted from discharge pursuant to section 523(a)(9) of the Bankruptcy Code.

LET JUDGMENT BE ENTERED ACCORDINGLY

Nancy C. Dreher
United States Bankruptcy Judge