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U.S. BANKRUPTCY COURT
DISTRICT OF HAWAII
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UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re WAYNE BOYD PICANCO and LINDA ANN PICANCO, Debtors.	)	Case No. 03-00129 Chapter 7
	)	Adv. Proc. No. 03-90018
DANIEL SERRAO and EDWINA SERRAO, Plaintiffs, vs. WAYNE BOYD PICANCO, Defendant.	)	

ENTERED ON DOCKET
SEP 22 2003

MEMORANDUM DECISION DENYING
MOTION FOR SUMMARY JUDGMENT

In this adversary proceeding, a creditor contends that its claim against the debtor is not dischargeable under 11 U.S.C. § 523(a)(6). That section excepts from the bankruptcy discharge "any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." The debtor has moved for summary judgment, arguing that the creditor has failed to offer any evidence that the debtor had the requisite mental state. The debtor's motion is

denied because the creditor has established that there is a genuine issue of material fact for trial.

Plaintiffs Daniel and Edwina Serrao (the "Serraos") allege that debtor Wayne Picanco ("Picanco"), a contractor who once had (but no longer has) a contractor's license, placed fill material on a vacant lot adjacent to the Serrao's residence and compacted the material by striking it repeatedly with the bucket of a large machine. The Serraos allege that the vibrations caused by this work damaged the foundation of their home. Relying on on section 523(a)(6), the Serraos contend that their claims against Picanco are not dischargeable.

Picanco has filed a motion to dismiss or, alternatively, for summary judgment,[1] arguing that the Serraos have failed to plead or to provide any evidence that he acted with the state of mind that section 523(a)(6) requires.

Summary judgment is appropriate when 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). The moving party has the initial burden of "identifying for

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[1] Defendant's Motion To Dismiss Adversary Complaint, Or In The Alternative, Motion For Summary Judgment was heard on August 12, 2003. Cori Ann Takamiya, Esq., appeared on behalf of defendant; and Rory Soares Toomey, Esq., appeared on behalf of the plaintiffs. At hearing, the parties were directed to file supplemental declarations. Because both parties have submitted declarations and other materials in addition to the pleadings, only the alternative request for summary judgment is in play.

the court those portions of the materials on file in the case that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir.1979). In a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir.1989).

By its terms, section 523(a)(6) applies only to claims for "willful and malicious injury." The section does not apply to injuries caused by recklessness or negligence. Kawaauhau v. Geiger, 523 U.S. 57 (1998). In order to prove that the debtor inflicted "willful injury" upon them within the meaning of section 523(a)(6), the Serraos must prove that "either the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct." In re Jercich, 238 F.3d 1202, 1208 (9th Cir. 2001). The test focuses exclusively on Picanco's subjective state of mind. Section "523(a)(6) renders debt nondischargeable when there is either a subjective intent to

harm, or a subjective belief that harm is substantially certain." In re Su, 290 F.3d 1140, 1144 (9th Cir. 2002).[2]

The subjective standard poses a problem for creditors. It is always difficult to prove a person's subjective state of mind. If the debtor denies having the required intent or subjective knowledge (and debtors almost always do so), the creditor has the right to challenge the credibility of that denial. The "actual knowledge" standard does not mean "that a court must simply take the debtor's word for his state of mind. In addition to what a debtor may admit knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." In re Su, 290 F.3d at 1446 n.6. To make this circumstantial case, a creditor may attempt to prove that the risks created by the debtor's conduct would have been immediately obvious to anyone in the debtor's position. The creditor will urge the court to infer that, because anyone in the debtor's position would have foreseen the consequences of the debtor's acts, the debtor must have either intended those consequences or known that the consequences were nearly certain. In many cases,

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[2] In addition, the Serraos must prove that they suffered a "malicious" injury. "A 'malicious' injury involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.' " In re Jercich, 238 F.3d at 1209 (quoting Murray v. Bammer (In re Bammer), 131 F.3d 788, 791 (9th Cir. 1997)).

the evidence that the creditor must use to prove the obviousness of the risk, and therefore to establish the debtor's subjective intent or subjective knowledge, will be the same as the evidence that the creditor would employ to prove recklessness or negligence.

Some of the evidence offered by the Serraos is inadmissible. Mr. Serrao does not claim to have personal knowledge of what Picanco knew and, therefore, his statements that Picanco knew that a grading permit was required but had not been issued, that Picanco knew that his work would damage the Serraos' residence, and that Picanco knew he did not have a contractor's license as required under Hawaii law must be disregarded.

Other pieces of evidence offered by the Serraos are insufficient to show that Picanco had the required state of mind. Mr. Serrao and Paul C. Weidig, PE, a civil engineer, point out that there was no grading permit and that Picanco had no valid contractor's license. These facts have nothing to do with whether Picanco had the mental state required by section 523(a)(6).

The Serraos have, however, offered some evidence that creates a genuine issue of material fact concerning Picanco's mental state. Mr. Serrao and Mr. Weidig both state (in substance) that, considering the poor soil conditions on the vacant lot, a contractor in Picanco's position must have known that placing fill

on the vacant lot and compacting it with heavy blows were substantially certain to damage the Serraos' house on the adjoining lot. If believed at trial, this evidence could support an inference that Picanco subjectively knew that his conduct was substantially certain to injure the Serrao's property. Therefore, this evidence is sufficient to create a genuine issue of material fact and preclude summary judgment.

The Serraos bear the burden of proof at trial, and the plaintiff's burden under section 523(a)(6) is crushing. Nevertheless, based on the existing record, the Serraos are entitled to an opportunity to meet that burden at trial.

A separate order denying the motion will be entered.

DATED: Honolulu, Hawaii, September 22, 2003.

/s/ Robert J. Faris
United States Bankruptcy Judge

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CERTIFICATION OF SERVICE
I HEREBY CERTIFY THAT THE ATTACHED ORDER/JUDGMENT WAS MAILED ON 7/22/03, TO THE ABOVE NAMED PARTIES IN INTEREST.

DEPUTY CLERK