UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re MARTIN P. LOPEZ and ENEDINA LOPEZ, **Debtors.**	**Case No. 07-00863-JDP** **Chapter 7**

TWO JINN, INC. dba ALADDIN BAIL BONDS/ ANYTIME BAIL BONDS, **Plaintiff,** **vs.** MARTIN P. LOPEZ and ENEDINA LOPEZ, **Defendants.**	**Adversary Proceeding** **No. 07-6041**

MEMORANDUM OF DECISION

Appearances:

Susan M. Campbell, Boise, Idaho, Attorney for Plaintiff.

Richard L. Alban, Nampa, Idaho, Attorney for Defendants.

Introduction

Plaintiff Two Jinn, Inc. commenced this adversary proceeding to determine the dischargeability of a debt. Docket No. 1. The complaint alleges that Defendants, chapter 7[1] debtors Martin and Enedina Lopez, are indebted to Plaintiff as a result of the forfeiture of a bail bond, and that such debt is not subject to discharge in Defendants' bankruptcy case pursuant to § 523(a)(7). Defendants moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted. Docket No. 5. The Court conducted a hearing on Defendants' motion on October 22, 2007, at the conclusion of which, the Court invited the parties to file

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8-119 Stat. 23 (Apr. 20, 2005), and all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

supplemental briefs, and deemed the issues under advisement for decision. Briefs were filed. Docket Nos. 19-21. Having now carefully considered the record, the arguments of the parties, and the applicable law, this Memorandum disposes of the issues.[2]

Facts

From the record, it appears that Plaintiff is a licensed bail bonding company authorized to do business in Idaho. In February, 2007, Defendants contacted Plaintiff's bail bond office in Boise, Idaho to inquire about the purchase of a bail bond to secure the release of their son, Martin Lopez, Jr. ("Martin Jr."), from jail in Canyon County. The state court had set bail for Martin Jr. at $50,000. Plaintiff posted the bail bond in exchange for, *inter alia*, Defendants' agreement to indemnify Plaintiff for any expenses incurred should Martin Jr. fail to personally appear at all court dates.

On April 13, 2007, Martin Jr. failed to appear at a hearing in state

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[2] To the extent required, this Memorandum represents the Court's findings of fact and conclusions of law. Rule 7052.

court as ordered, and, as a result, the court forfeited the bond. The court issued a notice to Plaintiff indicating that the bond had been declared forfeited pursuant to Idaho Code § 19-2927. The notice also provided that if Plaintiff brought Martin Jr. before the court within 90 days, the court would direct that the forfeiture be exonerated.[3]

On May 30, 2007, Defendants jointly filed for relief under chapter 7 of the Bankruptcy Code. Plaintiff filed its complaint commencing this action on September 4, 2007. In it, Plaintiff alleged that Defendants were liable to Plaintiff for the amount of the bail bond forfeiture, and that it was subrogated to the rights of Canyon County for purposes of collecting payment from Defendants on the bond. On this basis, Plaintiff alleged Defendants' debt to it was excepted from discharge in Defendants' bankruptcy under § 523(a)(7).

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[3] Idaho Code § 19-2927 was recently amended to extend this 90-day period to 180 days. Although Plaintiff contends that absent cause for exoneration, the bond will be due and payable to the Canyon County District Court 180 days from the date of the forfeiture, the statute in effect on the date forfeiture was ordered allowed only 90 days in which to exonerate the bond. There is no indication that the statutory amendment was intended to be applied retroactively.

Defendants moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief may be granted. In their memorandum in support of the motion, Defendants noted that Plaintiff's complaint failed to allege that Defendants are liable to Canyon County. Defendants further observe that Plaintiff had not alleged that it has paid anything to Canyon County for the bond forfeiture.[4] For these reasons, Defendants argue Plaintiff's complaint is inadequate to state a claim under § 523(a)(7).

Discussion and Disposition of the Issues

While every defense to a complaint must normally be asserted in a responsive pleading, a party may allege in a separate motion that a complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).[5] Such a motion is designed to test the legal sufficiency of

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[4] At the October 22, 2007 hearing on the motion to dismiss, Plaintiff's counsel conceded that it had not paid Canyon County on account of the bond forfeiture. Plaintiff explained that this was because proceedings on it's request to exonerate the bond forfeiture were still pending before the state district court. Plaintiff has made no further submission since the hearing to evidence that it has made any payments to Canyon County for the bond forfeiture.

[5] Fed. R. Civ. P. 12(b)(6) is incorporated in bankruptcy adversary proceedings by Fed. R. Bankr. P. 7012(b).

Plaintiff's claims based solely upon the allegations of its complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). However, when a party asks for dismissal based upon this rule, and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed. R. Civ. P. 12(b); *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998). Here, Plaintiff submitted the bail bond, the indemnity agreement, the promissory note, and other additional information for the Court's consideration in deciding Defendants' motion. Therefore, the Court will treat that motion as one for summary judgment. See *San Pedro Hotel Co.*, 159 F.3d at 477 (noting that when represented parties submit extrinsic matter for the court's consideration in ruling on a motion to dismiss, prior notice of the motion's conversion to a motion for summary judgment is not necessary).

A motion for summary judgment is governed by Rule 7056, which incorporates Fed. R. Civ. P. 56. The standards guiding the Court in

resolving a motion for summary judgment are well-settled. Summary judgment may be granted to the moving party if, when the evidence is viewed in a light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001). The Court may not weigh the evidence in considering a motion for summary judgment – it determines only whether a material factual dispute remains for trial. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997); *Perry v. U.S. Bank Nat'l Ass'n ND (In re Perry)*, 03.2 I.B.C.R. 128, 129 (Bankr. D. Idaho 2003) (internal citations omitted). An issue is "genuine" only if there is sufficient evidence for a reasonable fact-finder to find in favor of the non-moving party, and a fact is "material" if it might affect the outcome of the case. *Far Out Prods.*, 247 F.3d at 992 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)).

The initial burden of showing there is no genuine issue of material

fact rests on the moving party. *Esposito v. Noyes (In re Lake Country Invs.)*, 255 B.R. 588, 597 (Bankr. D. Idaho 2000) (*citing Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998)). However, if the non-moving party bears the ultimate burden of proof on an element at trial, that party must make a showing sufficient to establish the existence of that element in order to survive a motion for summary judgment. *Id*. (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

The applicable law in this action is § 523(a)(7) of the Bankruptcy Code. That statute provides:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt – . . .
>
> > (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty.

Thus, § 523(a)(7) establishes three requirements for non-dischargeability: (1) the debt must be for a "fine, penalty, or forfeiture;" (2) the debt must be "payable to and for benefit of a governmental unit;" and (3) it must not be

"compensation for actual pecuniary loss." *Corrales v. Sanchez (In re Sanchez)*, 365 B.R. 414, 417 (Bankr. S.D.N.Y. 2007).

As noted in one recent decision, the case law regarding whether debts, related in some fashion to forfeiture of bail bonds, are dischargeable is relatively harmonious. *Affordable Bail Bonds, Inc. v. Thompson (In re Thompson)*, 2007 WL 2738171 *4 (Bankr. N.D. Okla. 2007). An analysis of whether a debt is excepted from discharge under this provision of the Code must focus upon the role the debtor played in the bail-bonding process. *Id.* In *In re Thompson*, the bankruptcy court explained that there are at least two, and typically three or four parties, involved in a bail bond transaction. Those parties are:

> the state, who agrees to release a defendant on bail upon the posting of a bond; the [criminal] defendant/principal, who promises to pay a monetary penalty to the state if he/she does not abide by the terms of bail; the surety, who guarantees to the state the performance of the [criminal] defendant/principal, including the payment of the [criminal] defendant/principal's penalty; and in some cases, an indemnitor, who contracts with the surety to indemnify the surety

for its losses.

Id.

As reflected in the court's discussion, the following propositions have emerged in the case law.

When the debtor is the criminal defendant/principal, the cases hold that all three elements of § 523(a)(7) are satisfied and the debt is non-dischargeable. *See, e.g., Virginia v. Collins (In re Collins)*, 173 F.3d 924, 932 n. 4 (4th Cir. 1999) (dicta).

When the debtor is a professional bondsman/surety, the cases not that two of the three elements of § 523(a)(7) are clearly met, but there is a split in the circuits regarding whether the debt for the bond is "for a fine, penalty, or forfeiture." *Compare Hickman v. Texas (In re Hickman)*, 260 F.3d 400 (5th Cir. 2001) (concluding that the true nature of the debt was contractual and that "merely because a bail bond judgment is generally referred to as a forfeiture" does not automatically render it a "forfeiture" within the ambit of § 523(a)(7)), *and Virginia v. Collins (In re Collins)*, 173

F.3d 924 (4th Cir. 1999) (deciding that the debt on a bail bond is contractual, and therefore not a fine, penalty, or forfeiture within the meaning of § 523(a)(7)), *with Dobrek v. Phelan*, 419 F.3d 259 (3d Cir. 2005) (holding that judgments against professional bondsmen are "forfeitures" within the meaning of § 523(a)(7), are intended to be punitive, and therefore are non-dischargeable).

Finally, where the debtor is an indemnitor of a bail bond surety, the cases uniformly hold that none of the elements in § 523(a)(7) are met, and the debt is dischargeable. *See, e.g., Corrales v. Sanchez (In re Sanchez)*, 365 B.R. 414 (Bankr. S.D.N.Y. 2007); *Empire Bonding Agency v. Lopes (In re Lopes)*, 339 B.R. 82 (Bankr. S.D.N.Y. 2006); *Pioneer Gen'l Ins. Co. v. Midkiff (In re Midkiff)*, 86 B.R. 239 (Bankr. D. Colo. 1988).

Here, Defendants' debt to Plaintiff falls into this last category, and is analogous to the debts scrutinized in the *Lopes* and *Sanchez* cases – it is a debt allegedly owed by Defendants, as indemnitors, to Plaintiff, a bail bond surety, pursuant to the terms of a contract. As such, Defendants'

indebtedness does not satisfy any of the three case law requirements for a § 523(a)(7) exception to discharge: First, Defendants' debt to Plaintiff is not a fine, a penalty, or a forfeiture; Defendants' debt arises solely from a contract, the indemnity agreement. Second, Defendants' debt is not payable to and for the benefit of a governmental unit. Instead, this debt is payable to Plaintiff, a private, for-profit business corporation. And third, Defendants' debt can be fairly characterized as compensation for actual pecuniary loss, in as much as Defendants promised to "*reimburse* [Plaintiff] for *actual expenses incurred* and caused by a breach by [Martin Jr.] of the terms for which the application and Bail Bond were written." Docket No. 19 (emphasis added). Clearly, then, Plaintiff's claim in the complaint – that Defendants' debt must be excepted from discharge under § 523(a)(7) – lacks merit as a matter of law.

To counter this argument, Plaintiff argues that it is subrogated to the rights of Canyon County for the purposes of collecting payment on the bond forfeiture. And since the debt (*i.e.,* the bond) is ultimately payable to

Canyon County, Plaintiff contends it is a forfeiture to a governmental unit. Analyzed in this fashion, Plaintiff insists the debt fits under the umbrella of § 523(a)(7).

To support this position, Plaintiff cites *Amwest Surety Ins. Co. v. Contreras (In re Contreras)*, Adv. No. 01-3317-AJG (Bankr. S.D.N.Y. July 31, 2006). Plaintiff explains that in *In re Contreras*, the bankruptcy judge "found that Amwest Surety Insurance Company was subrogated to the rights of the State of New York in connection with a forfeiture claim against Defendant bail bond indemnitors." Docket No. 16.

What Plaintiff fails to note in its brief is the approach to the subrogation issue in *In re Contreras*, an unpublished opinion, has been rejected by two other judges sitting in the same district in their published decisions. *See In re Sanchez*, 365 B.R. at 420; *In re Lopes*, 339 B.R. at 90. In a detailed, thoughtful analysis, the bankruptcy court in *Sanchez* explained that the equitable doctrine of subrogation was inapplicable in this context. The court noted that "[s]ubrogation is where party 'A' is subrogated to the

rights of a creditor of party 'B' whose claim against B has been paid by A." *Id.* at 420. This principle is, in turn, codified in § 509(a) of the Code, which provides:

> Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, *a claim of a creditor against the debtor, and that pays such claim*, is subrogated to the rights of such creditor to the extent of such payment.

(emphasis added).

But, as noted in *In re Sanchez,* two key elements for the operation of the subrogation doctrine are missing here. First, Canyon County holds no claim against Defendants on account of the bond forfeiture. Because Defendants have no direct liability to Canyon County under the bond, Plaintiff cannot "stand in the shoes" of Canyon County in asserting a claim against Defendants for dischargeability purposes. *In re Lopes*, 339 B.R. at 90.

Second, Plaintiff has not shown that it has paid Canyon County on account of the bond forfeiture. Absent payment, there can be no

subrogation.

For these reasons, like the court in *In re Sanchez*, this Court respectfully declines to follow *In re Contreras*.[6] Plaintiff's subrogation theory fails to measure up to the task at hand.

Conclusion

Plaintiff cannot show that Defendants' debt is a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . " as required by § 523(a)(7). Further, under these facts, Plaintiff is not subrogated to any non-dischargeability rights of Canyon County. Viewing the evidence in a light most favorable to Plaintiff, no genuine issues of material fact remain, and Defendants are entitled to judgment as a matter of law. Accordingly, Defendants are entitled to a summary judgment holding that their debt to

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[6] In reaching his conclusion, Judge Hardin explained, "I have considered the brief transcript and the final Order (both unpublished) in *In re Contreras* (Bankr. S.D.N.Y. 2006) furnished by plaintiff's counsel. The one sentence oral ruling in that case does not recite any of the facts, or the arguments of the parties, or the authorities or analysis relied upon by the Court, and therefore is not useful as precedent in this Adversary Proceeding." *In re Sanchez*, 365 B.R. at 421.

Plaintiff is not excepted from discharge under § 523(a)(7).

A separate order and judgment will be entered.

Dated: December 24, 2007

Honorable Jim D. Pappas
United States Bankruptcy Judge