

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

**In Re: STEVEN A. NOBLE a/k/a
 STEVEN ALLEN NOBLE a/k/a
 STEVEN A. NOBLE,

 Debtor.**

BK. NO. 91-23479

A.P. NO. 92-2007

DECISION AND ORDER

**ALLSTATE INSURANCE COMPANY,
Individually and as Subrogee of
DONNA S. BIANCHI and LISA COLEMAN,

 Plaintiff,**

vs.

**TINA WANDELL and STEVE NOBLE,

 Defendants.**

BACKGROUND

On December 12, 1991 the debtor, Steven A. Noble ("Noble"), filed a voluntary petition initiating a Chapter 7 case. In his schedule of liabilities, Noble listed a liability to the plaintiff, Allstate Insurance Company ("Allstate"). The basis set forth for the liability was a March 28, 1989 default judgment in the principal amount of \$10,707 obtained by Allstate against Noble and a co-defendant, Tina Wandell ("Wandell"), in the Supreme Court of Monroe County (the "State Court Judgment"). It appears that Allstate was the subrogee of a passenger injured in an automobile accident which was caused by Wandell who it was alleged was driving while intoxicated or impaired. The State Court Judgment was entered against Noble, who, it was alleged in the summons and complaint, unlawfully furnished or assisted in procuring alcoholic beverages for Wandell.

Allstate has commenced an adversary proceeding objecting to Noble's discharge pursuant to 11 U.S.C. § 523(a)(6) alleging willful and malicious injury.

This matter is before the Court for decision on Noble's motion pursuant to Rule 7012 of the Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure, made

prior to interposing an answer, asserting that Allstate's complaint fails to state a claim upon which relief can be granted.

Noble's motion to dismiss asserts that since the summons and complaint in the State Court action only alleged that Noble was negligent, having violated Section 11-101 of the New York General Obligations Law, Allstate cannot now claim that Noble's actions were willful and malicious. The motion to dismiss therefore alleges that the matter is *res judicata* as to whether Noble's actions were negligent or willful and malicious since the State Court Judgment was based only on allegations of negligence.

Allstate contends that *res judicata* and collateral estoppel do not apply in this case since the generally accepted four-part test for collateral estoppel is not met. That test is:

- 1) The issue sought to be precluded must be the same as that involved in the prior action;
- 2) The issue must have been actually litigated;
- 3) It must have been determined by a valid and final judgment; and
- 4) The determination must have been essential to the final judgment.

Allstate contends that the issues of willfulness and malice were not presented and litigated in the State Court since such presentation and litigation were not necessary. Therefore, to determine whether Noble's actions were willful and malicious, and thus whether Allstate's claim is non-dischargeable, this Court must hear the facts and circumstances of Noble's actions.

DISCUSSION

This Court agrees with Allstate that *res judicata* and collateral estoppel do not apply in the determination of willfulness and malice in this adversary proceeding. The issue of willfulness and malice were not raised in the proceeding which resulted in the State Court Judgment, were never

actually litigated and determined by the Judgment, and were not essential to the Judgment actually entered which was based on a *per se* negligence statute.

As held by the Supreme Court in Brown v. Felston, 44 U.S. 127 (1979), the application of *res judicata* in dischargeability proceedings would inspire needless litigation by forcing an otherwise unwilling party to try dischargeability issues to the hilt in state court in order to protect himself against the mere possibility that a debtor might take bankruptcy in the future.

As well stated by United States Bankruptcy Judge Barry Russell in his Bankruptcy Evidence Manual: "As the Supreme Court held in Brown, where the facts necessary for dischargeability determination were not necessary to the determination in the prior judgment, the parties should not be bound or else the parties would always have to anticipate future bankruptcy proceedings and the state courts would be deciding facts not necessary to the state actions but only relevant to a possible future bankruptcy proceeding. In effect, state courts would then be deciding issues directly concerning dischargeability, contrary to congressional intent." Russell, Bankruptcy Evidence Manual, §4 (1991).

In this case, the issues of willful and malicious were not necessary to the State Court action by Allstate against Noble. Allstate had a fairly straightforward action in negligence and did not presume that Noble would file a bankruptcy petition.

Until this Court hears the evidence with respect to the facts and circumstances of Noble's actions surrounding the accident which ultimately caused the injury which Allstate paid for, it cannot determine whether the obligation to Allstate is or is not dischargeable. To date the record is devoid of any such evidence. The relevant facts and circumstances may result in a finding by this Court that there was willful and malicious injury. In In re Austin, 36 B.R. 306 (Bankr. M.D.Tenn. 1984), the Court found that a rock concert promoter's failure to prevent a minor from consuming beer was not a willful and malicious injury which would render a possible debt to the next-of-kin of a pedestrian

