

IT IS HEREBY ADJUDGED
and DECREED this is SO
ORDERED.

The party obtaining this order is responsible for
noticing it pursuant to Local Rule 9022-1.

Dated: August 26, 2010



Randolph J. Haines

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re)	Chapter 7
ELIZABETH WOLDRICH)	CASE NO. 2:08-bk-17307-RJH
Debtor.)	
_____)	
TICOR TITLE INSURANCE CO.,)	ADVERSARY NO. 2:09-ap-00242-RJH
Plaintiff,)	
v.)	CASE MANAGEMENT ORDER
ELIZABETH WOLDRICH,)	
Defendant.)	
_____)	

The issue here is whether Plaintiff has a right to a jury trial on the issue of damages and how that issue should be tried in relation to trial of the dischargeability issue.

Background Facts

Together with her husband, Elizabeth Woldrich purchased a printing business from A to Z Printing for a down payment of \$590,000 and a carry-back promissory note for \$1.45 million. The carry-back note was secured by a second deed of trust against the Woldriches' residence. Three years later, the Woldrichs sought to refinance the first lien on their residence with a new loan from Countrywide Home Loans. In order to close that new loan, Countrywide's title company, Fidelity National Title Company, required a release and reconveyance of the second deed of trust in favor of A to Z. The Woldriches therefore provided Fidelity with a release and reconveyance that appeared to have been executed by A to Z and acknowledged by a public notary.

1 Plaintiff in this nondischargeability action, Ticor Title Insurance Co., alleges that
2 both the A to Z signature and the notarization on the deed of release and reconveyance were
3 forgeries. Ticor is the plaintiff here because the Woldriches subsequently refinanced the
4 Countrywide loan with a new loan from World Savings Bank, and Ticor acted as the title
5 company insuring the World Savings Bank loan. Ticor alleges that it is related to Fidelity and
6 relied on the release and reconveyance in Fidelity's escrow file when it agreed to insure World
7 Savings Bank's lien as being in first position. Apparently, Fidelity had never recorded the
8 release and reconveyance that it was provided by the Woldriches, and Ticor did not record it
9 either.

10 Subsequently, the World Savings Bank lien was refinanced by a new loan from
11 Virtual Bank. LandAmerica Transnation was the escrow agent and title insurer for Virtual
12 Bank, and it also discovered that there had been no recorded release and reconveyance of the A
13 to Z second lien. The Woldriches allegedly provided LandAmerica with the same forged deed
14 of release and reconveyance and LandAmerica relied on that to insure Virtual Bank as being in
15 first position. Again, apparently, no one recorded the forged release and reconveyance.

16 Finally, in January of 2006, the Woldriches again refinanced their first lien with a
17 new million dollar loan from New Century Mortgage Corp. (a loan that was subsequently
18 acquired by Washington Mutual Bank). Stewart Title Guaranty acted as escrow agent and title
19 insurer for the New Century refinance. Stewart Title discovered the A to Z second deed of trust.
20 But instead of asking the Woldriches for a deed of release and reconveyance, Stewart Title
21 requested an indemnity agreement from Ticor. Relying on the allegedly forged deed of release
22 and reconveyance, Ticor agreed to indemnify Stewart Title for it to insure the New Century lien
23 as being in first position.

24 In February of 2007, A to Z sought a judicial foreclosure of its second deed of
25 trust. A to Z alleged that its lien took priority over the Washington Mutual deed of trust.
26 Washington Mutual therefore made a claim against Stewart Title under its insurance policy, and
27 Stewart Title in turn demanded indemnification from Ticor pursuant to the indemnification
28 agreement.

1 Elizabeth Woldrich filed this Chapter 7 case in 2008. Ticor has brought this
2 adversary proceeding seeking two distinct kinds of judgment: first, a money judgment for
3 damages arising from Ticor's reliance on the allegedly forged deed of release and reconveyance,
4 and, second, a judgment determining that Woldrich's debt to Ticor is nondischargeable in her
5 bankruptcy case either on the ground that it arises from fraud¹ or from willful and malicious
6 injury.²

7 Ticor has not filed a proof of claim in this bankruptcy case, and this appears to be a
8 no-asset case in which creditors were advised that there is no need to file a proof of claim unless
9 and until the Trustee determines there are assets available for distribution. Ticor also filed a
10 timely demand for jury trial.³ Ticor also moved for the District Court to withdraw the reference
11 pursuant to 28 U.S.C. § 157(d).⁴

12 Recently, the District Court denied that motion for withdrawal of the reference,
13 without prejudice. In doing so, the District Court noted that the Bankruptcy Court is capable of
14 determining whether Ticor has a jury trial right on the liability and damages questions. It also
15 noted that the necessity of deciding that question will become apparent when the Bankruptcy
16 Court rules on the dischargeability issue. The Court cited a case decided by the Bankruptcy
17 Appellate Panel in which the Bankruptcy Court had found a debt to be dischargeable, which
18 effectively mooted the issue of whether there was a jury trial right on the liability

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20 ¹11 U.S.C. § 523(a)(2)(A).

21 ²11 U.S.C. § 523(a)(6).

22 ³Bankruptcy Rule 9015 incorporates F.R.Civ.P. Rule 38(b), which requires that a jury trial
23 demand be served within 14 days after the last pleading directed to the issue to be tried. Bankruptcy
24 Rule 9015(a) makes clear that this jury trial demand must be filed in the Bankruptcy Court, even though
25 the Bankruptcy Court may not conduct a jury trial unless both parties consent and the District Court
26 authorizes the Bankruptcy Court to conduct such a jury trial, pursuant to Bankruptcy Rule 9015(b).

27 ⁴28 U.S.C. § 157(d) provides: "The District Court may withdraw, in whole or in part, any case
28 or proceeding referred under this section, on its own motion or on timely motion of any party, for cause
shown. Bankruptcy Rule 5011(a) provides that such a motion for withdrawal shall be heard by the
District Court. Local Bankruptcy Rule 5011-2(a) provides that a motion for withdrawal of reference
must be filed with the Bankruptcy Court Clerk, who then shall transfer the motion promptly to the
District Court Clerk for assignment to a District Judge."

1 determination.⁵

2
3 **Analysis**

4 The District Court's decision effectively implies that this Court might decide the
5 dischargeability issue, and that that determination might either resolve or clarify the jury trial
6 issue on liability. And a review of the facts as alleged in the complaint suggests that the District
7 Court's prediction may be entirely correct.

8 The complaint alleges that Debtor provided Fidelity with a forged deed of release
9 and reconveyance of a deed of trust in favor of A to Z Printing, which also contained a forged
10 acknowledgment. The complaint alleges that Ticor relied on that forged document in deciding
11 to issue title insurance to insure a new first lien on the Debtor's house.

12 If Ticor could prove that Debtor had provided Ticor a forged deed of release and
13 that Ticor suffered a loss on the debt it incurred when it insured the new lender, it seems fairly
14 clear that debt would be nondischargeable as a debt incurred by Debtor's fraud within the scope
15 of Bankruptcy Code § 523(a)(2).

16 But those are not all of the salient facts. The complaint makes clear that Ticor
17 never suffered a loss on the insurance policy it issued in reliance upon the Debtor's allegedly
18 forged deed of release and reconveyance. Ticor suffered no loss on that insurance policy
19 because its insured was fully paid off when there was another refinancing, this time insured by
20 LandAmerica Transnation. And then there was another refinancing, which was insured by
21 Stewart Title.

22 Ticor alleges that it ultimately did suffer a loss, however, because it had agreed to
23 indemnify Stewart Title. That loss, however, was not occasioned by the insurance policy for
24 which Ticor had relied on the forged release, but rather on account of the indemnity that Ticor
25 had given Stewart Title, for which Ticor had asked nothing of the Debtor.

26 Although not all of the elements of common law fraud are specifically identified in
27

28 ⁵*In re Hooper*, 112 B.R. 1009, 1013 (9th Cir. BAP 1990).

1 Code § 523(a)(2), Ninth Circuit case law effectively holds they must all be proven. These
2 include proximate causation, a right to rely, reasonable reliance and the debtor's intent that the
3 recipient of the false statement rely on it.⁶ While all of these elements might easily be proven if
4 Ticor had suffered a loss on account of an insurance policy that it issued when it first relied on
5 the allegedly forged satisfaction of the second lien, they will be more difficult to prove with
6 respect to Ticor's voluntary indemnification of the fourth title company. The greater difficulty
7 of proving those elements arises primarily from the fact that it does not appear the Debtor either
8 implicitly or explicitly asked Ticor to indemnify the fourth title company. Indeed, the Debtor
9 may not even have known about the indemnity, or the likelihood that Ticor would rely on the
10 allegedly forged release in giving such an indemnity. In fact, the Debtor never gave the forged
11 document to Ticor, but only to Fidelity, who has suffered no loss and is not suing the Debtor.

12 Moreover, while Ticor can probably establish "but for" causation in fact – Ticor
13 would not have issued the indemnity and suffered a loss on account of it but for the fact that it
14 had received the alleged forged release from the Fidelity's files – the Debtor may also be able to
15 establish that the actual, proximate cause of Ticor's loss was not the forged release itself but
16 either Fidelity's or Ticor's failure to record it. If either of them had recorded the release, none
17 of the title companies involved in the third and fourth refinancings would have had occasion to
18 inquire of Ticor. Those subsequent title companies would have relied on the recorded
19 document. And while someone would ultimately suffer a loss if the release was proven to be a
20 forgery, that loss would not have been Ticor's.

21 It therefore appears, from the facts as alleged in the complaint, that even if Ticor
22 can prove some liability of the Debtor to Ticor, Ticor may not be able to prove all of the
23 elements necessary to render that liability nondischargeable under § 523(a)(2). And because of
24 the specific intent element of § 523(a)(6)⁷ it may similarly be unable to prove

26 ⁶*In re Ettell*, 188 F.3d 1141, 1144 (9th Cir. 1999) (proximate cause and intent to deceive); *In re*
27 *Eashi*, 87 F.3d 1082, 1090 (9th Cir. 1996) (justifiable reliance).

28 ⁷*Barboza v. New Form, Inc.*, 545 F.3d 702 (9th Cir. 2008); *Carrillo v. Su*, 290 F.3d 1140 (9th Cir.
2002).

1 nondischargeability under that section.

2 It therefore makes sense to litigate and determine the nondischargeability issue
3 first, and then to litigate separately the amount of the liability only if it is determined there could
4 be some liability that is nondischargeable under § 523(a)(2) or (a)(6). Because there is no jury
5 trial right on the issue of dischargeability,⁸ these elements must be litigated to the Court. And it
6 may be that some of them can be resolved as questions of law based on facts that are stipulated
7 solely for purposes of the motion.

8 For these reasons,

9 IT IS ORDERED that the Court will bifurcate the trial and will try the
10 nondischargeability issues first. The parties are directed to meet and confer and then appear for
11 a status conference on August 30, 2010, at 10:00 a.m. to determine how and when those
12 nondischargeability issues shall be tried to the Court.

13 DATED AND SIGNED ABOVE

14 Copy of the foregoing mailed/e-mailed
15 this 26th day of August, 2010, to:

16 John Maston O'Neal, Esq.
17 Quarles & Brady LLP
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Attorney for Plaintiff

18 Patricia Beary, Esq.
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Attorney for Defendant

20 Honorable G. Murray Snow
21 United States District Judge
22 Sandra Day O'Connor Courthouse, Suite 622
23 401 West Washington Street, SPC 80
Phoenix, AZ 85003

24 /s/ Pat Denk
Judicial Assistant

28 ⁸*In re Locke*, 205 B.R. 592, 599-600 (9th Cir. BAP 1996).