

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT HAMMOND

IN RE: CASE NO. 11-23471 )  
MICHAEL R. MYERS )  
 )  
Debtor )  
\*\*\*\*\* )  
STATE OF INDIANA ON THE )  
RELATION OF THE INDIANA )  
WORKFORCE DEVELOPMENT )  
 )  
Plaintiff )  
v )  
MICHAEL R. MYERS )  
 )  
Defendant )

ADVERSARY PROCEEDING  
NO. 11-2171

**MEMORANDUM OPINION AND ORDER**  
**ON MOTION FOR SUMMARY JUDGMENT**  
**BY THE PLAINTIFF THE STATE OF INDIANA ON THE RELATION**  
**OF THE INDIANA WORKFORCE DEVELOPMENT**

I.

Statement of Proceedings

This Adversary Proceeding came before the Court on a Motion for Summary Judgment filed by the Plaintiff, The State of Indiana on the Relation of the Indiana Department of Workforce Development, (hereinafter: "Plaintiff") on April 20, 2012.

By Order of this Court dated April 29, 2012, the Defendant Michael R. Myers, (hereinafter: "Defendant") was given 30 days to file a Response or Answer to said Motion, and upon so doing the Movant was granted 15 days to file a Reply thereto.

No Response or Answer to said Motion for Summary Judgment was filed by the Defendant.

## II.

### Burden of Proof and Standard of Proof to be Applied on Motion for Summary Judgment

The ultimate burden of proof at the trial of this Adversary Proceeding is on the Plaintiff who is the Movant. The party seeking an exception to discharge of a debt bears the burden of proof as to each element. Matter of Scarlata, 979 F.2d 521, 524 (7th Cir. 1992); In re Kreps, 700 F.2d 372, 376 (7th Cir. 1987). See also, In re Martin, 698 F.2d 883, 887 (7th Cir. 1983), (§727 general discharge). In bankruptcy "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the Debtor". In re Scarlata, 979 F.2d at 524, supra, (quoting, In re Zarzynski, 771 F.2d 304, 306 (7th Cir. 1985)). Here the standard of proof in a §523(a) nondischargeability Adversary Proceeding is by a preponderance-of-evidence, rather than the more stringent standard of clear and convincing evidence. See, Grogan v. Garner, 489 U.S. 279, 11 S. Ct. 654, 112 L. Ed.2d 755 (1991). Thus, the court must apply the preponderance-of-evidence standard of proof to the Plaintiff in this Adversary Proceeding in testing the sufficiency of the Motion for Summary Judgment by Plaintiff.

## III.

### The Complaint by the Plaintiff

The Complaint filed by the Plaintiff is in three Counts. Each Count alleges that the Defendant by filing Claims with the Plaintiff made fraudulent representations to the Plaintiff by certifying that he was entitled to unemployment insurance benefits as he was unemployed, when a subsequent investigation by the Plaintiff revealed that the Defendant failed to disclose to the Plaintiff material facts that would have made him ineligible to receive the money paid to him by the Plaintiff,

and accordingly this overpayment indebtedness is nondischargeable pursuant to §523(a)(2)(A) and §523(a)(7).

Count 1 of the Plaintiff's Complaint alleges that the Defendant fraudulently obtained \$6,013.00 in benefits, and pursuant to 1.C.22-4-13-1.1(b), the Plaintiff is entitled to a 25% overpayment penalty of \$1,399.50, for a total of \$7,412.50

Count II alleges that the Defendant fraudulently obtained \$10,640.00 in benefits, and pursuant to 1.C.22-4-13-1.1(b), the Plaintiff is entitled to receive civil penalty of 50% of \$5,320.00 for a total of \$15,960.00.

Count III alleges that the Defendant fraudulently obtained \$390.00 in benefits, and pursuant to 1.C.22-4-13-1-1(b), the Plaintiff is entitled to receive a civil penalty in the amount of \$390.00 for a total of \$780.00.<sup>1</sup>

#### IV.

#### The Designation of Materials filed by the Plaintiff (Statement of Genuine Issues)

The Plaintiff's Designation of Materials in Judgment in support of its Motion for Summary Judgment pursuant to Fed. R. Civ. p. 56(c) as made application by Fed. R. Bk.P. 7056, and N.D.

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<sup>1</sup> Indiana Code 22-4-13-1.1(b) provides as follow:

(b) In addition to amounts forfeited under subsection (a), an individual is subject to the following civil penalties for each instance in which the individual knowingly fails to disclose or falsifies any fact that if accurately reported to the department would disqualify the individual for benefits, reduce the individual's benefits, or render the individual ineligible for benefits or extended benefits:

- (1) For the first instance, an amount equal to twenty-five percent (25%) of the benefit overpayment.
- (2) For the second instance, an amount equal to fifty percent (50%) of the benefit overpayment.
- (3) For the third and each subsequent instance, an amount equal to one hundred percent (100%) of the benefit overpayment.

Ind. L.B.R. 7056-1, includes Exhibits "A" through "N", which set out in detail the Determinations of Eligibility for Unemployment Compensation by the Plaintiff to the Defendant, the Plaintiff's Notices of Potential Overpayment to the Defendant, Verification of Weekly Earnings by the Defendant as an employee of Precision Towing, Inc., and Pioneer Associates, Inc., at the time unemployment insurance claims were submitted by the Defendant to the Plaintiff, and Claims Vouchers submitted by the Defendant. The Materials are of the type that can be presented in a form that would be admissible in evidence.

Under Rule 56 Fed. R. Civ. P., as made applicable by Fed. R. Bk. P. 7056, summary judgment is proper 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 judgment as a matter of law. Celotex Corp., v Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed2d 265 (1986); Anderson v Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355, 89 L.Ed.2d 538 (1986).

The moving party, in making a motion for summary judgment, "has the burden of establishing the lack of a genuine issue of material fact." Big O Tire Dealers, Inc., v. Big O Warehouse, 741 F.2d 160, 163 (7th Cir. 9184); Korf v. Ball State University, 726 F.2d 1222, 1226 (7th Cir. 1984).

Once a moving party has bet its initial burden, the opposing party must "set forth specific facts showing that there is a genuine issue for trial" and that the disputed fact is material. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983), cert. den., 464 U.S. 960, 104 S. Ct. 392, 78 L.Ed.2d 336 (1983). If the non-movant does not come forward with evidence that would reasonably

permit the finder of fact to find in the non-movant's favor on a material question, then the Court must enter Summary Judgment against the non-movant. Waldrige v. American Holchst Corp., 24 F.3d 918, 920 (7th cir. 1994).

The Defendant has filed no Materials that would constitute a Statement of Genuine Issues to contradict the Plaintiff's Designation of Materials, which constituted the Plaintiff's Statement of Material Facts, and thus the Plaintiff's Designation of Materials are accordingly deemed admitted by the Defendant.

V

Section 523(a)(2)(A)

In order to be awarded exception from discharge under 11 U.S.C §523(a)(2)(A), the Plaintiff is required to show the following: (1) that the Defendant made a false representation or omission, which he either knew was false or made with reckless disregard for the truth; (2) that the Defendant possessed an intent to deceive or defraud; and (3) that the Plaintiff justifiably relied on the false representation. Ojeda v Goldberg, 599 F.3d 712, 716-17 (7th cir. 2010); Matter of Maurice, 21 F.3d 767, 777 (7th Cir. 1994).

The Court finds that based on the Materials filed by the Plaintiff in support of its Motion, the Plaintiff has met its burden of showing that there is no genuine issue of material fact as to each of the above elements required of the Plaintiff to prevail under §523(a)(2)(A).

VI

Conclusion

The Court having examined the Materials filed by the Plaintiff in support of its Motion for Summary Judgment decides that there is no genuine issue of material Facts as to Counts I, II, and

III of the Plaintiff's Complaint, and that the Motion for Summary Judgment by the Plaintiff should be and is hereby granted as a matter of law.

When a federal judgment is based on a state law claim, as here, the Court must look to state law to determine the propriety of prejudgment interest on recovery. The Travelers Insurance Company v. Transport Insurance Company, 846 F.2d 1048, 1053 (7th Cir. 1988).

Prejudgment interest is allowable at the rate of 8% per annum pursuant to I.C. 24-4.6-1-102 and I.C. 24-4.6-1-103. Prejudgment interest is computed pursuant to I.C. 24-4.6-1-103 from the time the principal amount was demanded or due, and is allowable at the permissible statutory rate when no contractual provision specifies the rate. See Sand Creek Country Club v. CSO Architects, 582 N.E. 2d 872, 876 (Ind. App. 3d Dist. 1991). See also, In re Johnson, 120 B.R. 461, 474-477 (Bankr. N. D Ind. 1990) (prejudgment interest accrues from the date of filing of plaintiff's complaint where plaintiff did not prove when he had made demand on the debtor prior to the filing of the complaint). In that the record did indicate the date that the Plaintiff made an unconditional demand for payment on the Defendant, prejudgment interest shall accrue at the rate of 8% per annum from the date the Plaintiff's Complaint was filed, or October 27, 2011.

The United States Supreme Court in the case of Cohen v. De La Cruz, \_\_\_\_\_, U.S. \_\_\_\_\_, 118 S. Ct. 1212, 130 l. L.Ed 2d 341 (1998), held that statutory treble damages, plus attorney's fees and costs, provided for by a State Statute were within the discharge exception for actual fraud, and that the exception is not limited to the value of the money that the debtor obtained through fraud. Id. 118 S. Ct. 1212. Thus, the Statutory Penalties incurred by the Defendant pursuant to I.C. 22-4-13-1.1(b) are also nondischargeable pursuant to §523(a)(2)(A).

Generally in Indiana, each party must pay his own counsel fees in the absence of a statute or

agreement providing otherwise. Barrington Mfg. Co. v. Draper Family Ltd. Partnership, 695 N.E.2d 135, 142 (Ind. App 1998). In that the Plaintiff has not pointed to any statute that would authorize the granting of attorney's fees to the Plaintiff no such fee shall be awarded.

Pursuant to 28 U.S.C §1961(a), postjudgment interest shall be computed at a rate equal to the weekly average 1-year constant maturity yield, as published by the Board of Governors of the federal Reserve System, for the calendar week preceding the date of these Judgments. It is therefore,

**ORDERED, ADJUDGED, AND DECREED**, that the Plaintiff should be and is hereby awarded Judgment versus the Defendant as to Count I of its Complaint in the Principal sum of \$6013.00, together with a Civil Penalty of \$1399.00, for a total of \$7412.50, plus both prejudgment and postjudgment interest. And it is further,

**ORDERED, ADJUDGED, AND DECREED**, that the Plaintiff should be and is hereby awarded Judgment versus the Defendant as to Count II of its Complaint in the principal sum of \$10,640.00, together with a Civil Penalty of \$5,320.00, for a total of \$15,960.00, plus both prejudgment and postjudgment interest. And it is further,

**ORDERED, ADJUDGED, AND DECREED**, that the Plaintiff shall be and is hereby awarded Judgment versus the Defendant as to Count III of its Complaint in the principal sum of \$390.00, together with a Civil Penalty of \$390.00, for a total of \$780.00, plus both prejudgment and postjudgment interest.

Dated: August 15, 2012

  
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JUDGE, U. S. BANKRUPTCY COURT

## Notice Recipients

District/Off: 0755-2

User: pjn

Date Created: 8/15/2012

Case: 11-02171-kl

Form ID: pdf004

Total: 1

**Recipients submitted to the BNC (Bankruptcy Noticing Center):**

ust Nancy J. Gargula One Michiana Square Building Suite 555 100 East Wayne Street South  
Bend, IN 46601-2349

TOTAL: 1