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Defendant.

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By her complaint, plaintiff M. Cynthia Rose ("Rose") seeks to except from defendant Kevin M. Healy's chapter 7 discharge the fees and costs she incurred while defending a meritless lawsuit

1 brought against her by Healy. Rose maintains that this
2 prosecution was both willful and malicious.

3
4 Statement of Facts

5 1. Healy has been a California attorney since 1994. He
6 began representing Rose sometime in the late 1990's. By 2002,
7 Healy and his client had ended their attorney-client
8 relationship. They did not end their relationship on good terms.
9 Rose disputed that she owed fees to Healy and she filed a
10 complaint against him with the California State Bar.

11 2. This adversary proceeding directly implicates the fee
12 dispute between the parties. Their fee dispute was sent to a fee
13 arbitration that took place on January 31 and February 1, 2002.

14 3. While awaiting the arbitrator's decision and award, in
15 connection with the State Bar complaint, the State Bar sent
16 Healy, among other things, a copy of Rose's check in the amount
17 of \$1,250. See Exhibit LL. This was the amount Rose actually
18 paid toward the \$3,500 filing fee for the fee arbitration. Prior
19 to receipt of the \$1,250 check, Healy believed Rose had paid the
20 entire \$3,500 filing fee. Rose had claimed in the arbitration
21 that she had paid the entire \$3,500.

22 4. On March 29, 2002, the arbitration award was issued.
23 Healy was awarded \$77,076.75, which was reduced by \$1,750 as his
24 half of the \$3,500 filing fee for the arbitration fee paid by
25 Rose.

26 5. The award, then, gave Rose a credit equal to one-half
27 of the \$3,500 arbitration filing fee even though she had actually
28 only paid less than half of that fee, \$1,250. Despite this

1 discrepancy, Healy did not move to vacate or correct the
2 arbitration award, or even write to the arbitrators or Charles
3 Bauer, Rose's attorney, regarding this discrepancy.

4 6. Instead, on April 27, 2004, Healy filed a lawsuit
5 against Rose in Sacramento County Superior Court, asserting that
6 Rose had committed perjury during the fee arbitration. Her
7 perjury consisted of testifying that she had paid \$3,500 for the
8 fee arbitration when she had in fact paid only \$1,250. Healy
9 sought damages of \$1,125, the difference between one-half of
10 \$3,500 and one-half of \$1,250, as well as unspecified "special"
11 damages and punitive damages of \$1 million.

12 7. On June 1, 2004, Rose, filed a motion under California
13 Code of Civil Procedure § 425.16 (the "anti-SLAPP" statute) to
14 dismiss the complaint. Healy did not file opposition to the
15 motion addressing its merits. Instead, he moved to disqualify
16 the trial court judge. The case was then reassigned to another
17 judge. Healy then moved to disqualify the second judge. The
18 case was assigned to a third judge and the hearing on the motion
19 to dismiss the complaint was rescheduled for July 21, 2004.

20 8. Again, Healy filed no opposition addressing the merits
21 of the motion. Instead, the day prior to the hearing he filed a
22 letter demanding a stay of the proceedings, asserting his
23 military service required a stay under the terms of the Service
24 Members Civil Relief Act until October when his reserve duty was
25 scheduled to end.

26 9. On July 21, 2004, the Sacramento County Superior Court
27 refused to stay the hearing and granted Rose's anti-SLAPP motion,
28 holding that the litigation privilege of California Civil Code §

1 47 provided an absolute defense to Healy's action and that "as a
2 matter of law plaintiff cannot show probability of prevailing on
3 the merits." Rose thereafter moved for the attorneys' fees and
4 costs she had incurred in striking Healy's complaint and opposing
5 Healy's attempts to stay the progress of the action.

6 10. On August 16, 2004, before Rose's motion for fees and
7 costs could be heard, Healy filed his first bankruptcy case.
8 Rose sought and received relief from the automatic stay to go
9 forward with the hearing on her motion for fees and costs. Eight
10 days after the order granting relief from the stay was entered,
11 the bankruptcy case was dismissed.

12 11. The state court ultimately awarded Rose \$14,280 in
13 attorneys' fees and \$734.62 in costs. Rose has collected the
14 fees awarded to her under this Order, and they are not at issue
15 in the instant proceeding.

16 12. Thereafter, Healy moved to set aside the dismissal of
17 his state court complaint. The state court denied this motion
18 noting that Healy had not filed any opposition to Rose's
19 anti-SLAPP motion, nor had he demonstrated that Civil Code § 47
20 was not an absolute defense to his suit against Rose. The state
21 court further concluded that Healy had not acted in good faith in
22 asserting protection under the Service Members Civil Relief Act
23 and was seeking to use the protections of that Act to
24 "deliberately and willfully attempt[] to evade ultimate
25 determination of the issues involved in the litigation."

26 13. On May 20, 2005, Healy filed a state court appeal. His
27 notice of appeal included "the issue of the Court improperly
28 determining that Civil Code §47 provides a complete bar to civil

1 proceeding. . . ." However, his later appellate brief failed to
2 make any substantial argument on this point or cite any authority
3 in support of his assertion that his action against Rose had any
4 merit.

5 14. On February 14 2007, the Third District Court of Appeal
6 dismissed Healy's appeal from the anti-SLAPP order as untimely,
7 affirmed the award of attorney fees, and awarded appellate costs
8 to Rose.

9 15. On April 24, 2007, Rose, by and through her attorney,
10 filed a motion for the attorneys' fees she had incurred on the
11 appeal. On June 12, 2007, the Sacramento County Superior Court
12 entered judgment for Rose for attorney fees and costs totaling
13 \$12,739.68.

14 16. Healy next moved to reconsider and set aside the June
15 12, 2007 judgment. The state trial court's tentative ruling was
16 to deny the motion and to order Healy to show cause why he should
17 not be sanctioned for a frivolous motion calculated solely to
18 achieve delay. Healy then moved to disqualify the state court
19 judge. Ultimately, the state court declined to reconsider its
20 judgment.

21 17. On October 10, 2007, Rose filed a motion for
22 post-judgment attorneys' fees, seeking an additional \$6,180 in
23 fees and \$243.68 in costs incurred since April 24, 2007.

24 18. In the interim, Rose attempted to collect the June 2007
25 judgment from Healy. On December 5, 2007, an order for
26 examination of Healy was scheduled to take place. The evening of
27 December 4, 2007, Healy sent a fax to Rose's attorney stating
28 that the matter is "paid and stayed" and ordering her to inform

1 the court that the examination would not go forward. Based on
2 Healy's providing a receipt from the sheriff in the amount of
3 \$13,087.46, Rose's attorney cancelled the examination. Healy,
4 however, had not paid the judgment. His \$13,087.46 check was
5 written against insufficient funds. As of December 4, 2007, the
6 date the check was written, Healy had less than \$600 in the
7 account.

8 19. The state court eventually awarded Rose \$11,400 in
9 attorney fees and \$782.10 in costs, which was added to the June
10 12, 2007 judgment for fees and costs.

11 20. Rose's complaint seeks to have declared
12 nondischargeable the awards of June 12, 2007 and July 11, 2008.
13 These total \$24,921.78 and they remain unpaid.

14 21. Healy filed this bankruptcy case on July 9, 2010. He
15 has obtained his chapter 7 discharge, subject to the outcome of
16 this proceeding.

17 22. This brief and rather antiseptic recitation of the
18 relevant facts does not convey the antipathy between Healy, on
19 the one hand, and Rose and her attorneys, on the other hand.
20 After listening to the testimony of the witnesses and the
21 arguments of counsel, it is clear to this court that a deep-
22 seated hostility and animosity that predates the fee arbitration
23 has animated the litigation between the parties. This may be due
24 to the rift that caused the fee dispute, Rose's complaints to the
25 State Bar, or to the state court's refusal to entertain Healy's
26 requests for a stay or honor all of his recusal challenges.
27 Whatever the cause, the court finds that when Healy filed the
28 state court action accusing Rose of perjury, he did so knowing it

1 lacked legal merit and in order to harass his former client.

2 This is clear from the foregoing as well as the following facts:

3 a. Most puzzling is Healy's failure to make any attempt to
4 modify the arbitration award based on the discovery that
5 Rose had not paid the entire \$3,500 arbitration filing fee.
6 For instance, Cal. Civ. Pro. Code § 1285 et seq., lays out
7 the procedures to vacate or modify arbitration awards. None
8 were invoked by Healy. Instead, he opted to file a separate
9 suit for perjury.

10 b. Healy never seriously addressed the merits of Rose's
11 motion to dismiss his suit for the years the issue was
12 pending in the state trial and appellate courts.

13 c. Healy is an attorney with significant litigation
14 experience. It is difficult to believe, and the court does
15 not believe, that he did not understand that statements made
16 by witnesses and parties in the context of litigation are
17 privileged. See Cal. Civil Code § 47(b).

18 d. Before filing suit against Rose, Healy filed two
19 actions against the attorney who replaced Healy, Charles
20 Bauer, that were related to his litigation and disputes with
21 Rose. Both of those actions were dismissed pursuant to Cal.
22 Code of Civ. Pro. § 425.16. Yet, almost immediately after
23 the dismissal of the second suit, Healy filed a suit against
24 Rose that was obviously vulnerable to the same attack.

25 e. There is no credible evidence that Healy consulted
26 other attorneys or did research into the viability of the
27 action against Rose. The asserted consultation with other
28 attorneys amounted to no more than casual conversations with

1 office-mates and friends who were attorneys about his
2 dispute with Rose. None gave him legal opinions sanctioning
3 the suit. For instance, one such attorney friend, Douglas
4 Whatley, testified only that he and Healy "bounced ideas and
5 legal remedies off of each other, as legal colleagues." But
6 it is clear Whatley did not do any research on this issue.
7 He admitted that "I later came to understand that under
8 Civil Code Section 47, there were likely privileges that
9 would or could have prevented such a civil action. . . ."

10 f. And, Healy produced no memoranda or notes concerning
11 his own legal research that was contemporaneous with the
12 filing of the suit against Rose. While he testified that he
13 read a law review article and did research regarding an
14 "extrinsic fraud" theory, no specific, on-point authority
15 has been presented to this court.

16 g. Finally, the complaint filed by Healy against Rose is
17 completely out of proportion to the amount in controversy,
18 \$1,125. It consists of 156 paragraphs, demands not only the
19 \$1,125 but unspecified special damages and punitive damages
20 (which demand was later quantified by Healy at \$1 million),
21 and includes numerous allegations unrelated to the payment
22 of the arbitration fee.

23 23. To the extent any of the following conclusions of law
24 are findings of fact, they are incorporated by reference as
25 findings of fact.

26 Conclusions of Law

27 1. To the extent any of the foregoing findings of fact are
28 conclusions of law, they are incorporated by reference as

1 conclusions of law.

2 2. This Court is the proper venue for this proceeding.
3 See 28 U.S.C. § 1409.

4 3. The claim asserted by plaintiff is a core proceeding.
5 This action seeks a determination of the dischargeability of a
6 debt. See 28 U.S.C. § 157(b)(2)(I).

7 4. Under 11 U.S.C. § 523(a)(6), a debt for willful and
8 malicious injury by a debtor to another entity or to the property
9 of another entity cannot be discharged in bankruptcy.

10 5. The filing and prosecution of a suit against Rose in
11 state court for perjury was done to annoy and harass Rose, with
12 Healy's knowledge that the suit lacked merit. In so doing, Healy
13 acted deliberately, intentionally, and for purpose of injuring
14 Rose. His conduct resulted in a willful injury to Rose.

15 6. A malicious injury is "one involving (1) a wrongful
16 act, (2) done intentionally, (3) which necessarily causes injury,
17 and (4) is done without just cause or excuse." See Murray v.
18 Bammer (In re Bammer), 131 F.3d 788, 791 (9th Cir. 1997).

19 7. Here, Healy filed and prosecuted a suit against Rose
20 even though he likely knew it lacked merit for the purpose of
21 harassing Rose. There was no just cause or excuse for this
22 conduct, particularly considering the fact that Healy was an
23 attorney, and his conduct necessarily caused injury to Rose.

24 Therefore, this court will enter a separate judgment
25 declaring that the outstanding amounts awarded by the state court
26 in connection with the civil action filed by Healy against Rose
27 to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

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1 A conforming form of judgment shall be lodged by the
2 plaintiff within 14 days of the date of these findings of fact
3 and conclusions of law.

4 Dated:

By the Court

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Michael S. McManus, Judge
7 United States Bankruptcy Court
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