IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
TERRY WILLIE MONTFORD	)	
d/b/a Terry Montford	)	Number 90-4119
Construction Company	)	
(Chapter 7 Case 90-40728)	)	
	)	
Debtor	)	
	)	
	)	
	)	
JOHN H. NICHOLS, JR.	)	
JANE A. NICHOLS	)	
	)	
Plaintiffs	)	
	)	
	)	
	)	
v.	)	
	)	
TERRY WILLIE MONTFORD	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

On November 16, 1990, a hearing was held upon a Complaint to Determine Dischargeability of Debt. Upon consideration of the evidence presented at trial, the briefs and other documentation presented by the parties, together with applicable authorities, I make the following Findings of Fact and Conclusions of Law. I note for the record that the parties entered into a very detailed stipulation of facts consisting of twenty-three numbered paragraphs which has been most helpful in the formulation of this Order and is incorporated into the record. However, for purposes of this Order, I have summarized the relevant facts as follows.

FINDINGS OF FACT

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code with this Court on April 20, 1990, as an individual not engaged in business, but listed as "Terry Montford, f/d/b/a Terry Montford Construction." The Debtor had been doing business as a homebuilder in Chatham County, Georgia, for eleven years prior to filing the present bankruptcy. The Debtor holds a college degree in accounting and is licensed by the State of Georgia as a certified public accountant.

On April 14, 1989, the Plaintiffs entered into a contract which provided that the "contractor shall furnish all of the materials and perform all of the work . . . upon the parcel of land described as Lot 2844, Seawatch Drive, The Landings." (See Paragraph 2 of Plaintiffs' Proposed Findings of Fact and Conclusions of Law, Stipulated Findings of Fact, submitted November 16, 1990, hereinafter referred to as "Stipulated Facts"). Plaintiffs agreed to pay Debtor the sum of $261,994.00 "for the performance of the contract." The work was to be completed within 180 days but the contract did provide for any deletions or additions agreed upon by the parties after execution to be incorporated into the contract. Article 4 of the contract set forth the method of payment as follows:

> It is understood and agreed that OWNERS/LENDERS shall pay $261,994.00 according to addendum #1 and upon CONTRACTOR furnishing the usual affidavit against liens upon each payment. CONTRACTOR shall give OWNERS 30 days notice

> prior to completion date as to date OWNERS may occupy home.

Addendum One sets forth the payment schedule as follows:

> Owner, Mr. and Mrs. John H. Nichols, Jr., and Builder, Terry Montford, hereby agree to the following method of payment:
>
> 1) At Contract Date--------10% - $26,199.00
>
> 2) Foundation in Place-----10%
>
> 3) Rough-in Complete, including windows, HVAC, electrical, permanent roof, and the fireplace----------35%
>
> 4) Sheetrock, trim (interior & exterior), painting exterior, cabinets in place----------20%
>
> 5) Trim-out of all plumbing, electrical, HVAC, ceramic tile and interior painting----------15%
>
> 6) Balance upon completion----------10%

(Exhibit "A", Stipulated Facts).

On April 17, 1989, the Plaintiffs paid over to the Debtor $26,199.00 as the first payment towards the construction of their home (Paragraph 5, Stipulated Facts). On May 9, 1989, Plaintiffs paid an additional $26,199.00 to the Debtor (Paragraph 7, Stipulated Facts). On June 8, 1989, Plaintiffs paid $70,000.00 (Paragraph 9, Stipulated Facts) and on July 6, 1989, Plaintiffs paid $21,300.00 (Paragraph 12, Stipulated Facts). On July 27, 1989, the Plaintiffs paid $31,900.00 to the Debtor (Paragraph 13, Stipulated Facts) and on August 11, 1989, the Plaintiffs paid $26,199.40 to the Debtor (Paragraph 15, Stipulated Facts). On August 30, 1989, the

Plaintiffs paid the Debtor $20,000.00 (Paragraph 16, Stipulated Facts) and finally on September 25, 1989, the Plaintiffs paid an additional $20,000.00 to the Debtor for a total of $241,797.40 (Paragraph 17, Stipulated Facts). Of that amount, $134,419.12 was utilized for purposes other than the building of the Plaintiffs' home (Paragraph 19, Stipulated Facts).

At the time the Debtor entered into the contract, he was insolvent. The parties have stipulated that the Debtor's bank account at Great Southern Federal Savings Bank, as of March 21, 1989, had a negative balance of $9,359.13. The parties have further stipulated that the Debtor's Super Now/Checking Account with Anchor Savings Bank, as of March 21, 1989, held a positive balance of $106.48. The parties also stipulated that charges for insufficient funds on both account as of March 21st totalled $555.00. As of April 7, 1989, the Debtor's Anchor Savings Bank account was negative $10,204.02 and the Debtor's account at Great Southern had a negative balance of $25,605.06 for a total negative $35,809.08 (See Paragraph 6, Stipulated Facts). The parties further stipulated that if the Court should find that the debt is non-dischargeable, the amount of the non-dischargeable debt is $134,479.77 (Paragraph 3, Stipulated Facts).

The Debtor did not maintain the Plaintiffs' funds in a separate account but rather commingled the funds in an account which was used for other business purposes as well as the Debtor's personal expenses, including a $5,000.00 country club bill. Debtor testified that he had been in business for approximately eleven years and had consistently done business in this fashion. His

practice generally was to use whatever funds he received from customers to pay his oldest outstanding bills. He assumed that he would pay the bills incurred on this job out of funds received from subsequent contracts. He acknowledged that this was necessary because he had no capital invested in his business and that if he lost money on a particular contract he had to cover those losses out of funds earned on other jobs. It is also clear that Debtor was using Plaintiffs' money to pay personal living expenses without any contractual right to do so. There was no provision for Debtor to draw a salary while the job progressed. Instead he was an entrepreneur. If the contract had been profitable he would have retained all the excess. If not he should have born all the loss. This case arises because Debtor in effect transferred the risk of loss to his customers by drawing his "salary" before paying all bills. The fact that he had always done business in this fashion is no legal defense to the Plaintiffs' case. The question is whether a building who utilizes funds paid into his hands in this manner may discharge a debt arising when he is unable in the final analysis to pay all bills that come due. I rule that he may not.

CONCLUSIONS OF LAW

Plaintiffs filed this adversary proceeding against the Debtor challenging the dischargeability of a debt on the grounds of false pretenses, false representations and/or actual fraud, embezzlement, and willful and malicious injury to the Plaintiffs' property pursuant to 11 U.S.C. Sections 523(a)(2), (4) and (6), which provide in relevant part as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

The burden is on the objecting creditor to prove all of the elements of a Section 523 objection by clear and convincing evidence. Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986). Because I feel the Plaintiffs have made the strongest case for the exception to discharge set forth in 11 U.S.C. Section 523(a)(6) I will address that issue first.

In order to except a debt from discharge under Section 523(a)(6), the creditor must prove three elements by clear and convincing evidence: (1) That the debtor injured another entity or the property of another entity; (2) that the debtor's actions were deliberate and intentional; and (3) that the debtor's actions were malicious.

The Eleventh Circuit in Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988), approved and adopted the approach set forth in United Bank of Southgate v. Nelson, 35 B.R. 766 (Bankr.

N.D.Ill. 1983) in construing the "willful and malicious" elements of 11 U.S.C. Section 523(a)(6). Under Southgate, "willful means deliberate or intentional" and "malice for purposes of Section 523(a)(6) can be established by a finding of implied or constructive malice." Rebhan, 842 F.2d at 1263. "No showing of personal hatred, spite or ill will is required to prove an injury malicious; it is enough that it was 'wrongful and without just cause or excuse'." In re Lindberg, 49 B.R. 228, 230 (Bankr. D.Mass. 1985) [Quoting In re Askew, 22 B.R. 641, 643 (Bankr. M.D.Ga. 1982) aff'd, 705 F.2d 469 (11th Cir. 1983).] Hence, an injury is considered "willful" if it is intentional and "malicious", if it results from an intentional or conscious disregard of one's duties. Id.

The conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse to the other's injury, is a willful and malicious injury within the meaning of the Section 523(a)(6) exception. Matter of McLaughlin, 14 B.R. 773, 775 (Bankr. N.D.Ga. 1981); 3 Collier §523.16 at p.523-116 (15th Ed. 1989).

The legislative history of Section 523(a)(6) states "the intent is to include in the category of non-dischargeable debt a conversion under which the debtor willfully and maliciously intends to borrow money for a short period of time with no intent to inflict injury but in which injury is in fact inflicted." H.Rep.No. 95-595, 95th Cong., 1st Sess. 364 (1977) reprinted in U.S. Code Cong. & Admin. News 5787, 5963, 6320 (1978) quoted in In re Hopkins, 65 B.R. 967, 972 (Bankr. N.D.Ill. 1986).

"[A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be an injury which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. There may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one." Davis v. Aetna Accept. Co., 293 U.S. 328, 331, 55 S.Ct. 151, 153, 79 L.Ed. 393 (1934) (Citations omitted).

To meet the willful and malicious standard of Section 523(a)(6) the Debtor must be aware that the act violates the property rights of another. Matter of Brinsfield, 78 B.R. 364, 370 (Bankr. M.D.Ga. 1987). In assessing the intent of the debtor, a business person will be held to a higher standard than an ordinary individual where it is clear that the business person would be more knowledgeable of the natural consequences of his acts. Matter of Ricketts, 16 B.R. 833, 834-35 (Bankr. N.D.Ga. 1982).

It is difficult to prove that one holds a purposeful intent to harm another. However, when one acts with the knowledge that his act of conversion is in contravention of the rights of another yet proceeds deliberate and intentionally in the face of that knowledge, without justification or excuse, this Court will infer malice and render such debt non-dischargeable under Section 523(a)(6).

It is established that $241,797.40 was paid over in construction draws by the Plaintiffs to the Debtor/Contractor. It has been stipulated that $134,479.77 of the Plaintiffs' payments were not applied towards the construction of the Plaintiffs' home. The contract granted the Debtor no right to a draw or a salary during the construction period. He would have obtained all profits at the end of the job or suffered all the loss. By no means did the Debtor have the right to misappropriate the Plaintiffs' funds for his own personal use or for other business purposes. Such misappropriation constitutes a conversion within the meaning of Section 523(a)(6).

Once it is determined that a debtor has willfully converted the property of another, the determination of whether such debt will be held non-dischargeable under Section 523(a)(6) turns on the intent of the debtor. In assessing the intent of the debtor and holding a knowledgeable business person to a higher standard than an ordinary individual, I note that the Debtor herein is a college educated accountant and hence knew or should have known of the natural consequences of his actions. The fact that he may have done business in this fashion for a number of years does not justify or excuse his action of conversion.

Inasmuch as I find that the Debtor's misuse of his client's money constitutes a conversion and hence a willful or malicious injury to the property of another within the meaning of 11 U.S.C. Section 523(a)(6), the debt is non-dischargeable. In light of this ruling on the Plaintiffs' Section 523(a)(6) motion it is

unnecessary to address Plaintiffs' Section 523(a)(2) and (a)(4) allegations as they are moot.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the debt of Terry W. Montford due the Plaintiffs, John H. Nichols, Jr., and Jane A. Nichols, in the amount of $134,419.12 is non-dischargeable.

_____
Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of January, 1991.