

In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
COLMAN W. ROSEN	)	
LINDA F. ROSEN	)	Number <u>93-4146</u>
(Chapter 7 Case <u>92-41806</u> )	)	
	)	
<i>Debtors</i>	)	
	)	
	)	
CANDLER GENERAL FEDERAL	)	
CREDIT UNION	)	
	)	
<i>Plaintiff</i>	)	
	)	
	)	
v.	)	
	)	
COLMAN W. ROSEN	)	
LINDA F. ROSEN	)	
	)	
<i>Defendants</i>	)	

**MEMORANDUM AND ORDER**

**FINDINGS OF FACT**

This matter arises out of a proceeding filed by the Debtors under Chapter 7 of the United States Bankruptcy Code on or about January 22, 1993. The evidence indicates that, beginning at the time of the meeting of creditors held pursuant to 11 U.S.C. Section 341, the parties engaged in negotiations with respect to the 1991 Toyota Corolla owned by Debtors and pledged as security to Candler General Federal Credit Union ("Candler"). The negotiations were unsuccessful, and the case proceeded to discharge.

Following entry of the Order granting discharge, Candler attempted to take possession of the 1991 Toyota automobile. Debtors refused to surrender the vehicle and reopened negotiations toward possible reaffirmation of the debt. Approximately one week after the initial attempt to pickup the vehicle, negotiations again terminated, and Debtors agreed to surrender the vehicle to Candler. On this occasion, the vehicle was driven a short distance from the Debtors' residence when it stopped operating.

Assuming the vehicle to have a blown head gasket, Candler sold the vehicle to Harold Starling for the sum of \$3,000.00, a sum which was \$4,000.00 less than Mr. Starling would have paid for the vehicle in good condition. Mr. Starling, who has a background in mechanics, began repairs to the vehicle and discovered that the vehicle had been vandalized. A substance made of vinegar, sugar, and some unknown chemical had been poured into the gas tank, the radiator, and the brake cylinder. As a result, a highly

corrosive sludge was discovered throughout the engine, oil filter, brake reservoirs, radiator, fuel system and power steering reservoirs, rendering the automobile useless.

Upon making this discovery, Candler filed a Motion to Reopen the Chapter 7 case for the purpose of filing the instant adversary proceeding. That motion was granted and this case followed.

Candler argues that Debtors intentionally destroyed its collateral and that that act should render the debt to Candler non-dischargeable. Candler concedes that its case is circumstantial, and Debtors deny responsibility for the damage to the vehicle.

#### CONCLUSIONS OF LAW

Despite the circumstantial nature of the evidence in this matter, I conclude that Candler has met its burden. The evidence is that Debtors wished to retain possession of the vehicle only one week before the damage was discovered. There is no evidence from which it is possible to conclude that any damage was possible to the vehicle while in the possession of Candler. Debtors, by contrast, had both the motive and opportunity to vandalize the automobile.

The evidence as to the damage indicates that the solution already described was poured into the gas tank, the radiator, the brake cylinder, and the oil tank. Only the gas tank is accessible without opening the hood of the car and the gas tank is controlled by a lever located inside the vehicle. Thus, any vandal intent upon this damage would first have to obtain entry to the vehicle. In addition, Mr. Starling's undisputed testimony was that this action would require at least fifteen minutes to complete. The idea that a random vandal is responsible for this act is, therefore, remote. The only reasonable inference is that the car was damaged while in the possession and care of Debtors.

Further, the Debtors had the motive to damage the vehicle. The evidence demonstrates that the Debtors wished to retain the vehicle and expected to do so following the completion of their bankruptcy. Candler took a much harder negotiating strategy than anticipated, and the Debtors were unable to accomplish this goal. Indeed, even after the case concluded, the Debtors continued to attempt to negotiate for retention of the car.

Though circumstantial, the evidence is overwhelming that the Debtors are responsible for the condition of the vehicle when it was recovered by Candler. Such evidence is sufficient. In re Devers, 759 F.2d 751, 753-54 (9th Cir. 1985); Farmers Co-op Ass'n of Talmage v. Strunk, 671 F.2d 391, 395 (10th Cir. 1982).

Plaintiff seeks to have the debt owing to it excepted from discharge pursuant to 11 U.S.C. Section 523(a)(6) which provides in relevant part that:

A discharge . . . does not discharge an individual debtor from any debt--

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

The party seeking to except a debt from discharge must prove the willfulness and maliciousness of the act by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). 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 (M.D. Ill. 1983) in construing the "willful and malicious" element 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. Moreover, "[t]he removal or destruction of property subject to a security interest without payment of the debt secured thereby may constitute a willful and malicious injury . . . [under] . . . section 523(a)(6)." In re Decker, 153 B.R. 997, 1002 (Bankr. N.D. 1993).

I conclude that the acts of Debtors were both willful and malicious. The

occurrence was intentional, not accidental, and Debtors acted without justification in a manner which harmed Plaintiff by the partial destruction of its collateral. As a result, the loss it sustained by way of a substantially reduced resale price of its collateral, is non-dischargeable.

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 Colman W. Rosen and Linda F. Rosen to Candler General Federal Credit Union in the amount of \$4,000.00 is non-dischargeable.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_ day of March, 1994.