

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

In the matter of:

ROBERT J. EBERHART
(Chapter 7 Case 89-20110)

Adversary Proceeding
Number 89-2011

and

KARL M. ALLEN
(Chapter 7 Case 89-20112)

Adversary Proceeding
Number 89-2012

Debtors

FORD CONSUMER FINANCE COMPANY,
f/k/a Meritor Credit Corporation
f/k/a PSFS Credit Corporation

Plaintiff

FILED

at 12 O'clock & 28 min. PM

Date 11/27/89

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *PCB*

v.

ROBERT J. EBERHART
and
KARL M. ALLEN

Defendants

MEMORANDUM AND ORDER

On October 11, 1989, a trial of the above-captioned complaint to determine dischargeability of certain debts was held.

Because the facts in each of the adversary proceedings are identical and in light of the co-ownership by the two Debtors of Eberhart Progressive Homes, Inc., and their joint individual debt guarantees for that Corporation with the Plaintiff, I will consolidate this Order as to both Adversary Proceedings. After consideration of the evidence produced at the hearing and the pleadings of the parties I make the following consolidated Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On December 5, 1985, Plaintiff Ford Consumer Finance Company, formerly Meritor Credit Corporation, formerly PSFS Credit Corporation, entered into an inventory financing agreement with Eberhart Progressive Homes, Inc. As an inducement to the Plaintiff to enter such an agreement, the Defendants, Robert J. Eberhart, and Karl M. Allen, individually guaranteed to the Plaintiff the payment of all obligations or liabilities of Eberhart Progressive Homes, Inc., arising out of or connected with the inventory financing agreement.

Debtors' petitions list Robert J. Eberhart as president and treasurer of Eberhart Mobile Homes, Inc., and owner of 60% of

the outstanding stock of that corporation. Karl M. Allen is listed as vice president and secretary of Eberhart Mobiles Homes, Inc., and owner of 40% of the outstanding stock.

On or about December 22, 1988, Eberhart Mobile Homes sold one 1989 Fleetwood mobile home, Serial Number 0914AB, to third parties for \$18,000.00, from which there was due the Plaintiff the sum of \$14,714.00, which amount has to date not been remitted to the Plaintiff.

Sometime between December 1, 1988, and January 31, 1989, Eberhart Mobile Homes sold a 1989 Clayton mobile home, Serial Number 0289AB, to a third party. Eberhart Mobile Homes submitted the contract package along with its check in the amount of \$6,162.16 to the Plaintiff to complete the inventory payoff on that particular mobile home. The exact amount necessary to satisfy the outstanding balance to the Plaintiff for that mobile home was \$5,670.00. However, the check was returned due to insufficient funds in the dealer's account to cover it. The debt remains unpaid.

CONCLUSIONS OF LAW

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

(a) 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 dominant purpose of the bankruptcy laws is to provide the debtor with comprehensive, needed relief from his financial burden by releasing him from virtually all of his debts. To accomplish this goal, the courts have narrowly construed exceptions to discharge against the creditor and in favor of the bankrupt. Thus, the burden of proof lies with the creditor to show that the particular debt falls within one of the statutory exceptions. The exceptions to discharge were not intended and must not be allowed to override the general rule favoring discharge. Murphy & Robinson Investment Co., v. Cross (Matter of Cross), 666 F.2d 873, 879-80 (5th Cir. 1982) (footnotes and citations omitted). When a creditor seeks to have a debt determined to be non-

dischargeable, the creditor bears the burden of proving each element of the applicable code section by clear and convincing evidence. Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986); Matter of Brinsfield, 78 B.R. 364, 368 (Bankr. M.D.Ga. 1987).

Thus, 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 debtors injured another entity or the property of another entity;
- 2) That the debtors' actions were deliberate and intentional; and
- 3) That the debtors' 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 (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).¹ Absent a finding of willful

¹ Although §523(a)(6) does not expressly so provide, "willful and malicious injury" can include a willful and malicious conversion of security. S. REP. NO. 989, 95th Cong., 2d Sess. 79, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787; In re Pommerer, 10 B.R. 935, 940 (Bankr. D.Minn. 1981). "In proceedings involving alleged conversion of secured collateral, 'malice' is shown by proof that a debtor disposed of security with the specific knowledge that the disposition would invariably and indubitably cause harm to the secured creditor or by proof that the debtor had the specific intention of causing harm to the secured creditor by the disposition. A debtor's sale or other disposition of secured property is not an act which invariably implies malice toward the secured party." In re Eberle, 61 B.R. 638, 648 (Bankr. D.Minn. 1985) (emphasis original) [(citing Davis v. Allen Acceptance Corp., 293 U.S. 328, 332, 55 S.Ct. 151, 153, 79 L.Ed. 393 (1934).] Rather, this factual determination may be made only on a case by case basis. Id. A showing that the debtor was aware of the secured creditor's specific rights to the security and the proceeds thereof yet deliberately disregarded those rights is sufficient. Id.

intent to harm the lienholder, the debt is dischargeable in bankruptcy. A showing of a mere "technical conversion" of a lienholder's property rights is insufficient to prevent discharge, even if sold in reckless disregard of the secured party's rights. Farmers & Merchants Bank of Eatonton v. Alexander, 70 B.R. 419, 422 (M.D.Ga. 1987); Brinsfield, 78 B.R. at 370.

"[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 Acceptance Co., 293 U.S. 328, 331, 55 S.Ct. 151, 153 (1934) (citations omitted).

Once it is determined that a debtor has willfully converted the property of another by wrongfully selling collateral subject to a security interest, 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, a businessperson will be held to a higher standard than an ordinary

individual where it is clear that that businessperson 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).

Debtors' Chapter 7 petition shows that Debtors have been involved in the retail sale of mobile homes since May of 1983. With their excess of six years experience with inventory financing arrangements, I find that the Debtors knew or should have known that this property was held as collateral by the Bank on a loan. An exercise of dominion or control over secured property in a manner which is inconsistent with the rights of the secured party constitutes, as to him, a conversion of that property. Trust Company of Columbus v. Associated Grocers Co-op, Inc., et.al., 152 Ga. App. 701, 263 S.E. 2d 676 (Ga. App. 1979). Officers and directors of corporations will be held liable for the debts of the corporation to the extent of their participation in tortious acts resulting in harm to a third party. Ford Motor Credit Co., v. Owens, 807 F.2d 1556, 1559-60 (11th Cir. 1987); Citronelle-Mobile Gathering v. O'Leary, 499 F.Supp. 871 (D.C. Ala. 1980). The evidence shows that Ford Consumer Finance Company held a valid perfected security interest in the mobile homes in question. The evidence further shows that the Debtors were experienced businessmen in the mobile home retail business for at least six years. Yet contrary to the rights of Ford Consumer Finance Company,

Debtors sold the two mobiles homes in question without remitting the proceeds to Ford Consumer Finance Company.²

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 a secured creditor yet proceeds deliberately 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). Inasmuch as I find that the Debtors herein willfully and maliciously converted property of Ford Consumer Finance Company to its injury, I find that Section 523(a)(6) renders such debt non-dischargeable.

Ford Consumer Finance Company has argued in the alternative that its debt should be rendered non-dischargeable under Section 523(a)(4), as Debtors' actions constitute fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The Eleventh Circuit has held that a finding of non-

² Paragraph 7 of the Inventory Financing Agreement between the parties to the present dispute provides in relevant part as follows: "Dealer agrees to repay immediately to Lender any advance of money made to finance the acquisition of an unit of inventory upon the sale or other disposition by Dealer of such unit of inventory and all sums received from such sale of inventory shall be received and held in trust by Dealer until delivery to Lender."

dischargeability under Section 523(a)(6) for willful and malicious injury will render the entire debt non-dischargeable, not just to the extent of the converted collateral. Birmingham Trust National Bank v. Case, 755 F.2d 1474 (11th Cir. 1985). As such, it is unnecessary to address Ford Consumer Finance Company's Section 523(a)(4) claims.

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 Debtors' debt to the Plaintiff in the amount of \$21,273.40 shall be deemed non-dischargeable. Because I find the Debtors to be joint obligors, Debtors' liability for the \$21,273.40 debt shall be joint and several.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 20th day of November, 1989.

FILED

United States Bankruptcy Court

at 12 O'clock & 38 min. P.M

For the SOUTHERN District of GEORGIA

Date 11/27/89

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

FORD CONSUMER FINANCE COMPANY,
et al

Case No. 89-20110 and 89-20112 *POB*

Plaintiff

v.

ROBERT J. EBERHART
and KARL M. ALLEN

Defendant

Adversary Proceeding No. 89-2011
and 89-2012

JUDGMENT

This proceeding having come on for trial or hearing before the court, the Honorable _____, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

[OR]

This proceeding having come on for trial before the court and a jury, the Honorable _____, United States Bankruptcy Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict,

[OR]

The issues of this proceeding having been duly considered by the Honorable _____, United States Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED:

That the Plaintiff, FORD CONSUMER FINANCE COMPANY, f/k/a Meritor Credit Corporation and f/k/a PSFS Credit Corporation, shall recover of the Defendants, ROBERT J. EBERHART and KARL M. ALLEN, the principal sum of Twenty-One Thousand Two Hundred Seventy-Three Dollars and Forty Cents (\$21,273.40), together with interest at the rate of 7.90% per annum from date until paid in full. Defendants are found to be joint obligors and liability for the debt shall be joint and several.



[Seal of the U.S. Bankruptcy Court]

Date of issuance: 11/22/89

MARY C. BECTON

Clerk of Bankruptcy Court

By:

Patsy C. Burkhalter
Deputy Clerk