

5523(a)(6)
Conversion of Collateral by consumers
solicited - without prejudice

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

In the matter of:)
JOHN TIMOTHY JONES)
CATHY JO McALWEE JONES)
(Chapter 7 Case 89-50167))
Debtors)

EUGENE L. MASON, JR.,)
d/b/a Segrave's Furniture)
Company)
Plaintiff)

v.)
JOHN TIMOTHY JONES)
CATHY JO McALWEE JONES)
Defendants)

Adversary Proceeding
Number 89-5015

FILED
at 9 O'clock & 28 min. A.M
Date 2/8/90
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *PCB*

MEMORANDUM AND ORDER

On January 9, 1990, a hearing was held in Waycross, Georgia, upon an objection by Eugene L. Mason, Jr., d/b/a Segrave's Furniture Company, to the Debtors' discharge. Upon consideration of the evidence adduced at trial, the briefs and other documents

submitted by the parties, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code with this Court on July 12, 1989. On May 6, 1986, Defendants and the Plaintiff entered into a conditional sales contract for the sale of certain furniture, lamps, and a microwave oven. The amount financed under that contract was \$3,597.26. The goods sold under the contract included two beds, four dressers or a chest-of-drawers, two night stands, a dining table and six chairs, another dining table and four chairs, a desk and chair, a matching couch, love seat and chair, a coffee table, two end tables, two lamps, one T.V. stand, and a microwave oven. Plaintiff is the holder of a properly perfected security interest in those goods.

Defendants fell into default on that contract which resulted in several contacts between the Plaintiff and the Defendants in person and by telephone. These contacts included two telephone conversations in September of 1988, a telephone conversation in December of 1988, and three telephone conversations in June of 1989. In each of these conversations, the Defendants

told the Plaintiff that they still had the goods which were the subject of the retail installment contract and that it was their desire to work out some arrangement under which they could retain possession of these goods. Apparently no such arrangement worked out and in January of 1989, the Plaintiff filed a petition for a writ of possession against the Defendants in the Magistrate's Court of Coffee County, Georgia, in order to repossess the goods which were the subject of the contract. In their answer to the aforementioned complaint, the Defendants did not deny the Plaintiff's allegation that the Defendants had possession of the goods. The proceedings for a writ of possession were transferred to the Superior Court of Coffee County wherein the Plaintiff obtained the writ. Thereafter, Debtors filed their petition in bankruptcy. In Schedule "B-2" attached to the Debtors' Chapter 7 petition, Debtors stated that they had in their possession three beds valued at \$300.00, four dressers valued at \$200.00, two dining tables valued at \$350.00, ten chairs valued at \$250.00, one couch valued at \$350.00, one love seat valued at \$250.00, one coffee table valued at \$30.00, two end tables valued at \$50.00, one chair valued at \$100.00, one T.V. stand valued at \$50.00, one chest valued at \$60.00, five lamps valued at \$25.00, one desk and chair valued at \$100.00, and various appliances.

In Schedule "A-2" attached to the Debtors' Chapter 7 bankruptcy petition, they indicated that they had no secured creditors. The Movant was listed as an unsecured creditor with a claim in the amount of \$3,013.65. The unpaid balance owing on the contract is \$2,775.65.

With the exception of the two beds and sofa securing the Plaintiff's note, the Debtors are no longer in possession of the collateral. Debtors claim that much of the furniture was stolen in 1987 and that they made a police report of the theft at that time. As to the microwave oven, Debtors claim that it stopped working and they threw it away. As to certain other collateral, Debtors claim that it wore out and was disposed of. At the Section 341 creditors' meeting on September 6, 1989, the Plaintiff and his attorney requested permission to walk through the Defendants' home with the Defendants and their attorney in order to confirm that the Defendants no longer had possession of any other goods described in the contract. At that time the Defendants refused. In fact, as to the two beds and sofa that the Defendants agreed to turnover to the Plaintiff, the Defendants refused to allow the Plaintiff to pick them up at the Defendants' residence. Instead, the Defendants carried these items to the Defendants' place of employment where the Plaintiff was allowed to take possession of them.

In late December, 1989, the Debtors did allow the Plaintiff and his attorney to view the inside of their home. At that time none of the collateral securing the Plaintiff's note was located in the home. Instead, a set of used furniture which Defendants claim was loaned to them by a relative was located in the home, as well as other used furniture which they had purchased.

CONCLUSIONS OF LAW

Plaintiff seeks a denial of discharge of the debt owed it by the Defendants. 11 U.S.C. Section 523(a)(6) provides in relevant part as follows:

(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

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 converted 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).

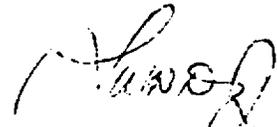
disposition would invariably and indubitably cause harm to the secured creditor or by proof that the debtor had the specific intention of causing harm to the secured creditor by the disposition. A debtor's sale or other disposition of secured property is not an act which invariably implies malice toward 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.

It is difficult to prove that one holds a purposeful intent to harm another. However, when one acts with a knowledge that his acts 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). 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). The Debtors herein assert that the collateral securing the loan of Segrave's Furniture Company was stolen or otherwise disposed of. The alleged theft was to have occurred in late 1987. However, on the Debtors' Schedule B-2 of their bankruptcy petition filed in July of 1989, well over a year after the alleged theft, the very property that was alleged to have been stolen was listed as property of the Debtors. In addition, I place great weight on the fact that the Defendants' answer to the complaint seeking a writ of garnishment filed in the Superior Court of Coffee County in January of 1989, contained no denial of the Plaintiff's allegations that the Defendants had possession of the goods which were allegedly stolen. In light of these discrepancies, I conclude that the Defendants did willfully

and maliciously convert the property of Segrave's Furniture Company. Inasmuch as I find that the Debtors herein willfully and maliciously converted property of Segrave's to its injury, I find that Section 523(a)(6) renders such debt 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 Defendants' debt in the amount of \$2,775.65 to Segrave's Furniture Company shall be rendered non-dischargeable.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 17th day of February, 1990.