

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

In the matter of:)
)
ROY L. ALLEN, II)
(Chapter 7 Case 98-40838))
)
Debtor)

Adversary Proceeding

Number 98-4139

FIRST LIBERTY BANK)
)
Plaintiff)

FILED
at 12 O'clock & 15 min PM
Date 9/23/99

MICHAEL F. MCHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

v.)
)
ROY L. ALLEN, II,)
)
Defendant)

MEMORANDUM AND ORDER

The Plaintiff filed this adversary on July 1, 1998 and trial was held on May 20, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(F), and heard the matter on May 20, 1999. Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor, Roy L. Allen II, a former Savannah attorney, represented Ms. Verdelle

Williams in a 1996 action to recover life insurance proceeds for the death of her son, Andrew L. Williams. Ms. Williams dismissed Allen in November of 1996. On August 18, 1998, Independent Life, the insurance company with which the 1996 claim was filed, issued a check numbered 630441337-5 in the amount of \$56,415.76 to "Roy Allen, attorney (sic) and Verdelle Williams." (Plaintiff's Exhibit 1). On August 20, 1998 Allen deposited the check in the Trust Account for the Allen Firm. (Plaintiff's Exhibit 2). An employee of First Liberty Bank testified that she accepted the check from Mr. Allen and deposited it in the trust account of the Allen Firm at his request. Ms. Verdelle Williams testified that she neither endorsed the check nor did she authorize Mr. Allen to endorse the check on her behalf. In fact, by the time that the check arrived in Mr. Allen's possession, the employment agreement between Allen and Ms. Williams had been terminated, at the request of Ms. Williams, for over one year.

Almost immediately after the insurance funds were deposited in Allen's account, they were withdrawn by Allen, leaving his account with insufficient funds to cover a check for \$45,950.00 that he then wrote to Ms. Williams. Ms. Williams tried to cash the check, discovered that funds in the account were insufficient to cover it, and demanded payment from First Liberty, as it accepted the original insurance check with a forged endorsement from Allen. First Liberty Bank then issued Verdelle Williams a check in the amount of \$45,950.00. Upon Mr. Allen's filing of a Chapter 7 case, First Liberty Bank initiated this adversary proceeding against Mr. Allen, seeking repayment of the \$45,950.00. The adversary trial was held on May 20, 1999. Mr. Allen, being incarcerated in Jackson, Georgia, did not appear and made no

arrangements to be represented by counsel.

CONCLUSIONS OF LAW

11 U.S.C. § 523 states in relevant part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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;

11 U.S.C. § 523.

In this matter, a determination of nondischargeability is sought on the amount that First Liberty Bank paid to Ms. Williams for compensation due to Allen's forged endorsement.

O.C.G.A. § 11-3-419 and § 16-9-2 provide that banks such as First Liberty will be held responsible for accepting for deposit checks endorsed without the authority of the payee. Tifton Bank & Trust Company v. Knights Furniture Company, Inc., 215 Ga. App. 471, 452 S.E.2d 219 (1994). First Liberty, in turn, seeks to collect the debt it incurred because of the forgery from

Allen. Georgia's version of the Uniform Commercial Code provides that a customer obtaining payment warrants to the payor bank that he has good title to the item and that he has no knowledge that the signature of the maker or drawer is unauthorized. O.C.G.A. § 11-4-207 (1994). This provision in the Commercial Code of Georgia creates direct liability of Allen to First Liberty. I hold that Mr. Allen's actions regarding the check issued to Verdelle Williams meet the individual requirements of Section 523(a)(2)(A), Section 523(a)(4), and Section 523(a)(6) and therefore the discharge of his debt to First Liberty Bank is denied.

Section 523(a)(2)(A) of the Bankruptcy Code provides that a debt for money obtained by "false pretenses, a false representation, or actual fraud" will not be discharged under Section 727 of the Bankruptcy Code. Mr. Allen obtained the check from First Liberty Bank under false pretenses, false misrepresentation, or actual fraud. Allen wrongfully endorsed the check and then knowingly presented it to First Liberty Bank, representing to the Bank that he had a right to said check when he clearly did not, and then requesting that it be deposited in the trust account of his law firm. Allen, because he had been discharged by Ms. Williams over a year before the check was mailed to him and was no longer Ms. Williams' attorney, had no right to negotiate the check.

Allen's actions in this case also fulfill the requirements of Section 523(a)(4), which provide an exception from discharge for fraud while acting in a fiduciary capacity, embezzlement, or larceny. Section 523(a)(4) of the Bankruptcy Code "makes no distinction

between whether a debtor's appropriation of the property was initially wrongful (larceny) or initially authorized (embezzlement)" and "establishing either one serves as a basis for further inquiry into Debtor's intent when the creditor's property is appropriated." In re Schalk, 191 B.R. 522, 527 (Bankr. .N.D.N.Y. 1995). The Court may "infer intent from the totality of the circumstances." Id. at 527.

Here, the totality of the circumstances presented at trial establish that Allen's appropriation of the check was wrongful, therefore meeting the requirements of larceny. The employment relationship between Ms. Williams and Allen terminated more than a year before he received the check. At the time the check was deposited into the account of the Allen Firm with Ms. Williams' forged signature, Allen had no right to the proceeds of the check. At no point did Allen receive any form of authorization from Ms. Williams allowing him to endorse the check with her name. The weight of evidence presented at trial is sufficient to establish that Allen committed larceny when he forged Ms. Williams' signature on the check, making it unnecessary for this Court to decide the issue of embezzlement.

The actions of Mr. Allen in this case also meet the requirements of Section 523(a)(6) that forbid discharge if the debtor committed willful and malicious injury to another entity. A debt will only be nondischargeable if it results from a deliberate and intentional injury, not merely a deliberate or intentional act that leads to injury. Kawaauhau v. Geiger, 523 U.S. 57, 60; 118 S.Ct. 974, 977 (1998). Actions that satisfy this requirement are often compared to

"intentional tort[s] requiring that the actor intend the consequences of the act, not merely the act itself." Id. This Court previously held that "conversion of a creditor's property can therefore constitute a willful and malicious injury and render the debt nondischargeable pursuant to 11 U.S.C. § 523(a)(6) . . . so long as both the act and the injury can be found to be deliberate and intentional." In re Lagrone, 230 B.R. 900, 903 (S.D. Ga. 1999). In establishing the intentional and deliberate nature of conversion, "the circumstances must demonstrate that the debtor intended the injury sustained by the creditor." Id. at 904.

In this case, Allen's actions in converting the check were deliberate and intentional. Allen injured Ms. Williams by forging her signature thereby intentionally denying her the rightful payment of the insurance check. He also injured First Liberty Bank by depositing the funds in his trust account and later withdrawing them, making it responsible to Ms. Williams for the amount of the forged check. Allen acted with the knowledge that his acts in converting these funds would cause specific injuries to Ms. Williams and to First Liberty Bank, therefore meeting the requirements of Section 523(a)(6). Mr. Allen's actions in this case, as set forth above, meet three of the Section 523(a) requirements, each of which independently serve to deny discharge to a debtor.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE

ORDER OF THIS COURT that debtor's obligation to Plaintiff, First Liberty Bank, in the amount of \$49,950.00 is determined to be excepted from discharge.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 23rd day of September, 1999.