



**IT IS ORDERED as set forth below:**

**Date: March 16, 2010**

*Mary Grace Diehl*

**Mary Grace Diehl  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION**

IN RE:	:	CASE NUMBERS
	:	
<b>ROGER A. RAY,</b>	:	<b>BANKRUPTCY CASE</b>
	:	<b>NO. 09-42543-MGD</b>
Debtor,	:	
	:	
<b>BRANCH BANKING AND TRUST</b>	:	<b>ADVERSARY CASE</b>
<b>COMPANY,</b>	:	<b>NO. 09-04094</b>
	:	
Plaintiff,	:	
	:	
v.	:	CHAPTER 11
	:	
<b>ROGER A. RAY,</b>	:	
	:	
Defendant.	:	

**ORDER GRANTING IN PART PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT**

This case is before the Court on Plaintiff’s Motion for Default Judgment (“Motion”), which Branch Banking and Trust Company (“Plaintiff”) filed on October 29, 2009. (Docket No. 5). Plaintiff commenced the underlying adversary proceeding against Roger A. Ray (“Defendant”) on

September 1, 2009, to declare Defendant's debt to Plaintiff non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6). Defendant did not file an answer to Plaintiff's Complaint. As identified below, Plaintiff's Complaint fails to allege facts sufficient to support an award of default judgment on its claim pursuant to § 523(a)(2)(A). Plaintiff's Motion is **DENIED** as to the § 523(a)(2)(A) claim. Plaintiff has alleged sufficient facts to support an award of default judgment on its claim pursuant to § 523(a)(6) and, therefore, Plaintiff's Motion is **GRANTED** as to that claim.

## **I. FACTS**

Defendant has been self-employed for ten years at Roger A. Ray Enterprises, Inc., where Defendant works in Camper Sales and Service. (Complaint at ¶ 11). Plaintiff and Defendant entered into three loans, for each of which Defendant pledged a camper as collateral. (Complaint at ¶ 1). Defendant signed each of the loans personally. (Complaint at Exhibit A, Exhibit B, Exhibit C). On December 19, 2006, the parties entered into a loan by which Defendant financed a 2005 Tahoe TT Transport. (Complaint at ¶ 10). The loan is memorialized in a retail note and security agreement, but there is no title listing Plaintiff as a lienholder. (Complaint at ¶ 10, Exhibit C). Defendant knowingly failed to apply for Plaintiff's title lien, despite his ten years of experience in camper sales and his knowledge of the process for listing lienholders on titles. (Complaint at ¶ 15). Defendant sold the 2005 Tahoe to a third party on May 25, 2007. (Complaint at ¶ 17). Plaintiff has filed a claim in Defendant's bankruptcy case for \$7,836.62 on this debt. (Complaint at ¶ 1).

On July 24, 2008, the parties entered into a loan by which Defendant financed a 2003 Coachman TT Chaparral. (Complaint at ¶ 8). That loan is memorialized in a retail note and security agreement, plus a Georgia Certificate of Title indicating a lien on the vehicle in favor of Plaintiff. (Complaint at ¶ 8, Exhibit A). Defendant sold the 2003 Coachman to a third party and denies

knowledge of the camper's location. (Complaint at ¶ 12, 15). Plaintiff has filed a claim in Defendant's bankruptcy case for \$10,177.14 on this debt. (Complaint at ¶ 1).

On July 29, 2008, the parties entered into a loan by which Defendant financed a 2007 Sandpiper TT 305RLW. (Complaint at ¶ 9). That loan is memorialized in a retail note and security agreement, but there is no title listing Plaintiff as a lienholder. (Complaint at ¶ 9, Exhibit B). Defendant knowingly failed to apply for Plaintiff's title lien, despite his ten years of experience in camper sales and his knowledge of the process for listing lienholders on titles. (Complaint at ¶ 15). Defendant sold the 2007 Sandpiper on September 28, 2008, only two months after pledging it as collateral. (Complaint at ¶ 16). Plaintiff has filed a claim in Defendant's bankruptcy case for \$19,897.91 on this debt. (Complaint at ¶ 1).

Regarding the claim of fraud, Plaintiff further alleges that Defendant "received the loans from Plaintiff under false pretenses." (Complaint at ¶ 21). "Defendant's actions were committed with actual fraud." *Id.* Finally, Defendant was aware that he had pledged the collateral as security when he later sold that collateral. *Id.*

## **II. DISCUSSION**

Plaintiff has moved for a default judgment. The Court has discretion as to the entry of a default judgment. Fed. R. Civ. P. 55(b), made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7055, provides that the court *may* enter judgment by default (emphasis added). "[A] defendant's default does not in itself warrant the court in entering default judgment. There must be a sufficient basis in the pleadings for the judgment entered." *Nishimatsu Constr. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *see also Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988), *cert. denied*, 493 U.S. 858 (1989); *Wahl v. McIver*, 773 F.2d

1169, 1174 (11th Cir. 1985). Plaintiff seeks a determination that Defendant's debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2). (Complaint at ¶ 25). Plaintiff specifically claims that Defendant's debt is non-dischargeable pursuant to § 523(a)(2)(A) and § 523(a)(6). As Plaintiff has failed to alleged facts sufficient to prove a claim pursuant to § 523(a)(2)(A), but has alleged facts sufficient to prove a claim pursuant to § 523(a)(6), the Court concludes that Plaintiff is entitled to default judgment only as to the § 523(a)(6) claim.

**A. Section 523 (a)(2)(A)**

Plaintiff alleges that Defendant "received the loans from Plaintiff under false pretenses" and that Defendant committed his actions "with actual fraud." (Complaint at ¶ 21). "The creditor bears the burden of establishing nondischargeability under section 523(a)(2)(A)." *In re Rusu*, 188 B.R. 325, 328 (Bankr. N.D. Ga. 1995). Plaintiff has not satisfied that burden. Plaintiff alleges that Defendant's acts constitute actual fraud. To succeed in establishing the nondischargeability of a debt for actual fraud pursuant to § 523(a)(2)(A), the creditor must show four elements: (1) that the debtor made a false representation with the purpose and intent of deceiving the creditor, (2) that the creditor relied on that representation, (3) that the creditor's reliance was justified, and (4) that the creditor suffered a loss as a result of its reliance. *Id.* Despite its legal conclusion that Defendant committed actual fraud, Plaintiff has not alleged any facts indicating that Defendant had any fraudulent intent or otherwise acted to defraud Plaintiff at the time that they entered into the agreement, merely that Defendant acted wrongfully after signing the agreement. The Court cannot, therefore, grant Plaintiff's request for a default judgment on this issue.

**B. Section 523 (a)(6)**

Plaintiff also seeks a determination that a portion of Defendant's debt is presumed

nondischargeable pursuant to 11 U.S.C. § 523(a)(6). (Complaint at ¶ ). When a debtor sells collateral that is subject to a security agreement without the authority of the creditor to whom the security interest was granted, then the debtor's act "is a willful and malicious conversion of property and renders the debt arising from the agreement nondischargeable." *In re Giffen*, 195 B.R. 951, 953 (Bankr. M.D. Fla. 1996). Plaintiff has alleged sufficient facts for the Court to grant a default judgment on this issue.

On September 1, 2009, a summons was issued commanding Defendant to file and serve an answer to the Complaint. On the same date, Plaintiff served a summons and copy of the complaint on Defendant by first class mail postage pre-paid and by certified mail pursuant to Rule 7004(b) of the Federal Rules of Bankruptcy Procedure. (Docket No. 4). Rule 7012 of the Federal Rules of Bankruptcy Procedure requires a defendant to "serve an answer within 30 days after the issuance of the summons." Defendant has neither answered nor filed a response to the Motion for Default Judgment. Consequently, the Motion for Default Judgment is deemed unopposed pursuant to Bankruptcy Local Rule 7007-1(c) for the Northern District of Georgia. Accordingly, it is

**ORDERED** that Plaintiff's Motion for Default Judgment pursuant to 11 U.S.C. § 523(a)(2)(A) is hereby **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff has fifteen (15) days in which to file an amended complaint regarding its claim of dischargeability pursuant to 11 U.S.C. § 523(a)(2)(A). If no such pleading is timely filed, that claim shall, without further notice, stand as **DISMISSED**.

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Default Judgment pursuant to 11 U.S.C. § 523(a)(6) is hereby **GRANTED**. A separate judgment in favor of Plaintiff will be entered contemporaneously with this Order.

The Clerk is directed to serve a copy of this Order upon Plaintiff, Plaintiff's counsel, Defendant, and Defendant's counsel.

**END OF DOCUMENT**