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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE; THOMAS JERRY SMITHEY Debtor	)	CHAPTER 7 CASE No. 03-64290
AMERICREDIT FINANCIAL SERVICES, Plaintiff v. THOMAS JERRY SMITHEY Defendant	)	**ADVERSARY PROCEEDING NO. 03-06350**

ORDER

This adversary proceeding is before the court following trial. Attorneys for both parties were present but Defendant did not attend. Plaintiff had not issued a subpoena to compel Defendant's attendance. Because Defendant did not attend the trial, in lieu of Defendant's live testimony, Plaintiff presented stipulated facts and Defendant's pretrial deposition. Therefore, a threshold issue is whether Defendant's deposition may be accepted in lieu of his live testimony at trial.

Defendant's statements are admissible as non-hearsay evidence under Federal Rules of Evidence ("FRE") 801(d)(2)(A). Hearsay is defined in FRE 801(c) as a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FRE 801(d), however, sets forth two exceptions to the general hearsay

rule: (1) a prior statement made by a witness and (2) an admission by a party-opponent. Plaintiff is unable to rely on the exception for prior statements by a witness because Defendant was not subject to cross-examination concerning the statements[1] and the Defendant has not testified at trial.

The second exception, however, is available to Plaintiff. Statements offered as substantive evidence of the admission of a party-opponent need not be subject to cross examination at the time it is made. *Owners Inc. Co. v. Jenson*, 667 F.2d 714 (8th Cir. 1981). All statements of an accused, so far as they are not excluded by the doctrine of confessions or by the privilege against self-incrimination, are usable against the accused and are not hearsay. *United States v. Clemons*, 676 F.2d 122 (5th Cir. 1982).

In the case of *In re McLaren*, F.3d 958 (6th Cir. 1993), the plaintiff was permitted to introduce and use portions of defendant's Bankruptcy Rule 2004 examination as an admission of a party opponent. In another case, an action in which it was alleged that the defendants conspired to defraud the creditors of the debtor-corporation by conveying assets of the corporation to themselves, the pretrial deposition testimony of one defendant was properly admitted under Rule 32(a)(2) of the Federal Rules of Civil Procedure and FRE 801(d)(2). *In re Checkmate Stereo & Electronics, Ltd.*, 21 B.R. 402, (E.D. N.Y. 1982). Defendant's statements made during a pre-trial deposition are admissible as admissions of a party-opponent under FRE 801(d)(2)(A).

[1] Actually, the deposition of Defendant was taken by Plaintiff and, therefore, Defendant was subject to cross-examination. He did not, however, undergo direct examination by his own counsel. Thus, it would seem that the full-examination intent of the Prior Statement exception was not fulfilled.

FINDINGS OF FACT

Plaintiff seeks a determination that its claim against Defendant is nondischargeable under §523(a)(6). Specifically, Plaintiff contends that Defendant's conversion of the insurance proceeds from a motor vehicle collision that "totaled" Defendant's vehicle constitutes a willful and malicious injury.

The stipulated facts show Plaintiff financed Defendant's purchase of a 2001 Ford Explorer. The amount outstanding on the loan equals principal of $24,032.62 plus accrued interest, late charges and attorney fees. At the time of the purchase, an appropriate title application listing Plaintiff as lienholder was sent to Georgia Department Revenue("GDR"). Apparently, GDR erroneously failed to list Plaintiff on the title as lienholder and sent title directly to Defendant. Less than two months after the purchase, the vehicle was destroyed in a collision. Because Defendant had not notified his insurance company that Plaintiff was loss payee, the insurance company paid Defendant the full benefits for the destruction of the vehicle and Defendant gave the insurance company the title. Defendant did not notify Plaintiff of loss of the collateral. Defendant did not remit the insurance proceeds to Plaintiff.

Set forth below are excerpted portions of Defendant's pretrial deposition:

Q: Did you buy a 2001 Ford Explorer in the past and was it financed by Americredit Financial Services?
A: Yes, it was a Ford Sport Track. [Transcript page 4, line 5.]

Q: How many payments do you believe you made on the vehicle?
A: Four. [Transcript page 4, line 20.]

Q: What happened to the vehicle?
A: It was totaled. [Transcript page 4-5, line 25-1.]

Q: What happened to the vehicle?
A: Someone pulled out in front of my partner, which was driving, and he hit her. [Transcript page 5, line 10.]

Q: And that insurance money, was it paid to Americredit?
A: No. [Transcript page 6, line 1.]

Q: Who was it paid to?
A: To me. [Transcript page 6, line 2.]

Q: And what did you do with the money?
A: Most of it went to legal fees for my business and the other half went for my medicines, which I take every month, because at that time I was uninsured by health. My medicines were, like, $2,000 a month. [Transcript page 6, line 5.]

Q: Did you provide State Farm with clean title?
A: Yes, I took something that was mailed to me in the mail and took it down to the claim center. [Transcript page 10, line 1.]

Q: Did you realize that Americredit was lienholder?
A: Uh-uh, not on that. I mean, it was a clean title. [Transcript page 10, line 6.]

Q: After the accident, how many payments did you make?
A: One, two, somewhere in that fashion, I think, one or two payments. I think it was, like, two. [Transcript page 11, line 10.]

Q: Why did you stop?
A: Financial problems. [Transcript page 11, line 13.]

Q: Did you realize at any point that if you ever got into an accident that the money would go to a lienholder if there was a balance owing.?
A: Yes. [Transcript page 16, line 17.]

Q: Did you realize that this money belonged to Americredit that you took a check from?
A: Yes. [Transcript page 16, line 25.]

Q: So, you took property that you knowingly knew that you should have paid back to Americredit, but you didn't do it?
A: Correct. [Transcript page 17, line 1.]

Q: Did Americredit know about the accident?
A: I don't know. [Transcript page 23, line 5.]

Q: Did you inform Americredit?
A: No, I did not. [Transcript page 23, line 8.]

Q: Why not?
A: My intention was to continue to pay–I needed the money to help with legal fees and, like I said, my medicine (HIV treatment). My intention was to just treat it as the same loan and continue to pay the note every month. [Transcript page 23, line 13.]

Q: So you failed to disclose to the insurance company there was a lienholder?
A: Not to mine, no. [Transcript page 25, line 6.]

Q: But you knew there was a lienholder at the time?
A: Yes, I did. [Transcript page 26, line 15.]

Plaintiff contends that Defendant improperly converted the insurance proceeds to his own use and that Defendant's conversion constitutes a willful and malicious injury under §523(a)(6).

CONCLUSIONS OF LAW

Section 523(a) of the Bankruptcy Code excepts various categories of debts from the discharge granted under section 727 of Bankruptcy Code. Section 523(a) (6) excepts from discharge any debts arising from a willful and malicious injury. The burden of proof is upon the creditor to establish that the debt is nondischargeable by a preponderance of evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L. Ed, 2d 755(1991).

Conversion of collateral may form the basis of a claim under § 523 (a)(6) , but a willful and malicious injury "does not follow as of course from every act of conversion, without reference to the circumstances." *Davis v. Aetna Acceptance Co.,* 293 U.S. 328, 332, 55 S. Ct. 151, 153, 79 L. Ed. 393 (1934); *Wolfson v. Equine Capital Corporation (In re Wolfson),* 56 F. 3d 52 (11th Cir. 1995). "[W]illful and malicious injury includes willful and malicious conversion,

which is the unauthorized exercise of ownership over goods belonging to another to the exclusion of the owner's rights." *Wolfson* at 54.

To fall within the exception of section 523(a)(6), the injury to an entity or property must have been both willful and malicious. An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will. *Hope v. Walker,* 48 F.3d 1161, 33 C.B.C. 2d 108 (11th Cir. 1995).

The legislative history states that the word "willful" means "deliberate or intentional," referring to a deliberate and intentional act that necessarily leads to injury. H.R. Rep. No. 595, 95th Congress., 1st Sess. 365 (1977). The Court in *Hope v. Walker* interpreted "willful" to require "the debtor to intend more than merely the act, that results in injury. . . ." Rather, the debtor is responsible for a "willful" injury "when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." 48 F.3d. at 1161. The 11th Circuit Court's construction of "willful" was effectively limited in scope by the U.S. Supreme Court's ruling in *Kawaauhau v. Geiger.* 118 S. Ct. 974 (1998). In *Geiger,* Mrs. Kawaauhau sought medical treatment from Dr. Paul Geiger after dropping a box on her right foot. After diagnosing her condition as thrombophlebitis of the right leg, Dr. Geiger admitted Mrs. Kawaauhau to the hospital for treatment and prescribed oral does of tetracycline. After conducting tests, Dr. Geiger determined that continued administration of the oral tetracycline would be an effective treatment of her condition. Dr. Geiger eventually prescribed oral penicillin in place of the tetracycline. Dr. Geiger then departed on a business trip leaving Mrs. Kawaauhau in the care of other physicians who began to administer intramuscular penicillin and decided to

transfer her to an infectious disease specialist. Upon returning, Dr. Geiger discontinued all antibiotics, believing that the infection had run its course. A few days later, Mrs. Kawaauhau's condition deteriorated and her right leg had to be amputated below the knee.

Mr. and Mrs. Kawaauhau (the "Kawaauhaus") succeeded in an action for malpractice against Dr. Geiger, who subsequently petitioned for protection under Chapter 7 of the Bankruptcy Code. The Kawaauhaus filed a complaint requesting that the bankruptcy court deny discharge of the malpractice judgment on the ground that it constituted a debt for willful and malicious injury excepted from discharge by 11 U.S.C. 523(a)(6). The bankruptcy court held the debt nondischargeable under 523(a)(6), concluding that Dr. Geiger's treatment of Mrs. Kawaauhau "was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." In an unpublished order, the district court affirmed. The Eighth Circuit Court of Appeals reversed, and the Supreme Court affirmed the judgment of the Eighth Circuit Court of Appeals, holding that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of 523(a)(6)."

In *Geiger*, the Supreme Court focused its discussion on whether section 523(a)(6) covers acts, done intentionally, that cause injury, or only those acts done with the actual intent to cause injury. The Court concurred with the Eighth Circuit's interpretation of the plain language of the statute and the similarity of the exception to the category of intentional torts. The Court reasoned that had Congress intended 523(a)(6) to prevent the discharge of debts resulting from reckless conduct it might have described "willful acts that cause injury" or it might have used additional words such as "reckless" or "negligent," to modify "injury." The Court also recognized that a broad definition of intent would cause a wide range of situations to come within the exception to

discharge, including traffic accidents where the act causing the accident was intentional but the resulting injury was not. Additionally, the Court expressed reluctance to adopt an interpretation of the exception that would render another portion of the same law superfluous.

A post-*Geiger* split amongst Circuit and Bankruptcy Courts illustrates that the scope of the requisite intent needed to establish willful conduct continues to be unclearly defined. Issues have arisen concerning whether the Supreme Court concluded that willfulness must be established by: (1) a showing that the debtor had a subjective intent to injure the creditor; or (2) a showing that the debtor had knowledge that his acts were substantially certain to cause injury. *E.g. In re Cox*, 243 B.R. 713, 718 (Bankr. N.D.Ill. 2000).

Substantial certainty of injury, alone, has been held by one bankruptcy appellate panel and several bankruptcy courts to be insufficient to satisfy 523(a)(6) willfulness under *Geiger. See In re Buck*, 220 B.R. 999, 1004 (10th Cir. BAP 1998); *Tomlinson v. Florida Outdoor Equipment, Inc.*, 220 B.R. 134, 137-38 (Bankr. M.D. Fla.1998). Those courts hold that willfulness must be shown by the debtor's actual subjective intent to cause injury. *Id.*

In *Tomlinson*, the bankruptcy court interpreted the "substantial certainty" standard of *Hope v. Walker* to be inconsistent with *Geiger*. 220 B.R. 134, 137-38 (Bankr. M.D. Fla. 1998); *see also Buchanan v. Scott*, 227 B.R. 918, 922 (Bankr. S.D. Fla. 1998) (adopting a strict intent standard). The *Tomlinson* court construed the language of *Geiger* to require a showing of intentional and deliberate injury to satisfy § 523(a)(6) and held that to come within the §523(a)(6) discharge exception, the debtor's conduct must have been accomplished with actual intent to cause injury. *See id.* at 138. In reaching this conclusion, the *Tomlinson* court expressly rejected

the prior position of the Eleventh Circuit that had included acts substantially certain to cause injury in the willful and malicious framework. *Id.*

On the other hand, a showing that the debtor had an objective knowledge that his acts were substantially certain to cause injury, alone, has been accepted by two circuit courts of appeals, one bankruptcy appellate panel, and several bankruptcy courts to fulfill the intent test of *Geiger*. *See e.g., In re Cox* 243 B.R. 713 (Bankr. N.D. Ill.2000); *In re Baldwin*, 245 B.R. 131 (9th Cir. BAP 2000); *In re Markowitz*, 190 F.3d 455 (6th Cir.1999); *Miller v. Abrams*, 156 F.3d 598, 603 (5th Cir.1998); *In re Budig*, 240 B.R. 397 (D. Kan.1999); *In re Kidd*, 219 B.R. 278 (Bankr. D. Mont.1998); *First Liberty Bank v. Lagrone,* 230 B.R. 900 (Bankr. S.D. Ga. 1999), citing *Miller v. Abrams*, 156 F.3d 598, 606 (5th Cir. 1998); *see also Britt's Home Furnishing, Inc. v. Hollowell*, 242 B.R. 541, 546-547 (Bankr. 1999) (J. Murphy).

Contrary to the holding in *Tomlinson*, the court in *Lagrone* held that the requisite malicious intent standard set forth in *Geiger* can be established by showing

. . . .

> ...either subjective intent to injure or an objective substantial certainty that harm would result....[T]he consensus among courts addressing the issue since the entry of the *Geiger* opinion appears to be that a willful injury under § 523(a)(6) may be shown by proof of the debtor's subjective motive to cause injury or by an objective substantial certainty that the conduct would.

In *Lagrone,* the debtor borrowed money in order to purchase and repair a boat that the debtor planned to sell. The loan was secured by the boat. The debtor sold the boat for substantially less than the debtor had anticipated, however, and did not apply proceeds towards repaying the loan. The debtor did not advise the creditor of the sale or seeks its consent. The debtor knew the loan creditor held a collateral interest in the vessel and its proceeds. The court held that the debtor's

actions were willful and malicious and were "substantially certain to cause injury sufficient to meet 11 U.S.C.§ 523(a)(6)."

Under the security agreement between Plaintiff and Defendant, Plaintiff was entitled to the insurance proceeds paid to Defendant. Whether Defendant acted with the requisite intent to meet *Geiger's* interpretation of 'willful' under section 523(a)(6) is dependent upon whether the actual intent standard is used or whether the objective certainty standard is employed.

If the *Tomlinson* actual intent standard is employed, Plaintiff must show by a preponderance of the evidence that Defendant's failure to notify Plaintiff and turn over the insurance proceeds must have been performed with the actual intent to cause injury. The facts as presented through Defendant's deposition fail to support a conclusion that Defendant had the subjective intent to injure Plaintiff. Although Defendant acknowledged that Plaintiff was legally entitled to the proceeds from the accident, Plaintiff has made no showing that Defendant converted the insurance proceeds with the actual intent to cause harm to the Plaintiff.

Under the objective certainty standard described in *Lagrone*, Plaintiff must show that Defendant's acts were substantially certain to cause injury. The evidence establishes that Defendant knew Plaintiff had a lien on his car but did not notify Plaintiff of the destruction of the collateral. Instead, Defendant used the insurance proceeds from the accident, which he admits to be property of Plaintiff, for expenses unrelated to the vehicle or the debt to Plaintiff. As in *Lagrone,* Defendant knew he could not repay Plaintiff without the insurance proceeds. Defendant's deposition shows that Defendant initially tried to maintain his car payments, but he made only one or two payments after the car was totalled. The logical inference is that Defendant's conduct was intended to prevent Plaintiff from discovering Defendant's conversion

of the insurance proceeds. Defendant's testimony supports a conclusion that Defendant knew his actions were substantially certain to cause harm to Plaintiff.

The practical implications of the subjective intent standard are severely limited by the Defendant's ability to conceal his or her thoughts. Although the subjective intent standard can be established upon a showing that the debtor acted with the actual intent to harm the Plaintiff, concrete proof of intent is difficult because Defendant controls the very evidence which is necessary to find him liable. The objective substantial certainty standard levels this evidentiary playing field by allowing a Plaintiff to rest on an evidentiary showing that a defendant was substantially certain that harm would result. Therefore, the most persuasive are those decisions that have determined that the standards in *Geiger* may be satisfied by a showing that the defendant knew his conduct was substantially certain to cause injury. Accordingly, it is hereby

ORDERED that judgment will be entered in favor of Plaintiff.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon counsel for both Plaintiff and Defendant.

IT IS SO ORDERED this 8th day of February, 2005.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE