UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
ROBERT A. MAY	)	CASE NO. 04-70676-MHM
	)	
Debtor	)	
	)	
	)	
ACUFF-ROSE MUSIC, INC., ARC MUSIC CORP., SEVEN SHADES MUSIC, KOOG TOWN MUSIC, RAY FARM MUSIC SHAKEY BEAN MUSIC, Q SUAVE MUSIC, BURNING FIELD MUSIC, CAPANO MUSIC, CASA DAVID, CONRAD MUSIC [A DIVISION OF ARC MUSIC CORP.], FIGS. D. MUSIC, INC., HELIOS MUSIC CORP., JEWEL MUSIC PUBLISHING CO., INC., LEE MENDELSON FILM PROD., INC., MILENE MUSIC, INC., MURRAH MUSIC CORPORATION, SONGS OF UNIVERSAL, INC., UNIVERSAL MUSIC CORP., SONY/ATV SONGS, LLC, YOUNG WORLD MUSIC, INC., ST. NICHOLAS MUSIC, INC., TED KOEHLER MUSIC CO., THELONIOUS MUSIC CORP., WINDSWEPT HOLDINGS, LLC, ZOMBA MUSIC ENTERPRISES,	)	**ADVERSARY PROCEEDING NO. 04-9177**
	)	
Plaintiffs	)	
v.	)	
	)	
ROBERT A. MAY	)	
	)	
Defendant	)	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgement. This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(I), and the Court has jurisdiction pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. For the reasons set forth below, Defendant's Motion for Summary Judgment is granted and Plaintiffs' Motion for Partial Summary Judgment is denied.

STATEMENT OF FACTS

At all relevant times, Defendant Robert A. May, Debtor herein, was the majority shareholder, President, Chief Executive Officer, and Chairman of Tempo, Inc. ("Tempo"). (Pls.' Statement of Undisputed Material Facts ("P Facts") ¶ ¶ 63, 71, 72; Def.'s Statement of Disputed Material Facts ("D Facts") ¶ ¶ 71, 72; May's Second Aff. ¶ 1.) Before Tempo ceased operations in 2002, it was engaged in the business of making and distributing recordings, both in compact disc and cassette format, that incorporated various musical compositions into specialty compilation recordings, which Tempo sold to corporate clients for retail sale or for use as premium giveaways. (P Facts ¶¶ 3-5; D Facts ¶¶ 3-5.) Tempo obtained mechanical licenses (copyrighted words and lyrics)[1] for the use of the musical compositions relevant in this case from The Harry Fox Agency, Inc. ("HFA") acting as agent for Plaintiffs, principal owners of the mechanical copyrights. (P Facts ¶ 6; D Facts ¶ 6.)[2]

In November, 2000, HFA caused the accounting firm Moss Adams LLP ("Moss") to perform a royalty examination of Tempo's books and records (P Facts ¶ 24). As a result

[1] "The license from a music publisher ... to a record company to manufacture and distribute phono records containing performances of work is called a "mechanical license." Howard B. Abrams, LAW OF COPYRIGHT § 5:16 (Thomas/West 2005).

[2] On occasion, Tempo sought to obtain a license at a reduced royalty rate, rather than the prevailing statutory rate, directly from one of the principal owners of the mechanical copyright. Regardless of the rate ultimately approved, the license was issued by HFA. (D Facts ¶ 7; P Facts ¶ 7.)

of its royalty examination, Moss rendered a report to HFA with the following findings: (1) that Tempo failed to report or underreported $511,451.69 in royalties to HFA's publisher-principals, (2) that Tempo failed to report $548,444.51 for direct licenses with HFA publisher-principals, (3) that Tempo failed to report $15,208.33 in royalties for promotional units, and (4) that Tempo failed to properly calculate royalty rates on certain licenses resulting in an additional underpayment of $31,279.76 (collectively, the "Royalty Examination Claims"). (P Facts ¶ 28; D Facts ¶ 28.) Defendant disputes the accuracy of these findings. (D Facts ¶ 28).

Subsequently, by letter dated January 23, 2002, HFA notified Tempo that, if the outstanding royalties were not paid within thirty days, all of Tempo's licenses would be terminated. (P Facts ¶ 33; D Facts ¶ 33.) Tempo did not pay the arrearage and the licenses were terminated. (P Facts ¶ 34; D Facts ¶ 34.)

Plaintiffs commenced a civil copyright infringement action against Defendant and Tempo August 19, 2002, in the U.S. District Court for the Northern District of Georgia, *Acuff-Rose Music, et al. v. Tempo, Inc. and Robert A. May*, (N.D. Ga. 2002; Index No. 02-cv-2289-JOF, NDGA 2002) (the "Infringement Action"), asserting 44 counts of willful copyright infringement.[3] Ultimately, Tempo and Defendant agreed to settle the Royalty Examination Claims and the Infringement Action pursuant to the terms of a settlement agreement executed July 15, 2003 (the "Settlement Agreement").

Under the Settlement Agreement Defendant agreed to pay HFA $100,000 by December 31, 2004, plus $150,000 with interest in eight quarterly payments over two

[3] The Court takes judicial notice of the documents filed in the Infringement Action.

years. (Settlement Agreement; P Facts ¶ 38; D Facts ¶ 38.) If, however, Defendant paid HFA $200,000 by December 31, 2004, Plaintiffs agreed to accept it as full payment of the settlement. (Settlement Agreement; P Facts ¶ 38; D Facts ¶ 38.) On the other hand, if Defendant failed to pay at least $150,000 by December 31, 2004, or defaulted on any of the quarterly payments due between September 30, 2005, and June 30, 2007, HFA was authorized to enter a Consent Judgment against Defendant in the amount of $350,000. (Settlement Agreement; P Facts ¶ 38; D Facts ¶ 38.) In accordance with the Settlement Agreement, the parties entered into and filed with the district court a Stipulation of Dismissal without prejudice. (District Court Record)

Defendant filed the petition initiating his Chapter 7 case July 2, 2004. As of the petition date, Defendant had made no payments under the Settlement Agreement. (P Facts ¶ 41; D Facts ¶ 41.) Plaintiffs, however, did not request relief from the automatic stay to enter the Consent Judgment on the district court's docket. Instead, Plaintiffs filed a proof of claim in the Chapter 7 case in the amount of $6.6 million, the amount they originally sought in their complaint in the Infringement Action. Neither Defendant nor the Chapter 7 trustee objected to Plaintiffs' proof of claim.

This adversary proceeding arises from Plaintiffs' Complaint to Determine Dischargeability of Certain Debts (the "Complaint") filed October 4, 2004. The Complaint alleges that Plaintiffs' claim in the amount of $6.6 million is nondischargeable pursuant to §§ 523(a)(2) and (a)(6). Both Plaintiffs and Defendant filed motions for summary judgment October 31, 2005. Defendant disputes the amount of Plaintiffs' claim and contends the debt is dischargeable. Plaintiffs do not oppose Defendant's motion for summary judgment in regards to § 523(a)(2), but seek summary judgment on the § 523(a)(6) claim.

Standard for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is authorized when all the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In assessing whether a "genuine issue" for trial exists, the court must consider all the evidence and factual inferences reasonably drawn from the evidence in a light most favorable to the nonmoving party. *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 850 (11th Cir. 2000). "The party seeking summary judgment bears the initial burden to demonstrate to the court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact . . . . If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that genuine issues of material facts exist." *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

Discussion

Plaintiffs contend that the debt arising from Defendant's failure to pay royalties is nondischargeable pursuant to § 523(a)(6). Defendant asserts the applicable statute of limitations under federal copyright law as a defense. Defendant contends that, unless Plaintiffs have a claim for a debt arising under copyright infringement, the issue of dischargeablity under § 523(a)(6) never arises. Defendant further contends that, for purposes of applying the statute of limitations, the voluntary dismissal without prejudice of the Infringement Action returned the parties to the position they were in before Plaintiffs commenced that action and that Plaintiffs are now time-barred from asserting a claim for copyright infringement. Plaintiffs, in their Response to Defendant's Motion for Summary Judgment, contend that the statute of limitations defense is precluded by the Consent Judgment in the Infringement Action and is furthermore irrelevant in this dischargeability proceeding.

The Consent Judgment, executed by the parties in accordance with the Settlement Agreement, was not entered on the docket in the Infringement Action, and therefore is not a final order of the district court and has no preclusive effect in this case. Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2785 and cases cited therein; *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001). Nonetheless, a voluntary dismissal pursuant to a settlement agreement is often treated in a manner similar to a consent judgment. Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 4443 ("Consent judgments entered upon settlement by the parties may assume forms that range from simple orders of dismissal with or without prejudice to detailed decrees."). Although a dismissal without prejudice generally has no *res judicata* effect, where the dismissal was entered pursuant to a settlement agreement, courts will consider the intentions of the parties to preclude further litigation. *Id.*; 18 James Wm. Moore *et al.*, MOORE'S FEDERAL PRACTICE ¶ 131.30[c][ii]. Generally, a judgment entered pursuant to a settlement agreement is treated as having both contract and judgment characteristics. Moore, *supra*, ¶ 131.30[c][ii]. Thus, where the judgment is ambiguous as to whether it precludes further litigation on the claim or issue, courts employ basic contract interpretation principles to determine the intent of the parties. *Id.* The Eleventh Circuit Court of Appeals held in *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1288-89 (11th Cir. 2004), that the best evidence of the intentions of the parties is contained in the settlement agreement itself.

The Settlement Agreement in this case provides in paragraph 11 that upon Defendant's execution of the agreement, the publisher-principals released and discharged Tempo and Defendant of all claims and causes of action of every kind and nature arising from (1) the Royalty Examination Claims, and (2) the mechanical licenses for which Tempo applied on or before June 30, 2002. The Settlement Agreement further provides that upon Defendant's failure to make payments in accordance with the agreement, Plaintiffs were entitled to present the Consent Judgment for entry on the record in the Infringement Action. Despite Plaintiffs' failure to present the Consent Judgment to the district court as a final order, the terms of the agreement evidence that it was the intent of the parties to preclude further litigation of the claims raised in the Infringement Action. Therefore, Defendant will not now be heard to argue that Plaintiffs' claims are barred by the statute of limitations. To hold otherwise would encourage a debtor to enter into a settlement agreement to delay litigation until such time that the statute of limitations has expired and then avoid his contractual obligations under a settlement agreement by filing bankruptcy.

Moreover, the only limitations period applicable to the issue of dischargeability is the requirement of Bankruptcy Rule 4007(c) that a "complaint to determine the dischargeability of any debt pursuant to § 523(c) [of the Bankruptcy Code] shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." *In re Gergely*, 110 F.3d 1448 (9th Cir. 1997); *In re McKendry,* 40 F.3d 331, 336 (10th Cir.1994); *see also Banks v. Gill Distribution Centers, Inc.*, 263 F.3d 862, 869 (9th Cir. 2001); *Kaleta v. Sokolow*, 183 B.R. 639, 642 (M.D. Ala. 1995);[4] *but see In re Pascucci*, 90 B.R. 438 (Bankr. C.D. Cal. 1988); *In re Taylor*, 137 B.R. 925 (Bankr. S.D. Ind. 1991). Defendant does not allege that this dischargeability proceeding was filed in violation of Rule 4007(c). Accordingly, Plaintiffs' nondischargeability claim is not time barred.

Section 523(a)(6) excepts from discharge "any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The Supreme Court held in *Kawaauhau v. Geiger*, 523 U.S.57, 61, 118 S.Ct. 974 978 (1998), that willfulness under § 523(a)(6) requires a "deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." Additionally, maliciousness under § 523(a)(6) requires only that the act was wrongful or without just cause or excuse, even in the absence of personal hatred, spite or ill-will. *Hope v. Walker*, 48 F.3d 1161 (11th Cir. 1995). Thus, to prevail under § 523(a)(6), Plaintiffs must show

---

[4] These cases hold that the state law statute of limitation for fraud is irrelevant to a nondischargeability proceeding in bankruptcy court. Nonetheless, the principle that state (nonbankruptcy) law does not establish the time allowed for bringing a nondischargeability action (*i.e.*, an action in bankruptcy court to prevent the discharge of a certain debt) is the same.

that Defendant had a subjective intent to inflict injury or believed that his conduct was substantially certain to cause injury. *See Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1208 (9th Cir. 2001); *Bank of Lumber City v. Rowland* (*In re Rowland*), 316 B.R. 759, 763-64 (Bankr.S.D.Ga. 2004) (citing *Henderson v. Woolley* (*In re Woolley*), 288 B.R. 294, 301 (Bankr.S.D.Ga.2001), and *Johnson v. Fors* (*In re Fors*), 259 B.R. 131, 136 (8th Cir. BAP 2001)); *see also Britt's Home Furnishing, Inc. v. Hollowell* (*In re Hollowell*), 242 B.R. 541 (Bankr. N.D. Ga. 1999) (Murphy, J.); *Americredit Financial Services v. Smithey* (*In re Smithey*), 2005 Bankr. LEXIS 484 (Bankr. N.D. Ga. 2005) (Murphy, J.). Defendant contends that mere nonpayment of royalties cannot establish a willful and malicious injury under § 523(a)(6). Defendant argues that "[i]f nonpayment is sufficient to invoke § 523(a)(6) in this case, then it will suffice with respect to every debt incurred by anyone possessing the mental acuity to recognize that failure to pay a creditor is 'substantially certain' to injure that creditor."

No reported case is squarely on point with the facts presented in the case at bar. Plaintiffs primarily rely on cases holding that a debt for copyright infringement is nondischargeable where the debtor used copyrighted material without a valid license. In *Broadcast Music, Inc. v. Elms* (*In re Elms*), 112 B.R. 148 (Bankr. E.D. La. 1990) and *Knight Kitchen Music v. Pineau* (*In re Pineau*), 149 B.R. 239 (D. Me. 1993), the debtors intentionally failed to obtain a valid license in order to avoid the licensing fees.[5] In *Elms*, the debtor failed to pay the U.S. Copyright Office the required fee for licenses to operate

[5] Plaintiffs also rely on *Jubilee Communications, Inc. v. Lynch* (*In re Lynch*), 1990 WL 126199 (Bankr. W.D.Okla. 1990) and *In re Gabaldon Broadcast Music, Inc. v. Gabaldon* (*In re Gabaldon*), 55 B.R. 431 (Bankr. D. N.M. 1985). In both of these cases, also, the debt for copyright infringement arose from debtor's use of the copyrighted material without a valid license.

its jukeboxes. 112 B.R. at 149. The court concluded that "Debtor's knowing failure to obey the federal copyright law is 'an aggravating feature which evinces a willingness to voluntarily inflict injury on [the plaintiff].'" *Id.* at 152 (quoting *Broadcast Music, Inc. v. Gabaldon* (*In re Gabaldon*), 55 B.R. 431 (Bankr. D. N.M. 1985)). In *Pineau*, upon the debtor's failure to pay licensing fees, the plaintiff instructed the debtor that further broadcasting of copyrighted material without first paying the licensing fee arrearage would constitute infringement. 149 B.R. at 241. Thereafter the debtor, a radio station, broadcast the copyrighted songs without paying the fees. *Id.* The court held that by failing to pay the plaintiff before broadcasting the songs, the debtor "could expect that the plaintiff would be financially injured even if he intended to later redress any injury." *Id.* at 244-45.

At least one court has relied on the characterization of a failure to pay a licensing fees as an intentional tort to find the debt nondischargeable. In *Mosanto Co. v. Trantham* (*In re Trantham*), 304 B.R. 298 (6th Cir. B.A.P. 2004), the debtor used cotton and soybean seeds produced through patented technology without first paying the licensing fee required by federal patent law. *Id.* at 301-302. The bankruptcy court held that the debt was dischargeable because no evidence was produced to show that the debtor intended to cause the plaintiff a financial loss. *Id.* at 304. The Bankruptcy Appellate Panel reversed, holding that the debtor's actions constituted an intentional tort, which under *Geiger* could lead to nondischargeability under § 523(a)(6). *Id.* at 307-08. The Panel analogized the debtor's conduct to that of a bank robber, and concluded, "[h]is chief motive is to enrich himself, not financially injure the bank. The injury, however, is bound to occur, and in civil terms it constitutes an intentional tort against the bank." *Id.* at 307. The Panel also concluded that even if the debtor's primary intent was not to cause injury to the plaintiff, the debtor "must have known, and therefore believed, that economic damage to [the plaintiff] was substantially certain to result from his failure to pay the license fee because he was in a zero-sum situation. He could gain only if [the plaintiff] lost." *Id.* at 307. Finding that the debtor acted in conscious disregard of his duty to the plaintiff, the Panel held that the injury was willful and malicious. *Id.*

Failure to pay royalties under 17 U.S.C. § 115 generally gives rise to an action for the intentional tort of copyright infringement. *Peer Intern. Corp. v. Latin American Music Corp.*, 161 F.Supp.2d 38, 52 -53 (D. P.R. 2001); *Essex Music, Inc. v. ABKCO Music Records, Inc.,* 743 F.Supp. 237, 241 (S.D.N.Y.1990) ("it is beyond dispute that non-payment of royalties can constitute copyright infringement");[6] *see e.g., Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 931 (7th Cir. 2003) ("Copyright infringement . . . is an intentional tort."). Section 523(a)(6), however, requires more than a mere technical intentional tort; it requires an intentional wrong. *Cf. Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 331, 55 S.Ct. 151, 153 (U.S. 1934) (holding a willful and malicious injury does not automatically result from every tortious conversion); *see also Elms*, 112 B.R. at 151 ("Proof of a copyright infringement under Title 17, U.S.C., does not necessarily provide sufficient proof of wrongdoing under 11 U.S.C. § 523(a)(6)."). In *Elms* and *Pineau*, the debtors intentionally violated the federal copyright law for the sole

---

[6] On appeal, in *Peer Intern. Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1337 (9th 1990), the plaintiffs claimed the trial court erred in holding that the defendants' failure to pay royalties before the plaintiffs terminated their compulsory licenses did not constitute infringement where the "defendants did not continue to sell, distribute or otherwise make use of the works ... after termination of the compulsory licenses." Although the Ninth Circuit acknowledged that the plaintiffs' construction of the 1976 Act was plausible, it declined to address the issue because the parties had negotiated their own licenses, which varied from the statutory scheme. *Id.*

purpose of avoiding the fee and benefitting from the use of the copyrighted material without a valid license. Further, the court in *In re Trantham* found that the debtor "deliberately and with forethought hatched and carried out a plan to appropriate plaintiffs' patented and certificated technology for their own use" and then undertook to conceal his actions. 304 B.R. at 308 (quoting *Monsanto Co. v. Thomason* (*In re Thomason*), Case No. 00-31755, Adv. No. 01-3012 (Bankr. W.D. La. 2003)).

Plaintiffs contend that Defendant's pattern of conduct evidences his intent to benefit from the use of copyrighted material without paying royalties. First, Plaintiffs contend that Defendant has significant experience in licensing copyrighted music and was aware of the requirement to obtain licenses and to pay royalties. Plaintiffs further contend that anyone with Defendant's experience would have known that the failure to pay royalties would be harmful to Plaintiffs. Plaintiffs further claim that this is the second company with which Defendant has been involved that has closed owing significant amounts in royalties to HFA and its publisher-principals. Mr. Christos Badavas, Vice President and Senior Counsel of HFA, stated in his affidavit submitted in support of Plaintiffs' Motion for Partial Summary Judgment that he knew Defendant both from his work at Tempo and a prior company called Score Production, Inc. ("Score"). Mr. Badavas further stated that when Score went out of business in 1995, it owed outstanding royalties to HFA.[7] Plaintiffs further contend that Tempo continued to sell recordings containing copyrighted material even after Plaintiffs sent notice to Tempo that, unless the outstanding royalties were paid

[7]Although Defendant admitted in his deposition that at various times he served as Vice President and President of Score, a company that was in the business of making and distributing recordings of musical compositions, the parties dispute the details of Defendant's role at the company as well as the circumstances surrounding the licensing operations and the company's eventual closing.

within thirty days, all the licenses for which royalties remained unpaid would be terminated and that upon termination of the licenses any recordings that had been made under the terminated licenses without the payment of royalties would constitute copyright infringement. Plaintiffs also contend that Tempo continued to manufacture and distribute recordings containing unlicensed copyrighted material after the licenses were terminated.[8] Finally, Plaintiffs contend that in 2000 and 2001, while Tempo was not paying the royalties due, Tempo paid Defendant a salary and paid for the lease on Defendant's Mercedes.

Defendant contends that it was always his intent that Tempo pay the royalties it owed to Plaintiffs, but was unable to pay the royalties due to his and Tempo's increasingly precarious financial condition, which resulted in the closing of the business and liquidation of Defendant's assets. Defendant ascribed Tempo's financial difficulties in part to the availability of pre-recorded music at discount prices via the Internet (*e.g.*, Amazon.com) or through discount retailers (*e.g.*, Wal-Mart), as well as to the popularity of on-line file sharing and free downloads. Also, Tempo's corporate clients became less interested in pre-recorded music as a marketing tool and were not willing to pay as much for Tempo's product, causing Tempo's profit margin to decline. Tempo's corporate clients became even less interested in its promotions after the terrorist attacks on September 11, 2001, as they began to scale back their marketing budgets.

---

[8] Plaintiffs' claims in this case do not include claims for the use of unlicensed copyrighted material. Defendant had licenses for all 44 songs in this case. Plaintiffs did not show which of the songs were produced after the license was terminated.

Defendant stated that in the last couple of years of existence, Tempo was unable to meet its financial obligations, including payroll. Defendant and Meredith Marconi, Chief Operating Officer and minority shareholder, both stated in their affidavits that they frequently did not take a salary. Ms. Marconi further stated that when she left, Tempo owed her $65,000 for salary, commissions, and credit card reimbursements. In an effort to revive Tempo, Defendant took out a $135,000 home equity loan on his residence, most of which was used to fund Tempo's operation. Defendant also claims to have developed a new product that would be the first custom published magazine on compact disc. Defendant stated in his affidavit that he sincerely believed that Tempo could change with the times and continue as a successful company. Tempo, however, ultimately ran out of cash and ceased operations in June 2002.

No evidence has been presented to show that Defendant acted with an intent to cause injury to Plaintiffs as required by § 523(a)(6) under *Geiger*. Defendant's actions were not directed at Plaintiffs, but at attempting to maintain the failing business. While Defendant's decision to continue the business despite its financial condition and to pay some expenses while failing to pay others may have been imprudent, it does not necessarily follow that it was willful and malicious. *Cf. New Buffalo Savings Bank v. McClung* (*In re McClung*), 335 B.R. 466 (Bankr. M.D. Fla. 2005) (holding the debtor's act of conversion was not willful and malicious where the debtor was motivated by personal concerns and not by an intent to injure the bank); *see also, In re Caffey*, 248 B.R 920 (Bankr. N.D. Ga. 2000) (citing *Kawaauchau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed. 2d 90 (1998)) (holding the debtor's operation of motor vehicle without insurance may have been reckless, but did not constitute willful and malicious injury). Accordingly, the debt arising from Defendant's failure to pay royalties is dischargeable.

Finally, Defendant seeks to recover prevailing party attorney's fees under 17 U.S.C. § 505. Defendant contends that Plaintiffs' claims are frivolous and unreasonable, and were motivated in this action by a vendetta and a desire to persecute him. Defendant further contends that he has no ability to pay his attorneys fees and costs and that his fresh start will be impeded, unless Plaintiffs are required to pay his litigation fees and costs. Although Plaintiffs have not prevailed on their claims of nondischargeability arising from Defendant's acts of copyright infringement, Plaintiffs' position in this proceeding was substantially justified. Therefore, Defendant's request for an award of attorney's fees should be denied. Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED**. It is further

ORDERED that Plaintiffs' Motion for Partial Summary Judgment is **DENIED**. It is further

ORDERED that Defendant's request for an award of attorney's fees is **DENIED**.

IT IS SO ORDERED, this 29th day of September, 2006.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE