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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JOHN LENNON MILES JUDY REBEKAH MILES,	:	BANKRUPTCY CASE NO. 05-14055-WHD
Debtors.	:	
AUTOMOTIVE FINANCE CORP.	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO. 06-1006
v.	:	
JOHN LENNON MILES JBM AUTOMOTIVE INTERNET SALES,	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendants.	:	

ORDER

Before the Court is the Complaint to Determine Dischargeability, filed by the plaintiff, Automotive Finance Corporation (hereinafter the "Plaintiff") against John Lennon Miles (hereinafter the "Debtor"). Matters involved herein constitute a core proceeding over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(J); 1334.

FINDINGS OF FACT

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on October 14, 2005. Prior to the petition date, the Debtor and his wife were the sole shareholders of JBM

Automotive Internet Sales, Inc. (hereinafter the "Corporation"). Beginning in December 2002, the Debtor operated through the Corporation an independent car dealership that sold vehicles over the internet. In approximately June 2003, the Corporation entered a floor-plan financing arrangement (hereinafter the "FPA") with the Plaintiff. In this regard, the Corporation executed a promissory note, under which the Plaintiff agreed to advance funds to the Corporation to enable it to purchase inventory. The FPA provided that the Corporation would hold the funds received in trust for payment to the Plaintiff and that the Corporation would remit funds to the Plaintiff within forty-eight hours of the disposition of a vehicle.[1] At the same time the Corporation entered the FPA, it also executed floor-plan financing arrangements with two other lenders, Manheim and Center Point.

Prior to the filing of the Debtor's petition, the Corporation and the Plaintiff operated successfully under the terms of the FPA for approximately three years, during which time the Plaintiff floor-planned over two-hundred vehicles with the Corporation. Subsequently, the Corporation failed to comply with the terms of the FPA on multiple occasions. As the Corporation became "short of funds," the Debtor caused the Corporation to use the proceeds

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[1] Specifically, Paragraph 4 of the FPA states that the Corporation may sell vehicles in the ordinary course of its business and, upon the sale of a vehicle, "shall hold the amount received from the disposition of inventory in Trust for the benefit of [the Plaintiff] and . . . shall pay to [the Plaintiff], in accordance with Paragraph 2.6, an amount equal to the unpaid balance of" the lien. Paragraph 2.6 of the FPA provides that the Corporation "shall pay to [the Plaintiff] at the office of [the Plaintiff] the Purchase Money Inventory Obligations, on demand and without notice, with respect to an item of Purchase Money Inventory on the earlier of: (a) forty-eight (48) hours after the disposition of the sale or otherwise of an item of Purchase Money Inventory; or (b) the Curtailment Date.

from the sale of vehicles to pay off liens outstanding on previously sold vehicles. Specifically, the Debtor used the sales proceeds to pay off loans that had been outstanding the longest amount of time. Having worked in the retail automobile industry for approximately fifteen years, the Debtor understood that the Corporation's actions breached the terms of the FPA, but, nevertheless, he operated the Corporation in this manner in an effort to keep the Corporation in business.

The Debtor was able to continue this course of operation by always ensuring that, when the time came for the Plaintiff to conduct its lot inspection, the debt for the vehicles that had been sold out of trust were paid. On March 24, 2005, however, the Corporation failed a lot inspection conducted by the Plaintiff. At that time, the Plaintiff discovered that the Corporation had sold eleven vehicles that were subject to the Plaintiff's security interest without remitting the funds to the Plaintiff. On April 29, 2005, after being unable to contact the Debtor, the Plaintiff's representative, Thomas Muller, caused the Plaintiff to seize the remaining five vehicles on the Corporation's lot, and the Plaintiff eventually disposed of those vehicles and remitted their proceeds to the lender that held the security interest. The total amount of the debt arising from the Corporation's failure to remit the Plaintiff's portion of the sales proceeds for the eleven vehicles is $126,248.85.[2] Following the repossession of the Corporation's remaining inventory, the Corporation went out of business.

[2] The Plaintiff sued the Debtor in the United States District Court for the Southern District of Indiana and obtained a default judgment against the Debtor.

CONCLUSIONS OF LAW

The Plaintiff alleges that the Corporation committed the tort of conversion by retaining the sales proceeds from the vehicles sold out of trust. The Plaintiff further asserts that the Debtor, as the corporate officer in charge of the daily operations of the Corporation, is personally liable for any debt arising from the Corporation's conversion and that the Debtor's participation in the Corporation's tort is sufficient to support a finding that the debt arising from the failure to remit the funds is nondischargeable under section 523(a)(6).

As to the Debtor's personal liability for the Corporation's debt, the Plaintiff is correct that, under Georgia law, a corporate officer is personally liable for tortious conduct in which he knowingly and intentionally engaged, despite the fact that he may have used a corporate vehicle by which to conduct his dealings with the Plaintiff. *See WMH, Inc. v. Thomas*, 195 Ga. App. 61 (Ga. App. 1990), *aff'd in part, rev'd on other grounds*, 260 Ga. 654 (Ga. 1990) ("In Georgia, where a corporate tort is committed, an officer who takes part in its commission or who specifically directs the particular act to be done or who participates or cooperates therein is personally liable for the commission of the tort."); *In re Lennard*, 245 B.R. 428 (Bankr. M.D. Ga. 1999) ("'[I]f an officer, director or shareholder of a corporation has obtained money or property for the corporation through fraud, he will not be shielded by the corporate form.'"); *see also In re Musgrove*, 187 B.R. 808, 812 n.3 (Bankr. N.D. Ga. 1995) (Drake, J.) ("Under Georgia law, a corporate officer or director who knowingly directs or participates in corporate malfeasance thereby becomes personally liable for that corporate

wrong."). Accordingly, the Court will turn to the issue of whether the conversion of the Plaintiff's collateral constitutes a willful and malicious injury under section 523(a)(6).

Section 523(a)(6) provides that any debt for willful and malicious injury by the debtor shall be nondischargeable. 11 U.S.C. § 523(a)(6). Such an injury can include an injury to a property interest held by another. *See Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934); *In re Wolfson*, 56 F.3d 52 (11th Cir. 1995); *In re Foust, 52 F.3d 766 (8th Cir. 1995)* (knowing and fraudulent conversion of proceeds of creditor's collateral resulted in nondischargeable debt under section 523(a)(6)); *In re Pharr Luke*, 259 B.R. 426 (Bankr. S.D. Ga. 2000); *In re LaGrone*, 230 B.R. 900 (Bankr. S.D. Ga. 1999) (the act of conversion of property is an intentional injury contemplated by the exception to discharge). Like other exceptions to discharge, however, the provisions of section 523(a)(6) warrant narrow construction. *See Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986). The plaintiff bears the burden of establishing non-dischargeability under section 523(a)(6). *Hunter*, 780 F.2d at 1579.

To establish that a debt is one that arises from a willful injury, a plaintiff must show that the debtor had the specific intent to inflict the injury or that there was a substantial certainty that injury would result from the debtor's actions. *See In re Miller*, 156 F.3d 598 (5th Cir. 1998); *In re Moody*, 277 B.R. 865 (Bankr. S.D. Ga. 2001); *see also In re Hollowell*, 242 B.R. 541 (Bankr. N.D. Ga. 1999) (Murphy, J.). This standard is consistent with the United States Supreme Court's holding that, standing alone, a finding that the debtor's

actions were voluntary is insufficient to support the conclusion that the debt is nondischargeable. *See Kawaauhau v. Geiger*, 523 U.S. 57 (1998) ("The word 'willful' . . . modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury."). "Malicious means wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will." *In re Neal*, 300 B.R. 86, 93-94 (M.D. Ga. 2003) (citing *In re Walker*, 48 F.3d 1161 (11th Cir. 1995)).

In this case, the Debtor has argued that his failure to remit the proceeds from the out-of-trust vehicles was not willful and malicious because he used the proceeds to continue the Corporation's business operations and always intended to bring his account with the Plaintiff current through the sales of additional vehicles. The Debtor points to the fact that he was able to do so for an extended time period and , from this evidence, suggests that he would have been able to continue this mode of business indefinitely had it not been for the Plaintiff's intervention in repossessing the remaining five vehicles in the Corporation's inventory.

The Court recognizes that evidence to suggest that a debtor engaged in out of trust sales as a means to continue business operations and to increase the amount of funds available for repayment to a secured creditor may preclude a conclusion that the debtor acted with malice. *See In re Long*, 774 F.2d 875 (8th Cir. 1985). However, in this case, the Court is not persuaded that the Debtor's conduct was motivated by a sincere desire to maintain the

business for the purpose of repaying secured creditors. The Court agrees with the Plaintiff's view of the evidence and concludes that, at some point prior to March 2005, the Debtor must have realized that it would have been impossible for the Corporation to bring the Plaintiff's account current by selling the remaining five vehicles. The Court also agrees with the Plaintiff that the Debtor, having substantial experience in the retail automotive industry, having operated his own business for several years, and having access to information regarding the number of vehicles available in the Corporation's inventory and the Corporation's general financial condition, would have known to a substantial certainty that the Plaintiff's security interest would be harmed by the Corporation's continued out-of-trust sale of vehicles. Instead of winding down the Corporation's business or giving the Plaintiff a choice as to whether to continue extending credit, the Debtor consciously chose to continue selling vehicles without remitting the sales proceeds to the Plaintiff and actively concealed the Corporation's business practices from the Plaintiff. These actions resulted in an economic loss to the Plaintiff. Accordingly, the Court finds that the Debtor's conduct caused a willful and malicious injury to the Plaintiff within the meaning of section 523(a)(6).

That being said, "a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances." *Davis*, 293 U.S. at 332; *see also In re Wolfson*, 56 F.3d 52 (11th Cir. 1995). As the United States Supreme Court has stated, "[t]here may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice." *Davis*, 293 U.S. at 332. "There may

be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed." *Id.* In such cases, the conversion will be found to constitute a tort, but not a "willful and malicious one." *Id.*

In *In re Wolfson*, the Eleventh Circuit Court of Appeals relied on the Court's instruction in *Davis* when it reversed the lower court's determination that a debt resulting from a debtor's conversion of a secured creditor's proceeds was nondischargeable under section 523(a)(6). In that case, the lower court found that the creditor knew that the debtor routinely deposited the proceeds from the sale of the collateral into its general operating account and used the proceeds to pay general operating expenses. Notwithstanding this knowledge, the creditor continued to extend credit to the debtor in an effort to return the debtor's business to profitability. The court concluded that, through its actions, the creditor "waived its right to assert under 11 U.S.C. § 523(a)(6) that its claim [was] nondischargeable and that it suffered 'willful and malicious injury.'"

Here, the Debtor testified that the Plaintiff was aware for some time prior to the March 2005 lot inspection that the Corporation had been in a situation in which it was "rolling out of trust." The Debtor referenced lot checks prior to March 2005, at which the Debtor contends, the Plaintiff would have noted that the Corporation was out of trust. However, the Debtor, when asked whether the Plaintiff was aware of the Corporation's business practices, answered that he was not "sure what they were aware of" and, when asked whether he ever told the Plaintiff about the Corporation's sales, stated that the Plaintiff

"didn't ask." In response to his attorney's question, the Debtor agreed that the Corporation was "out of trust for a few days," but was always able to catch up the account. He stated that, if he had not been able to do so, the lenders would never have continued the Corporation's line of credit. The Plaintiff's representative, Thomas Muller, who testified at the trial, had recently begun his employment with the Plaintiff and could not effectively rebut the Debtor's testimony as to whether the representative's predecessor had been aware of the Corporation's out of sales of vehicles.

Nonetheless, having considered all of the circumstances of this case, as well as the Debtor's testimony and his credibility as a witness, the Court finds that the Plaintiff did not become aware of the Corporation's out-of-trust position until the time of the March 2005 lot inspection. This conclusion is based on the fact that the Debtor's own testimony with regard to whether the Plaintiff was aware of the out of trust sales was ambiguous. Many statements made by the Debtor indicate that the Plaintiff would not have had an opportunity to discover that the Corporation was selling significant numbers of vehicles out of trust and that, had the Plaintiff made this discovery, it would have ceased extending credit. This latter conclusion is also supported by the testimony of the Plaintiff's representative. Additionally, the Debtor admitted that he engaged in conduct specifically designed to conceal the out of trust situation from the Plaintiff and his other lenders. He testified that he made a practice of selling vehicles floor planned by one lender and using the proceeds to pay off a previously sold vehicle and that, in most cases, the vehicle sold out of trust would have to be paid off within thirty days to avoid the out of trust sale being detected during a lot check. The Debtor's

efforts to conceal the out of trust sales from the Plaintiff and the other lenders sufficiently rebuts the Debtor's self-serving testimony that the Plaintiff was aware of the Corporation's business practices. At the very least, the evidence could be construed to support a finding that the Plaintiff became aware on occasion that the Corporation was out of trust for a very short time, but, even according to the Debtor's testimony, the situation was corrected and the Plaintiff was paid within a day or two. This is insufficient to support a finding under *Wolfson* that the Plaintiff waived its right to assert that the out of trust sales resulted in a nondischargeable debt.

CONCLUSION

Having carefully considered the record, the Court concludes that the debt owed to the Plaintiff by the Debtor is nondischargeable under section 523(a)(6) of the Bankruptcy Code. A final judgment in favor of the Plaintiff shall be entered concurrently with the entry of this Order. All other claims asserted in the Plaintiff's complaint are hereby deemed abandoned and are **DISMISSED**.

IT IS SO ORDERED.

At Newnan, Georgia, this 10 day of January, 2007.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE