IT IS ORDERED as set forth below:

Date: July 13, 2007

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
	:	
BRIAN WESLEY REDICK	:	BANKRUPTCY CASE
LINETTE MAE REDICK,	:	NO. 06-10479-WHD
	:	
Debtors.	:	
_____	:	
	:	
AUTOMOTIVE FINANCE CORP.	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 06-1095
v.	:	
	:	
BRIAN WESLEY REDICK	:	
LINETTE MAE REDICK,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendants.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Request for Entry of Default and Motion for Partial Summary Judgment, filed by the plaintiff, Automotive Finance Corporation (hereinafter the "Plaintiff") against Brian and Linette Redick (hereinafter the "Debtors"). 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 Debtors were the sole shareholders of Christian Auto Brokers, Inc. (hereinafter the "Corporation") and were personally in charge of the day-to-day operations of the Corporation. Plaintiff's Statement of Undisputed Facts, ¶ 3.[1] Through the Corporation, the Debtors operated an independent car dealership in the State of Georgia. Plaintiff's Statement of Undisputed Facts, ¶ 4. On approximately August 15, 2002, the Corporation entered a floor-plan financing arrangement (hereinafter the "FPA") with the Plaintiff. Plaintiff's Statement of Undisputed Facts, ¶ 6. In this regard, the Corporation executed a promissory note (hereinafter the "Note"), under which the Plaintiff agreed to advance funds to the Corporation to enable it to purchase inventory. Plaintiff's Statement of Undisputed Facts, ¶ 5. The Debtors guaranteed the obligations of the Corporation (hereinafter the "Guaranty").

[1] The Debtors have not responded to the Plaintiff's motion and have not specifically controverted the Creditor's Statements of Undisputed Fact. Accordingly, the Court must deem these facts to be admitted. *See* BLR 7056-1(b)(2) ("All material facts contained in the moving party's statement which are not specifically controverted in respondent's statement shall be deemed admitted.").

Plaintiff's Statement of Undisputed Facts, ¶ 5.

The FPA authorized the Corporation to sell inventory in the ordinary and regular course of business, but provided that the Corporation would hold the funds received in trust for payment to the Plaintiff. Plaintiff's Statement of Undisputed Facts, ¶ 7. The Corporation was obligated to remit funds to the Plaintiff within forty-eight hours of the disposition of a vehicle. Plaintiff's Statement of Undisputed Facts, ¶ 8. The Corporation and the Debtors defaulted on the payments due under the Note and the Guaranty. The Defendant guaranteed the obligations of the Corporation. Plaintiff's Statement of Undisputed Facts, ¶¶ 10-11. The Debtors sold three vehicles without remitting the proceeds to the Plaintiff. Plaintiff's Statement of Undisputed Facts, ¶ 12. The Debtors tendered to the Plaintiff a check for $56,155, which was returned to the Plaintiff by the bank due to insufficient funds. Plaintiff's Statement of Undisputed Facts, ¶¶ 14-15.

On November 19, 2004, the Plaintiff filed suit against the Corporation and the Debtors in the Marion County Superior Court, State of Indiana. Plaintiff's Statement of Undisputed Facts, ¶ 21. The state court complaint asserted claims for breach of note and security agreement, breach of guaranty, criminal deception for selling vehicles of trust, and check deception. Plaintiff's Statement of Undisputed Facts, ¶ 21. On November 8, 2005, the state court granted summary judgment in favor of the Plaintiff in the amount of $403,981.44. Plaintiff's Statement of Undisputed Facts, ¶ 24.

The Debtors filed a petition under Chapter 7 of the Bankruptcy Code on March 30,

2006. On October 11, 2006, the Plaintiff filed a complaint to determine the nondischargeability of the judgment debt. The Debtors' answer was due on November 10, 2006. The Debtors filed an answer on November 16, 2006. On May 7, 2007, the Plaintiff filed what the Court construes as a request for Clerk's entry of default[2] and the instant motion for summary judgment. The motion for summary judgment seeks judgment against the Debtors with regard to the nondischargeability count of the Complaint. The Debtors failed to respond to either the request for entry of default or the motion for summary judgment.

CONCLUSIONS OF LAW

Despite the fact that the Debtors filed an answer on November 16, 2007, the answer was untimely, and the Debtors are in default for failure to plead or defend on a timely basis. See Fed. R. Civ. P. 55(a). The Debtors have never moved to have the default set aside. Accordingly, the Court hereby recognizes and enters default against the Debtors.

As noted above, the Court considers the Plaintiff's pleading to be a request for entry of default, rather than a motion for default judgment. Nonetheless, if the Court were to treat the pleading as a motion for default judgment, the Court would find, for the reasons stated below, that the facts alleged in the Complaint, even when assumed to be true, are insufficient

[2] Although the pleading filed is captioned Motion for Default Judgment, and, in the body of the pleading states that the Plaintiff seeks entry of a default judgment, the Plaintiff had not previously requested the entry of default and no default had been noted on the docket. Additionally, the prayer at the conclusion of the pleading states that, because the Debtors had failed to defend, "the Clerk shall enter the parties' default."

to support entry of a default judgment as to all of the Plaintiff's claims. *See In re Alam*, 314 B.R. 834 (Bankr. N.D. Ga. 2004); *Nishimatsu Construction Co., Ltd. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("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."). As to that portion of the Complaint that does state a valid cause of action, the Court finds that the Plaintiff is entitled to summary judgment as to that claim as discussed below.

In accordance with Rule 56 of the Federal Rules of Civil Procedure (applicable to bankruptcy pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure), the Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Furthermore, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. Lastly, the moving party has the burden of establishing the right of summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482,

484 (11th Cir. 1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the movant has made a *prima facie* showing of its right to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991). In the case *sub judice*, the Court will examine the record to determine whether the Plaintiffs' motion provides a sufficient legal basis which would entitle it to a judgment as a matter of law. *Dunlap*, 858 F.2d at 632; *Kelly*, 924 F.2d at 358.

A. *Damages Arising From Conversion of Collateral*

The Plaintiff asserts that the Debtors' conduct with regard to the Plaintiff is sufficient to render the judgment debt nondischargeable under section 523(a)(2)(A) and (a)(6). A portion of the judgment debt, $239,516.44, arises as a consequence of the Debtors' conversion of the Plaintiff's collateral, while the remaining $164,465.00 represents an award of damages for the Debtor's commission of check deception.

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)).

"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) (where creditor knew that debtor was selling collateral out of trust and continued to extend credit to the debtor in an effort to return the debtor's business to profitability, 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.'"). 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 this case, the Plaintiff has established sufficient facts to support a finding that the Debtors' failure to remit the proceeds from the out-of-trust vehicles was willful and malicious. The undisputed facts show that the Debtors sold the vehicles and intentionally failed to remit the proceeds to the Plaintiff. There is no evidence to support a finding that the failure to remit the funds was the result of any good faith belief on the Debtor's part that the Plaintiff had authorized the Debtors to sell the vehicles and retain the funds. Accordingly, there are no remaining material questions of fact, and the Plaintiff is entitled

to judgment as a matter of law as to that portion of the judgment debt attributable to the Debtors' failure to remit the proceeds of the collateral.

B. *Damages for Check Deception*

With regard to the amount of the debt arising from the Debtors' check deception, the judgment entered in the state court litigation awarded the Plaintiff $164,465 that necessarily constituted treble damages pursuant to Indiana Code section 34-24-3-1. To award such damages, the state court must have found that the Debtors violated Indiana Code Section 34-43-5-5. *See* I.C. §§ 34-24-3-1. ("If a person suffers a pecuniary loss as a result of a violation of IC 35-43 . . . the person may bring a civil action against the person who caused the loss for" treble damages). Indiana Code Section 34-43-5-5 provides that a person commits the crime of check deception when the person "knowingly or intentionally issues or delivers a check, a draft, or an order on a credit institution for the payment of or to acquire money or other property, knowing that it will not be paid or honored by the credit institution upon presentment in the usual course of business." I.C. §§ 34-43-55.

The Court does not question the Plaintiff's assertion that the state court must have found that the Debtors engaged in fraud by issuing a check to the Plaintiff. However, even if the Court granted preclusive effect to the state court judgment, the Court could not find that the damages assessed on account of the Debtors' fraud are nondischargeable under section 523(a)(2)(A).

Pursuant to section 523(a)(2)(A), "a discharge under Chapter 7 of the Bankruptcy

Code does not discharge a debtor from any debt for money, property, services or credit to the extent obtained by false pretenses, a false representation or actual fraud . . . ." *In re Couch*, 154 B.R. 511 (Bankr. S.D. Ind. 1992). A debt arising from the presentation of an NSF is not nondischargeable under section 523(a)(2)(A) if the "debtor simply tenders a bad check in payment of a preexisting debt and obtains nothing from the creditor in exchange for the bad check." *Id*. at ; *see also In re Preston*, 47 B.R. 354 (E.D. Va. 1983) (payment of a preexisting debt with a bad check does not render the debt nondischargeable because the debtor did not obtain money, property, services, or an extension of credit by presenting the bad check). While the Plaintiff is owed a debt (treble damages) by the Debtors arising out of their presentation of a bad check, the debt is not one "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by" fraud as is required for a finding of nondischargeability. 11 U.S.C. § 523(a)(2)(A). The Debtors obtained no money, property, services, or credit by presenting the check. Instead, they obtained credit and money from the Plaintiff at the time the Plaintiff advanced funds under the FPA.

The Plaintiff has not shown that it is entitled to judgment as a matter of law with regard to its allegation that the treble damages awarded in connection with the Debtors' issuance of a nonsufficient funds check are nondischargeable under section 523(a)(2)(A). Accordingly, the motion for summary judgment as to that claim must be denied.[3]

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[3] While the presentation of the NSF check was arguably a willful and malicious act by the Debtors, it does not appear that the presentation of the check caused an injury to the Plaintiff. The Plaintiff had previously loaned the funds at issue to the Debtors and were, therefore, not deprived of any additional funds or property when the check was returned by the bank. However, the Court will not foreclose the possibility that section 523(a)(6) may apply to the treble damages arising from the check deception and will provide the

CONCLUSION

Having carefully considered the Plaintiff's request for entry of default and motion for summary judgment, the Court concludes that the Plaintiff has established that the Debtors are in default for failing to file an answer within the time permitted and that the Plaintiff is entitled to summary judgment as to the nondischargeability, pursuant to section 523(a)(6), of that portion of the debt resulting from the Debtors' conversion of the Plaintiff's collateral. The Court concludes from the evidence submitted that this figure is $239,516.44 plus interest accruing at the rate of 8% from the date of the entry of the state court judgment. As to the remainder of the Plaintiff's claim regarding the non-dischargeability of the particular debt owed by the Debtors, summary judgment is inappropriate for the reasons discussed above.

Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Plaintiff's Motion for Summary Judgment is **GRANTED in part and DENIED in part**. Having determined that there is no just reason for delay, the Court shall enter contemporaneously herewith a final judgment in favor of the Plaintiff in accordance with Rule 7054 of the Federal Rules of Bankruptcy Procedure and Rule 54(b) of the Federal Rules of Civil Procedure.

It is **FURTHER ORDERED** that the Debtors are in default with regard to the Plaintiff's Complaint.

With regard to the Plaintiff's remaining claims under section 523(a) and 727(a), the

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Plaintiff an additional opportunity to address the issue in light of the Court's decision that section 523(a)(2)(A) is not applicable.

Plaintiff shall, within sixty (60) days of the date of the entry of this Order, file either a renewed motion for summary judgment, a motion for default judgment, or a request for a trial date.

END OF DOCUMENT