IT IS ORDERED as set forth below:

Date: December 18, 2007

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NUMBERS
WILLIAM MICHAEL HART,	:	**BANKRUPTCY CASE NO. 06-71928-MGD**
Debtor,	:	
REGIONS BANK,	:	**ADVERSARY CASE NO. 07-06405**
Plaintiff,	:	
v.	:	CHAPTER 7
WILLIAM MICHAEL HURT,	:	
Defendant.	:	

ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

This case is before the Court on Plaintiff's Motion for Default Judgment ("Motion") (Docket No. 6). Regions Bank ("Plaintiff") commenced the underlying adversary proceeding against William Michael Hurt ("Debtor" or "Defendant") on August 14, 2007, to determine the

dischargeablilty of debt incurred by Debtor pursuant to 11 U.S.C. § 523(a)(6). On August 14, 2007, a summons was issued commanding Debtor to file and serve an answer to the complaint. On August 15, 2007, Plaintiff served a summons and copy of the complaint on Debtor, Debtor's bankruptcy counsel, and the Chapter 7 Trustee by first class mail postage pre-paid pursuant to Rule 7004(b) of the Federal Rules of Bankruptcy Procedure. 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." Debtor has failed to file an answer to the complaint and Plaintiff is requesting entry of judgment against Defendant in the amount of $11,555.97 plus pre- and post-judgment interest, liquidated attorneys' fees in the amount of $3,500, and all court costs.

Defendant has not filed a response to the Motion for Default Judgment, which is therefore deemed unopposed pursuant to Bankruptcy Local Rule 7007-1(c) for the Northern District of Georgia. However, the entry of default judgment is discretionary. *See* Fed. R. Civ. P. 55(b) made applicable in this proceeding by Fed. R. Bankr. P. 7055 ("Judgment by default *may* be entered" by the Court) (emphasis added); *See also FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834, 837 (Bankr.N.D.Ga. 2004) (Bonapfel, J.). First, the plaintiff must prove a *prima facie* case in order to succeed on a motion for default judgment. *Capital One Bank v. Bungert (In re Bungert)*, 315 B.R. 735, 737 (Bankr.E.D.Wis. 2004) (internal citations omitted). The Court has reviewed the complaint and the record in the case and has concluded that Plaintiff has failed to allege facts sufficient to establish a basis for the Court to be able to grant judgment pursuant to § 523(a)(6) and Plaintiff's Motion for Default Judgment is therefore **DENIED**.

According to the facts cited in the complaint, Debtor financed a principal balance of $13,527.40 with Regions Bank and granted Regions a security interest in a 2005 Pace American

Trailer. (Complaint at ¶¶ 4-6). Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on September 27, 2006, and that case was converted to Chapter 7 on November 9, 2006. (Complaint at ¶ 1). Plaintiff received relief from the stay with respect to the subject collateral on January 4, 2007, and made numerous attempts to recover the collateral, including obtaining a Writ of Possession, executed by a Sheriff, and an order compelling Debtor to surrender the collateral issued by the State Court of Gwinnett County. (Complaint at ¶¶ 7-10). According to the complaint, Debtor contends that Regions or some other party repossessed the collateral, but neither Regions, nor any of its agents, have repossessed the subject collateral. (Complaint at ¶ 10). Regions also alleges that Debtor may have sold or transferred the collateral to a third party and has not remitted any sales proceeds to Regions; such actions by Debtor constitute conversion of the collateral. (Complaint at ¶¶ 11-12). Finally, the complaint states that Debtor has intentionally converted the collateral by preventing Regions from lawful repossession, Debtor never received permission from Regions to convert or sell the collateral or proceeds thereof, and Debtor has failed to deliver any proceeds to Regions. (Complaint at ¶ 16). Plaintiff's unanswered complaint avers that Debtor has wilfully and maliciously inflicted injury upon Regions by so converting its collateral. *Id.*

11 U.S.C. § 523(a)(6) provides that "[a] discharge under section 727...of this title does not discharge an individual debtor from any debt... (6) for willful and malicious injury by the debtor to another entity or to the property of another entity." To be nondischargeable under § 523(a)(6), the debt must result from a deliberate and intentional injury and not merely a deliberate or intentional act that leads to injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998). Conversion may amount to a wilful and malicious injury where a debtor deprives another of his property by deliberately disposing of it without authority, *McIntyre v. Kavanaugh*, 242 U.S. 138,

37 S.Ct. 38 (1916). However, while negligent or reckless acts that deprive a creditor of his property may amount to conversion, they do not rise to the level of "wilful and malicious" so as to except the debts from discharge. *See Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S.Ct. 151 (1934). To succeed on a § 523(a)(6) dischargeability action based on conversion, a creditor must therefore allege and prove that a debtor deliberately "deprive[d] the creditor of its lawful exercise of rights in the collateral or its proceeds by disposing of or retaining it without the creditor's knowledge or consent." *First Liberty Bank v. LaGrone*, 230 B.R. 900, 904 (Bankr. S.D. Ga. 1999) (citing *Kawaauhau*, 118 S.Ct. at 977).

The relevant facts set forth in Plaintiff's complaint are that Debtor incurred a debt to Plaintiff secured by a 2005 Pace American Trailer, that Plaintiff obtained relief from the stay with respect to the collateral and has made multiple attempts to recover the collateral, that Plaintiff has been unable to recover the collateral, and that Debtor has not remitted any "proceeds" to Plaintiff in payment of the debt. While Plaintiff alleges that Debtor converted the collateral thus wilfully and maliciously inflicting injury on Plaintiff, these allegations, which go to the heart of a section 523(a)(6), are alleged in a manner that makes them pure speculation: "the Debtor *may have sold or transferred* the Collateral to a third party or is otherwise making same unavailable for recovery." (Complaint at ¶ 11). At least twice Plaintiff states that "upon information and belief" Debtor sold or otherwise transferred the collateral contrary to the terms of the security agreement, but Plaintiff does not specify the source or content of such information.

The complaint does not state with specificity what has happened to the subject collateral and the Court, therefore, even taking the allegations of the complaint as true, cannot make a determination regarding whether Debtor's actions were wilful and malicious or even whether Debtor

has acted at all. So while Plaintiff has alleged that any conversion by Debtor was done with wilful and malicious intent, the complaint does not sufficiently allege that the collateral was in fact converted. The Court cannot grant Plaintiff's Motion for Default Judgment where Plaintiff has failed to make out a prima facie case under § 523(a)(6).

The Court also notes that Debtor's alleged conduct occurred post-petition and after Plaintiff had been granted relief from the automatic stay. Even if Plaintiff were able to allege a cause of action under 11 U.S.C. § 523(a)(6) under these circumstances, the "debt" created by any wilful and malicious injury is distinct from the pre-petition debt for the vehicle itself, and would be limited to the damages sustained from loss of the collateral.

Accordingly, it is

ORDERED that Plaintiff's Motion for Default Judgment is hereby **DENIED** without prejudice to Plaintiff's amendment of the complaint within ten (10) days of the entry hereof.

The Clerk's Office is directed to serve a copy of this Order upon Plaintiff's counsel, Defendant, Debtor's counsel, and the Chapter 7 Trustee.

END OF DOCUMENT