IT IS ORDERED as set forth below:

Date: January 4, 2012

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	**CASE NUMBERS**
SANOBER F. SHEIKH	BANKRUPTCY CASE NO. 11-12172-WHD
Debtor.	
AUTOMOBILE ACCEPTANCE CORP.	
Plaintiff,	ADVERSARY PROCEEDING NO. 11-1058
v.	
SANOBER F. SHEIKH,	
Defendant.	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

O R D E R

Before the Court is the Motion for Default Judgment, filed by the plaintiff,

Automobile Acceptance Corporation (hereinafter the "Plaintiff") against Sanober F. Sheikh (hereinafter the "Debtor"). This matter constitutes 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 obtained a loan from the Plaintiff in the approximate amount of $21,346.20 on or about April 8, 2011. Complaint, ¶ 3. The loan was secured by a lien against a 2004 Honda Civic EX (hereinafter the "Vehicle"). *Id*. The Debtor's insurance carrier issued a check to the Plaintiff in the amount of $2,851 to cover the cost of repairing damage to the Vehicle. *Id*. ¶ 4. The Plaintiff endorsed the check and sent it to the Debtor to use to pay for the repairs. *Id*. The Debtor abandoned the Vehicle at the repair shop, failed to pay for the repairs, and retained the insurance funds for her own use. *Id*. ¶ 5.

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on June 29, 2011. The Debtor's statement of intent indicates that she intended to reaffirm the debt owed to the Plaintiff. The Debtor has not, however, executed a reaffirmation agreement with regard to the debt owed to the Plaintiff.

On October 3, 2011, the Plaintiff filed a complaint to determine the nondischargeability of the debt owed by the Debtor to the Plaintiff. The Debtor's answer was due on November 2, 2011, which, pursuant to Rule 7012(a), was thirty days after the issuance of the summons. The Debtor served an answer on the Plaintiff on November 7,

2011. On December 5, 2011, the Plaintiff filed a motion for default judgment, and the Debtor failed to respond to the motion.

CONCLUSIONS OF LAW

Despite the fact that the Debtor served the Plaintiff with an answer on November 7, 2011, the answer was untimely, and the Debtor is in default for failure to plead or defend on a timely basis. *See* Fed. R. Civ. P. 55(a). The Debtor has not moved to have the default set aside. Accordingly, the Court hereby recognizes and enters default against the Debtor.

To grant the default judgment requested by the Plaintiff, however, the Court must find that the facts alleged in the Complaint, which the Court must deem admitted, are sufficient to support entry of a default judgment. *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."); *see also* FED. R. BANKR. P. 7055; FED. R. CIV. P. 55.

The Plaintiff asserts that the debt owed by the Debtor to the Plaintiff arose as a result of a "willful and malicious" injury inflicted by the Debtor upon the Plaintiff. 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, the voluntary nature of the debtor's action 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)).

Although conversion of a secured creditor's collateral or its proceeds can constitute the basis for a finding of nondischargeability, "[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. In such a case, 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 Debtor failed to use the proceeds of the Plaintiff's collateral to repair the damage to the Vehicle and further failed to maintain the Plaintiff's collateral by abandoning it. While the Court can surmise that, in doing so, the Debtor breached the terms of the security agreement between the Plaintiff and the Debtor, the Court cannot conclusively find this to be the case, as the Plaintiff has made no allegations regarding the terms of the agreement between the parties. Similarly, the Plaintiff has not filed a copy of the agreement, from which the Court

could discern the nature of any such obligations on the Debtor's part.

Further, assuming the security agreement obligated the Plaintiff to repair and maintain control over the Plaintiff's collateral, the Complaint fails to allege that the Debtor was aware of and understood these obligations, yet acted in disregard of her obligations and the Plaintiff's rights. *See United Bank of Southgate v. Nelson*, 35 B.R. 766, 776 (D.C. Ill. 1983) ("The debtor's knowledge may be inferred from his experience in business, his concealment of the sales, his admission that he had read the security agreement which forbid the sale or that he understood what was meant by the term security agreement and collateral used as security.").

The Court lacks sufficient facts to determine the amount of the debt that would be nondischargeble. Only the amount of the debt that arose from the willful and malicious injury would be nondischargeable. The Debtor injured the Plaintiff by accepting the insurance proceeds to pay for the repair of the Vehicle and not doing so. She also impeded the Plaintiff's ability to repossess and liquidate its collateral. Accordingly, the measure of damages would be the amount the Plaintiff could have realized had the Debtor paid for the repairs and made the Vehicle available to the Plaintiff to liquidate. Unless the value of the repaired Vehicle at the time of its abandonment was equal to or greater than the amount of the debt, the amount of the debt subject to section 523(a)(6) would not be equal to the amount of the unpaid debt. For these reasons, the Plaintiff's motion for default judgment must be denied.

CONCLUSION

Having carefully considered the Plaintiff's request for entry of a default judgment, the Court concludes that the Plaintiff has not established its entitlement to a default judgment. The Plaintiff's Motion is hereby **DENIED** without prejudice to the amendment of the complaint and the filing of a renewed motion for default judgment, the filing of a motion for summary judgment following discovery, or a request for a trial date.

END OF DOCUMENT