UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G11-20382-REB
STEVEN MILTON CRUMLEY and HOLLY ANN CRUMLEY a/k/a HOLLY V. CRUMLEY,	:	
Debtors.	:	
	:	ADVERSARY PROCEEDING
AgGEORGIA FARM CREDIT, ACA,	:	NO. 11-2083
Plaintiff,	:	
v.	:	
	:	CHAPTER 12
STEVEN MILTON CRUMLEY and HOLLY ANN CRUMLEY a/k/a HOLLY V. CRUMLEY,	:	
Defendants.	:	JUDGE BRIZENDINE

ORDER DENYING DEFENDANTS' MOTION TO DISMISS COMPLAINT

Before the Court is the motion of Defendant-Debtors filed on May 24, 2011 for entry of an order dismissing the complaint filed by Plaintiff named above as filed on April 29, 2011. In the complaint, as amended by Plaintiff on June 2, 2011, Plaintiff asserts that it lent Debtors various sums of money for use in operation of their cattle business. The loans were secured by a perfected security interest in Debtors' cattle and its progeny, including after-acquired property and proceeds of same, as reflected in certain promissory notes and security agreements. According to Plaintiff, without its consent, Debtors later sold the cattle and failed to use at least $175,000.00 of the proceeds for purposes of their business or to remit same to Plaintiff in

violation of their agreements with Plaintiff. As a result, Plaintiff contends that this indebtedness should be determined to be nondischargeable as a willful and malicious injury to Plaintiff and its collateral under 11 U.S.C. § 523(a)(6), and that it have judgment herein in said amount.

In their motion to dismiss, Debtors, who have not yet filed an answer, assert that Plaintiff's theory of recovery fails to state a claim upon which the requested relief can be granted as the sale of cattle subject to a security interest does not constitute a willful and malicious injury within the meaning of Section 523(a)(6). Debtors argue that, under the standard set forth in *Hope v. Walker (In re Walker)*, 48 F.3d 1161 (11th Cir. 1995), the complaint does not set forth sufficient facts, which if true, support a claim for relief in relation to a willful and malicious injury as intended by Debtors in connection with their sale of the collateral and use of the proceeds.

In its response to the motion filed on June 2, 2011, Plaintiff contends that consistent with Rule 8 of the Federal Rules of Civil Procedure, adopted herein through Rule 7008 of the Federal Rules of Bankruptcy Procedure, and Rule 12(b)(6) of the Federal Rules of Civil Procedure, adopted herein through Rule 7012 of the Federal Rules of Bankruptcy Procedure, while more is required than conclusory statements or merely reciting the elements of the statutory provision at issue, a complaint need only give "fair notice" of the claim and its supporting grounds. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007), citing *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Plaintiff maintains that it has met this standard because it can reasonably be determined from its allegations that a basis for entry of relief in its favor can be established at a trial based on Section 523(a)(6). Specifically, Plaintiff states that while a sale of collateral is a conversion of property

that may not in and of itself render a resulting indebtedness nondischargeable, it has alleged that Debtors' actions in converting the subject collateral were willful and malicious in that the injury suffered by Plaintiff was intended by Debtors. *See Ford Motor Credit Co. v. Owens*, 807 F.2d 1556 (11th Cir. 1987); *Citizens Bank of Washington Co. v. Wright (In re Wright)*, 299 B.R. 648 (Bankr. M.D.Ga. 2003).

Based upon a review of the complaint as amended, the motion, brief, and response thereto, the Court concludes that Debtors' motion should be denied. Until recently, the guiding standard in deciding whether Plaintiff's factual allegations are sufficient to withstand a motion for dismissal under Fed.R.Civ.P. 12(b)(6) required a determination regarding whether it is certain "beyond doubt that the plaintiff can prove no set of facts" that could serve as a basis for relief as prayed in its complaint. *Fuller v. Johannessen (In re Johannessen)*, 76 F.3d 347, 349 (11th Cir. 1996), quoting *Conley v. Gibson*, 355 U.S. at 45-46, 78 S.Ct. at 102. In *Twombly*, however, the United States Supreme Court ruled that "to survive a motion to dismiss, a complaint must now contain factual allegations which are 'enough to raise a right to relief above the speculative level.'" 550 U.S. at 555, 127 S.Ct. at 1965, as quoted in *Berry v. Budget Rent A Car Systems, Inc.*, 497 F.Supp.2d 1361, 1364 (S.D.Fla. 2007). The court still takes the well-pleaded factual allegations of the complaint as true in making this determination and views them "in the light most favorable to the plaintiff." *Johannessen*, 76 F.3d at 350. Consistent with these legal standards, and based upon a review of the factual allegations in the complaint as amended, this Court concludes that Plaintiff's complaint herein is sufficient to state a plausible claim for the relief requested.

A "willful and malicious injury" under 11 U.S.C. § 523(a)(6) is confined to acts, such

as intentional torts, done with an actual intent to cause injury as opposed to acts done intentionally that result in injury. *See Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998); *see also Walker*, 48 F.3d 1161. This distinction is important because reckless conduct resulting in injury that evidences an entire want of care or conscious indifference to the consequences is not sufficient under the legal standard established in this exception to discharge. Stated differently, Section 523(a)(6) addresses only those situations in which a debtor desired the injury caused by his or her conduct. It does not reach a debtor's failure to meet a duty of care that results in injury to someone else. *See generally Herndon v. Brock (In re Brock)*, 186 B.R. 293 (Bankr. N.D.Ga. 1995); *Myrick v. Ballard (In re Ballard)*, 186 B.R. 297, 299-301 (Bankr. N.D.Ga. 1994).

As discussed in *Woolley v. Woolley (In re Woolley)*, 288 B.R. 294, 301-02 (Bankr. S.D.Ga. 2001), whereas *Geiger* generally narrowed the scope of this provision to "trespassory intentional torts" where the debtor is shown to have "desired or anticipated injury," the matter of a debtor's state of mind has been subject to further interpretation in the case law. Reviewing recent decisions on this issue, the court in *Woolley* examined Eleventh Circuit precedent in the *Walker* case and concluded that sufficient evidence of a debtor's "subjective" or "personal substantial certainty" with regard to an injury resulting from his or her act remains necessary under Section 523(a)(6), as opposed to a purely objective or reasonable person test that risks reinstating the "previously rejected 'reckless disregard' standard." 288 B.R. at 302; questioning *Miller v. J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998) (allowing that either an objective or a subjective finding satisfies willful and malicious injury requirement).

This Court agrees and thus, with respect to willfulness under Section 523(a)(6), it must

be shown that a debtor either acted "with the desire to cause" the resulting harm to a targeted person, acted "with knowledge that injury will occur" to such person, or acted in the belief that harm was "substantially certain to result" either through evidence of "subjective motive" regarding same or when "'no other plausible inference'" can be drawn from the record than that the debtor entertained such knowledge. *See Woolley*, 288 B.R. at 301-02 (cites omitted).

Regarding maliciousness, the legal standard here does not require "a specific intent to harm," and can be found "even in the absence of personal hatred, spite or ill-will." *Walker*, 48 F.3d at 1164. An injury is malicious under Section 523(a)(6) when same is determined to be "wrongful and without just cause or excessive," or simply resulting from a bad act having no redeeming social value or purpose whatsoever. *Id.* (cites omitted).

As an additional point, the Court observes that this specific dischargeability exception ordinarily addresses torts and not contract actions. Hence, a suit alleging a knowing breach of a contract provision, such as a duty under a security agreement, must also be shown to rise to the level of tortious conduct to warrant relief under Section 523(a)(6). *See Atlanta Contract Glazing, Inc. v. Swofford (In re Swofford)*, _ B.R. _, 2008 WL 7842040 (Bankr. N.D.Ga. Dec. 2008), citing *Lockerby v. Sierra*, 535 F.3d 1038, 1041-42 (9th Cir. 2008).

In view of the foregoing, the Court concludes that Plaintiff's allegations could serve as a basis for relief under Section 523(a)(6) and thus, its complaint should not be dismissed under Rule 12(b)(6). If true and properly proven, Debtors' acts in disposing of the collateral in question and diverting the proceeds to purposes contrary to their known obligation as set forth in the security agreements could be shown to have been wrongful and intentional by Debtors as tortious conduct injuring Plaintiff's rights and causing it financial harm. In addition, in the case

law, it appears that an act of conversion or sale of collateral out of trust, even if shown to have been done merely as part of an attempt to avoid further financial problems or save a business, *could* support a finding that such act was without just cause or excuse given a debtor's specific contractual legal duties with respect to the disposition of said collateral and its proceeds.[1]

Accordingly, based on the discussion herein, it is

ORDERED that the motion of Defendant-Debtors to dismiss Plaintiff's complaint herein be, and the same hereby is, **denied**.

All parties herein are directed to cooperate in discovery and preparation of this matter for trial, which will be set by separate written notice.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff, counsel for Defendant-Debtors, the Chapter 12 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 8th day of August, 2011.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE

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[1] *See e.g. Columbia State Bank, N.A. v. Daviscourt (In re Daviscourt)*, 353 B.R. 674, 687-88 (B.A.P. 10th Cir. 2006). Such a proposition, however, does not appear assured. *See generally Bombardier Capital, Inc. v. Tinkler (In re Tinkler)*, 311 B.R. 869 (Bankr. D.Colo. 2004) (and *see* cases cited in Appendix, located at 311 B.R. at 884-88). Here, Plaintiff will have the burden of proving through competent evidence, including witness testimony, that Debtors acted intending the injury that Plaintiff allegedly suffered through loss of its property or knowing with substantial certainty that same would result. Merely showing that Debtors knowingly breached their contractual duties despite the consequences, however, will not be enough as tortious conduct, for instance, in selling the cattle and diverting the proceeds, will also have to be established. *Compare Lockerby*, 535 F.3d 1038.