



IT IS ORDERED as set forth below:

Date: January 11, 2016

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CASE NO. 14-52495-WLH
)	
WILLIAM ALLEN TREXLER,)	CHAPTER 7
)	
Debtor.)	JUDGE WENDY L. HAGENAU
_____)	
)	
JOHN J. FLEMM,)	
)	
Plaintiff,)	
)	
v.)	ADV. NO. 14-5133
)	
WILLIAM ALLEN TREXLER,)	
)	
Defendant.)	
_____)	

ORDER

This dischargeability action involving allegedly stolen guns was tried before the Court over several days. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I) as a determination of the dischargeability of a particular debt.

The testimony of the Plaintiff and the Defendant is simply not possible to reconcile. The parties' transactions were not in writing and were all in cash. It is clear to the Court that neither party's memory is entirely accurate, which is not surprising given that over seven years has passed since the events took place. It is also apparent that the entire event was upsetting to both parties, not only because of the personal property at stake, but also because of the parties' long-standing friendship. Finally, the Court notes Plaintiff's divorce (discussed below) had been upsetting and distracting to him and the domestic abuse charge (discussed below) had naturally increased his stress level and distraction. As is frequently the case, the emotions of the parties colored their view and recollection of the facts. These difficulties led the Orange County, Florida sheriff to declare the matter a civil one when Plaintiff sought to press criminal charges. Plaintiff then obtained a default judgment in the Florida state court in a civil action, but the judgment contained no findings of fact. Thus, the job falls to this Court to sort out the events leading to this dispute.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff John ("Jack") Flemm is a collector of rare firearms. Defendant Debtor Allen Trexler ("Trexler" or "Debtor") also collects firearms and has previously purchased firearms on behalf of Flemm. Beginning in January 2008, Flemm placed several firearms with Trexler for safekeeping. Trexler sold some of the firearms with Flemm's permission. Despite Flemm's requests for Trexler to return the remaining firearms, Trexler allegedly never returned the property. Some of the remaining firearms were sold, traded, or transferred to third parties. Flemm claims he had not authorized these sales or transfers to third parties.

Flemm sued Trexler in state court in Florida on May 3, 2010 ("State Court Complaint"). Flemm asserted claims for civil theft, conversion, unjust enrichment, constructive trust, and constructive fraud. Flemm moved for summary judgment against Trexler on January 4, 2013.

Although Trexler participated in the litigation from July 2010 until July 2012, Trexler did not respond to the motion for summary judgment. Only twelve days later, on January 16, 2013, the Florida court granted Flemm's motion for summary judgment finding Trexler liable to Flemm for damages in the amount of \$160,000, as well as attorney's fees and costs ("State Summary Judgment Order"). The Florida court issued a final judgment on July 8, 2013 ("State Court Judgment") awarding Flemm damages in the amount of \$160,000, attorney's fees in the amount of \$43,335, and costs of \$1,705.82, for a total judgment of \$205,040.82 plus interest of 4.75%. Neither the State Summary Judgment Order nor the State Court Judgment contained any factual findings.

Trexler filed his petition under Chapter 7 of the Bankruptcy Code on February 4, 2014. Flemm filed this adversary proceeding objecting to the dischargeability of the judgment and moved for summary judgment, arguing collateral estoppel applies to the State Court Judgment, such that it, including fees and costs, is non-dischargeable in the Debtor's bankruptcy case pursuant to Section 523(a)(4) (embezzlement) or (a)(6) (willful and malicious injury to the property of another entity). The Court denied the Motion for Summary Judgment by order dated March 30, 2015. Although the amount of Flemm's claim was fixed by the State Court Judgment, the absence of findings of fact coupled with the multiple counts on which judgment was granted did not permit the Court to conclude that collateral estoppel applied to the issues of fraud, deceit, willfulness and maliciousness required to determine the debt non-dischargeable. Thus, a trial was held to determine the dischargeability of the claim represented by the State Court Judgment.

FINDINGS OF FACT AND SUMMARY OF EVIDENCE

Flemm and Trexler were friends, dating back to 2004. Their friendship was based largely on the fact they were both gun collectors, with a focus on historic weapons. Flemm considered Trexler to be his "gun guy", meaning that Trexler would buy, sell or trade guns on Flemm's

behalf or assist Flemm in having guns delivered to gunsmiths for repair. Throughout most of the relevant time period, Trexler held a curio and relic gun license which permitted him to engage in certain activities involving historic weapons. Flemm owned a number of guns over the years, but he never maintained an inventory of his guns. His only “record” of his guns was certain tags he kept with the guns identifying them. Trexler testified he maintained a record of guns bought, sold and traded, but that record was stolen from his car in 2010 (after all the events at issue) so he has no records either.

The parties agree that guns were delivered by Flemm to Trexler. The parties disagree as to which guns were delivered, whether the deliveries occurred once or twice, and whether the guns were returned. Flemm testified that in late December 2007 or early January 2008, his wife moved out of the house, taking one of his guns. He was then concerned about the remainder of his gun collection, so he delivered his “non-marital asset” guns to Trexler and understood some of them would be held in a bank. Flemm testified he hand wrote a list of guns that were delivered to Trexler in January 2008 and had Trexler sign it (“Initial List”). Trexler disputes having ever seen the Initial List and points out that several of the guns on the Initial List had been sold by Flemm through Trexler before January 2008. Trexler vehemently denies signing the Initial List. Both parties agree that, in February 2008, Flemm was the subject of a domestic abuse charge by his then-wife. As a result, he was required to remove all firearms from his possession. Flemm states Trexler then came to Flemm’s house to obtain the remainder of the gun collection which Flemm contended were “marital assets”. Trexler states Flemm brought the guns to Trexler’s house and this was the only time Flemm brought his gun collection to Trexler to hold. Both parties agree there is no list made of the guns that were delivered to Trexler in the wake of the domestic abuse charge.

Flemm's divorce was finalized in April 2009, and he did not ask for return of his guns until after the divorce was final. In the period from February 2008 to April 2009, though, Flemm authorized some sales of his guns by Trexler and authorized Trexler to buy some additional guns. During this time period, Flemm referred his friend Mr. Montalvano to Trexler. Mr. Montalvano was also a gun collector, and Flemm recommended that he use Trexler as his "gun guy" to sell a gun. Mr. Montalvano was very unhappy about the price obtained for the gun by Trexler and expressed that to both Trexler and Flemm. Flemm, in turn, was upset with the way Trexler had handled Mr. Montalvano's sale.

In the late spring or early summer of 2009, Flemm made periodic phone calls to Trexler asking for his guns to be returned. In July 2009, Trexler visited Flemm's home and the ensuing confrontation is yet another source of dispute. They both agree, however, that by the end of the visit Flemm was very angry with Trexler and attempted to block his exit from the house. Only a couple of days later, Flemm asked the Orange County Sheriff's Department to go to Trexler's house to retrieve his guns. The sheriff's deputy visited Trexler on July 31, 2009 with Flemm initially watching from a distance and then becoming engaged in the conversation. When the sheriff presented Trexler with the Initial List, he denied having ever seen it or signing it and denied having stolen any of Flemm's guns. Flemm at that time also accused Trexler of stealing certain jewelry. Later that day or the next day, Flemm found the missing jewelry box and acknowledged that Trexler did not steal it. In the process of the investigation, Trexler returned guns and ammunition to the Sheriff's Department. One of the guns, known as the "Engraved Colt", did not have a serial number prompting the Sheriff's Department to retain and destroy the gun. After the investigation, the Orange County Sheriff's Department declined to press charges, deeming the matter a civil one.

As a result of this Court's Order on Summary Judgment, the trial focused extensively on the guns: which guns were delivered to Trexler, which guns were returned by Trexler to Flemm or the sheriff, and what happened to any of the others. The parties presented several lists of guns: the Initial List, the handwritten list dated August 3, 2009 given by Flemm to the Orange County Sheriff's Department of the allegedly stolen weapons, typed lists prepared by the Orange County Sheriff's Department, and the list of firearms for which Flemm seeks recovery in this cause of action ("Exhibit 35").¹ The lists have many similarities, but also inconsistencies.

The Initial List was handwritten by Flemm and, according to him, reflects the guns that were delivered to Trexler in January 2008. He states the signature on the Initial List is Trexler's. Trexler denies having ever seen the Initial List or having signed it. The Initial List was purportedly given by Flemm to an expert to review and opine as to the authenticity of Trexler's signature. The Initial List, however, was not presented at trial, and the only evidence as to its location was that the expert witness could no longer locate it. The handwriting expert testified by means of a video deposition that the signature on the Initial List is that of Trexler. While he was sure that the signature was Trexler's, he was not asked, and therefore did not opine, as to whether it appeared Trexler's signature on the Initial List was an original. The Court notes the signature is in an awkward place on the document. Because the Court cannot review the original, it has no view as to whether the signature on the Initial List was applied in January 2008 or at some other time or in some other way.

It is undisputed that some of the items on the Initial List were sold with Flemm's permission. For example, Flemm testified he permitted the sale of two AK-47s and a Remington. Upon further questioning by the Orange County Sheriff, Flemm then recalled he had in fact received from Trexler two Winchesters, a Browning 22-caliber, a High Standard, and

¹ Apparently there were other versions of Exhibit 35 that were disclosed in discovery or in the state court litigation, but they were not presented as evidence to the Court.

a 1916 Colt converted into a 22. The Court notes Flemm's testimony was inconsistent with other evidence. At one point, he testified he never received any of the weapons on the Initial List from Trexler, but the police report reflects Flemm confirmed a number of the weapons on the Initial List were returned to Flemm. In fact, Exhibit 35 does not include some of the items on the Initial List. Trexler was asked about a number of the guns identified on the Initial List, and he had a specific recollection of many of them and their disposition. There were several he did not recall at all, however, and others on the Initial List about which he was not asked.

Then there are guns on Exhibit 35 that Flemm claims he delivered to Trexler in a "second batch" of deliveries in February 2008 but were not returned. Flemm created this list from memory since he did not have an inventory of his guns. Flemm testified the weapons delivered in January 2008 were "non-marital assets", while the items delivered in February 2008 were "marital assets". Flemm stated in his affidavit of financial condition provided in connection with his divorce that the marital portion of his gun collection was only worth \$4,000, but the items on Exhibit 35 not on the Initial List are worth significantly more than \$4,000, according to Flemm. Finally, the Court has no evidence of the list of guns supporting the judgment of \$160,000 in the state court. So, exactly what was delivered and what is missing is difficult to discern.

Trexler repeatedly testified to three major transactions involving the weapons that occurred between January 2008 and July 2009. First, he testified he sold several weapons and used the money to buy the "Engraved Colt" for Flemm (identified as Exhibit 35v). Flemm acknowledges the Engraved Colt was purchased, but he disagrees that he directed Trexler to sell certain weapons in order to purchase the Engraved Colt. The weapons sold by Trexler to purchase the Engraved Colt are:

- 1942 Colt 45-caliber pistol, M1911A1 #844797 Exhibit 35 (h)
- 1939 Colt Navy 45 caliber pistol, M1911A1, #716457 Exhibit 35 (j)
- Remington US Marine Corp 45 caliber pistol M1911 Exhibit 35 (b)
- Pistol, M1914, 45-caliber, M1911 Norwegian manufacture Exhibit 35 (aa)

The Court finds these four guns were sold and the proceeds used to purchase the Engraved Colt which was delivered to the Orange County Sheriff's Department. The Engraved Colt did not have a serial number on it and therefore was considered "contraband". The Orange County Sheriff's Department retained the gun and presumably destroyed it. The Engraved Colt is not on the Initial List so therefore was not in Flemm's possession in January 2008, and no evidence has been presented that the proceeds from the sale of the four guns were used for anything other than the purchase of the Engraved Colt.

The second transaction involves the sale of three guns for the purchase of what Flemm and Trexler called a 1914 Colt Commercial. Trexler testified he sold the following guns:

- 1912 45-caliber US Navy pistol M1911, #13708 Exhibit 35(m)
- 1918 45-caliber US Marine Corps pistol M1911, #217295 Exhibit 35(f)
- Union Switch and Signal 45-caliber pistol M1911A1 Exhibit 35(i)

The Court finds these three guns were sold for the 1914 Colt Commercial. Again, no evidence was presented that any proceeds from the sale of the three guns went for any purpose other than to purchase the 1914 Colt Commercial.

The third transaction focused on a 45-caliber pistol M1911 made by the Singer Sewing Machine Company, serial #800247 ("Singer"), identified as Exhibit 35c. This gun was unique, and there were relatively few of them made. Flemm testified he purchased the Singer from Trexler in 2005 for \$12,000 in cash while Trexler testified he simply allowed Flemm to borrow the gun to show to friends. Flemm's testimony was corroborated by the testimony of Mr. Montalvano and Mr. Naser, both of whom saw the pistol on November 3, 2007 at Flemm's birthday party. Flemm had shown the Singer to Mr. Montalvano several weeks earlier. Mr. Montalvano was so impressed with it, he made a special box for the pistol and gave it to Flemm for his birthday. Flemm had in his possession numerous original letters as to the value of the Singer.

Trexler testified he bought the Singer in 2000 or 2001 at a gun show in Atlanta from a dealer named “Jake”. Trexler testified he never sold the Singer to Flemm but he did let him borrow it for seven to ten days in 2004 or 2005. Trexler testified he disposed of the gun and no proceeds of the disposition were provided to Flemm. The exact disposition, though, varied in Mr. Trexler’s testimony. He stated at one time he sold it in 2006 to “the same guy” from whom he bought it. Another time he testified he traded the Singer to another gun dealer. This other gun dealer varied in age from 40 to 60, had grey or dark hair, looked bad, was dead, or in fact appeared at a gun show within the last two years. Finally, Trexler testified he bought Flemm a replica Singer at some point. Given Trexler’s inconsistent testimony about the Singer, the Court finds his testimony to be not credible. Instead, the Court finds that Flemm has proven by a preponderance of the evidence that the Singer pistol was sold to him by Trexler, that Flemm gave Trexler the Singer to hold for him during the course of his divorce, and that Trexler sold it or otherwise disposed of it in a way in which the proceeds were not delivered to Flemm.

The value of the Singer was also hotly contested. Flemm opined the value of the Singer as of the time of trial was \$65,000. He also stated he purchased the Singer for \$12,000 from Trexler and \$12,000 is the value he placed on the Singer when he filled out the police report alleging it had been stolen. The written valuations of the Singer in 2003 ranged from \$15,000 to \$25,000. Flemm testified the value of the Singer in 2008 was \$37,500 according to the 2008 Blue Book. The Court finds the value of the Singer when it was not returned to Flemm was \$37,500.

Flemm claims Trexler stole 29 guns. The Court has found four of the guns were sold for the Engraved Colt which was delivered to the Sheriff’s Department. The Court has found three of the guns were sold and used to purchase the 1914 Colt Commercial. Finally, the Court has

found the Singer was owned by Flemm but sold by Trexler and that Trexler retained the funds. That leaves 20 guns for which Flemm seeks recovery.

With respect to the remaining guns, Flemm testified generally that all of the guns identified on Exhibit 35 were delivered to Trexler and not returned. Trexler testified generally that he returned all guns to Flemm or the Orange County Sheriff unless Flemm had authorized their sale. In some instances, Trexler testified to a specific disposition of the gun. Other times he was not asked or could not recall the specific disposition of the gun or was not aware of the existence of the gun. The Court will review the testimony as to the remaining 20 guns.

Exhibit 35a

Exhibit 35a is a 1967 Smith & Wesson 44-magnum revolver, serial #S252178. This weapon was identified on the Initial List but was not originally on the police report. It is included in a supplemental report by one of the detectives. Trexler testified and also told the Orange County police officer he had sold the weapon with Flemm's permission.

Exhibit 35d

Exhibit 35d is a 45-caliber Union Switch & Signal Company M1911 pistol known as a demonstrator or cutaway model. This weapon was identified on the Initial List and the police report. Trexler testified he did not have such a weapon and he did not know Flemm had such a weapon. Mr. Montalvano testified he could not recall Flemm having this weapon.

Exhibit 35e

Exhibit 35e is a 1939 22-caliber Colt pistol M1911 A1 "Navy Ace", #713747. This gun is on the Initial List and is in all of the police reports as a missing weapon. Trexler recalls he purchased the weapon for Flemm. No testimony was elicited from Trexler as to what happened to the gun.

Exhibit 35g

Exhibit 35g is a 357-magnum Smith & Wesson revolver Model 19, serial #7K30867. This gun is identified on the Initial List and in all of the police reports. Trexler, however, testified he did not remember this gun.

Exhibit 35k

Exhibit 35k is a 1924 45-caliber M1911 Colt pistol, #702141. This gun is listed on the Initial List and included in all the police reports. Trexler has no recollection of this gun.

Exhibit 35l

Exhibit 35l is a 45-caliber M1927 pistol with an Argentine Sistema "IP" stamp, #408. This weapon was discussed at trial as one connected with Eva Peron in Argentina. This weapon was identified on the Initial List and on the police report. Trexler testified he recalled the weapon and that Flemm had authorized him to sell it.

Exhibit 35n

Exhibit 35n is a 44-caliber Remington Rand demonstration pistol M1911, #140. This weapon is identified on the Initial List and on the police report. Neither party discussed this weapon specifically.

Exhibit 35o

Exhibit 35o is a 45-caliber Union Switch & Signal Company experimental pistol M1911. This weapon is identified on the Initial List and on the police report. Neither party discussed this weapon specifically.

Exhibit 35p

Exhibit 35p is a 9-mm Colt Commander lightweight pistol #1940LW. This pistol was identified on the Initial List and on the police report. Mr. Montalvano recalled Flemm having this pistol. Trexler acknowledged that Flemm owned the gun and stated he sold it to Flemm.

Exhibit 35q

Exhibit 35q is a Beretta M92 stainless steel 9-mm pistol, #L35981Z. This weapon was identified on the Initial List and in the police report. However, there was no specific testimony with respect to this gun.

Exhibit 35r

Exhibit 35r is a 38-caliber M1911 Colt Wadcutter, #1934-MR. This gun is on the Initial List and on the police report. There was no specific testimony regarding this gun.

Exhibit 35s

Exhibit 35s is a 1957 38-caliber Smith & Wesson M19 revolver. This item is not on the Initial List. It is, however, identified in the police report as missing. Flemm testified at the trial this gun was part of his “marital” property delivered to Trexler in February. There was no testimony elicited from Trexler as to this weapon.

Exhibit 35t

Exhibit 35t is a 45-caliber Colt pistol M1911 with a serial number assigned to Egyptian King Farouk’s security detail. Both parties testified to their knowledge of this weapon. This gun was not on the Initial List. Flemm testified he thought it was delivered to Trexler in February and at another point he said maybe this was one of the guns he had Trexler buy for him during the time period when Trexler was holding his guns. No testimony was elicited from Trexler as to the disposition of the gun.

Exhibit 35u

Exhibit 35u is a 1967 45-caliber Colt Commander pistol with ivory grips and hardened slide, with 22-caliber conversion kit. This item is not on the Initial List but is in the various police reports. Flemm testified this gun was part of his marital property delivered to Trexler. No testimony was elicited from Trexler about this particular gun.

Exhibit 35x

Exhibit 35x is a 1926 45-caliber Colt M1911A1 pistol with ivory grips, chrome finish, a dragon motif and initials "CW" on both grips. This item is not on the Initial List but is in the various police reports. Flemm testified this gun was part of his marital property he delivered to Trexler. No testimony was elicited from Trexler about this particular gun.

Exhibit 35y

Exhibit 35y is a 1916 45-caliber Colt pistol M1911. This weapon, however, is not on the Initial List. When asked at trial whether this weapon was returned, Flemm was unsure.

Exhibit 35z

Exhibit 35z is a 9-mm Browning Hi-power pistol of Canadian manufacture with wooden shoulder stock, #3ch6975. This item is not identified on the Initial List. Flemm established at trial that he owned the weapon, having purchased it in 2003. No testimony was elicited from Trexler as to the disposition of this weapon.

Exhibit 35bb

Exhibit 35bb is a 45-caliber M1911 Colt pistol manufactured in the United States for the Russian government with some Russian markings. This weapon is not identified on the Initial List, although it is identified by Flemm on the police report. Trexler also recalls Flemm owning this weapon, but states that Flemm authorized him to sell this gun in 2007.

Exhibit 35cc

Exhibit 35cc is a 38-caliber Colt Commander lightweight semi-automatic pistol, M1911 Frame. This item is not identified on the Initial List and not identified in any of the police reports. When asked, Flemm could not confirm whether this gun was provided to Trexler as part of the marital property.

Exhibit 35dd

Exhibit 35dd is a 30.06 caliber Mauser rifle converted by Interarms to a sporting weapon. This rifle is not on the Initial List. Trexler testified that this Mauser, along with another one, was delivered to him by Flemm in the summer of 2009 and that he delivered this weapon, together with the other Mauser, to the Orange County Sheriff's Department. Trexler consistently answered interrogatories in the same manner (Exhibit J, Document 11-10, page 5). The Orange County police report also confirms that Trexler provided the Mauser weapons to the Orange County sheriff and that the weapons were returned to Flemm. When asked at the trial, Flemm admitted he could not recall what had happened with this weapon.

Based on the foregoing, the Court finds the following guns were delivered to Trexler by Flemm and not returned to Flemm:

Exhibit 35c	45-caliber pistol M1911 made by Singer Sewing Machine Company serial #S800247
Exhibit 35e	1939 22-caliber Colt pistol M1911 A1 "Navy Ace", #713747
Exhibit 35g	357-magnum Smith & Wesson revolver Model 19, serial #7K30867
Exhibit 35k	45-caliber M1911 Colt pistol, 1924, serial #702141
Exhibit 35n	45-caliber Remington Rand demonstration pistol M1911
Exhibit 35o	45-caliber Union Switch & Signal Company experimental pistol M1911
Exhibit 35p	9-mm Colt Commander lightweight pistol #1940LW
Exhibit 35q	Beretta M92 stainless steel 9-mm pistol, #L35981Z
Exhibit 35r	38-caliber M1911 Colt Wadcutter, #1934-MR
Exhibit 35s	38-caliber Smith & Wesson M19 revolver
Exhibit 35t	45-caliber Colt pistol M1911 with a serial number assigned to King Farouk's security detail
Exhibit 35u	45-caliber Colt Commander pistol with ivory grips and hardened slide, with 22-caliber conversion kit
Exhibit 35x	a 45-caliber Colt M1911A1 with ivory grips, chrome finish, a dragon motif and initials "CW" on both grips
Exhibit 35z	9-mm Browning high-power pistol of Canadian manufacture with wooden shoulder stock, #3CH6975

As to the remaining guns on Exhibit 35, the Court finds Flemm has not carried his burden of proving that the guns were delivered to Trexler, or if delivered that he did not receive them or authorize their disposition.

APPLICABLE LAW

Exceptions to discharge are to be strictly construed, and the burden is on the creditor to prove the exception. St. Laurent v. Ambrose (In re St. Laurent), 991 F.2d 672, 680 (11th Cir. 1993). The party objecting to dischargeability under Section 523 must prove all the statutory elements by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 290 (1991). Flemm contends the state court judgment is non-dischargeable under both Sections 523(a)(4) and 523(a)(6).

Under Section 523(a)(4), a debt arising from fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny is non-dischargeable. Here, Flemm contends Trexler embezzled the guns. Embezzlement need not be in a fiduciary capacity to be non-dischargeable; “ordinary” embezzlement will suffice. Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991). Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. Littleton, 942 F.2d at 555 (citing Moore v. U.S., 160 U.S. 268, 269 (1885)).

To establish embezzlement, then, the plaintiff must show (1) property owned by another which is rightfully in the possession of the debtor; (2) the debtor appropriates the property for personal use; (3) the appropriation occurred with fraudulent intent or by deceit. Pollitt v. McClelland (In re McClelland), Adv. Proc. 09-9030, 2011 WL 2461885 at *17 (Bankr. N.D. Ga. June 8, 2011) (citing Sandalon v. Cook (In re Cook), 141 B.R. 777, 780 (Bankr. M.D. Ga. 1992); KMK Factoring, LLC v. McKnew (In re McKnew), 270 B.R. 593, 631 (Bankr. E.D. Va. 2001);

U-Save Auto Rental of America v. Mickens (In re Mickens), 312 B.R. 666, 680 (Bankr. N.D. Calif. 2004)).

“An intent to defraud is defined as ‘an intention to deceive another person, and to induce such other person, in reliance upon such deception to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.’” Cook, 141 B.R. at 781 (citations omitted). The Court is to take into consideration all the circumstances in order to make a determination of intent to defraud. Moreover, “[i]ntent is a state of mind which may be interpreted by the conduct of the person implicated.” Id. at 783. Finally, a debtor’s intent to repay the funds converted is not a defense to embezzlement. Id.

Concealment is frequently used by the courts as evidence of fraudulent intent. See Cook, 141 B.R. at 784 (stating debtor lied to plaintiff about the location of the property which was evidence of the debtor’s fraudulent intent); McKnew, 270 B.R. at 633 (stating debtor concealed his removal of excessive compensation providing false and misleading financial information to the other members of the LLC, which actions of concealment further buttressed the debtor’s fraudulent intent); King v. Spivey (In re Spivey), 2010 WL 3980132 (Bankr. E.D. Tenn. 2010) (stating managing member’s use of company funds for other projects and for personal use without authorization or knowledge of the plaintiffs, is embezzlement). Murray v. Woodman (In re Woodman), 451 B.R. 31 (Bankr. D. Idaho 2011) (stating debtors falsely assured investors of return of funds after used for inappropriate purpose); see also Bennett v. Wright (In re Wright), 282 B.R. 510, 516-17 (Bankr. M.D. Ga. 2002) (distinguishing Cook because debtor in Wright did not conceal or lie about the disposition of the property).

Alternatively, Flemm alleges the state court judgment is non-dischargeable under 11 U.S.C. § 523(a)(6), which excepts from discharge any debt for willful and malicious injury by the debtor to another entity or to the property of another entity. The term “willful” means

intentional and deliberate; malicious means wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill will. Lee v. Ikner (In re Ikner), 883 F.2d 986, 990 (11th Cir. 1989). The Supreme Court in Kawauhau v. Geiger, 523 U.S. 57 (1998), held that Section 523(a)(6) only encompasses acts done with the actual intent to cause injury. Id. at 61, 64. The word “willful” modifies injury such that non-dischargeability requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Id. Because the term “willful” means intentional and deliberate, willfulness cannot be established by reckless conduct. Id. See also Ikner, 883 F.2d at 990-91 (“wanton” conduct causing car wreck not “intentional” under § 523(a)(6)); Kane v. Stewart Tilghman Fox & Bianchi, P.A. (In re Kane), 755 F.3d 1285, 1293 (11th Cir. 2014) (“A debtor is responsible for a “willful” injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury.”) (quoting Maxfield v. Jennings (In re Jennings), 670 F.3d 1329, 1334 (11th Cir. 2012)). “Malice” under Section 523(a)(6) can be constructive or implied, e.g., Ikner, 883 F.2d at 991, and “[t]o establish malice, ‘a showing of specific intent to harm another is not necessary,’” Jennings, 670 F.3d at 1334 (quoting Ikner, 883 F.2d at 991).

CONCLUSIONS OF LAW

As described above, the evidence presented was not consistent with respect to all of the guns. The witnesses discussed some guns at great length, while other guns were not mentioned at all, other than being on the Initial List or Exhibit 35. Because the plaintiff bears the burden of proving non-dischargeability by a preponderance of the evidence, if the defendant’s contradictory evidence neutralizes the plaintiff’s evidence, the plaintiff fails to carry his burden of proof.

Singer Pistol

On every list Flemm submitted to the police and to the courts, he claimed he owned the Singer and delivered it to Trexler. The Court has found Flemm delivered the Singer to Trexler who sold it and retained the proceeds. The Court also concludes the value of the Singer in 2008 when it was converted was \$37,500. The amount to be recovered upon a conversion claim is the value of the property converted at the time of conversion. Transamerica Commercial Fin. Corp. v. James (In re James), 124 B.R. 614, 616 (Bankr. M.D. Fla. 1991) citing Exxon Corp. v. Ward, 438 So. 2d 1059, 1060 (Fla. Dist. Ct. App. 1983).

The Court concludes Flemm has shown by a preponderance of the evidence that his claim for \$37,500 for the conversion of the Singer is non-dischargeable. First, Flemm has established non-dischargeability under 11 U.S.C. § 523(a)(4). He has shown that he owned the Singer and the Singer was rightfully in Trexler's possession because Flemm delivered it to him for safe keeping. Flemm has also shown that Trexler appropriated the Singer for his personal use since he disposed of the Singer without delivering any proceeds from the disposition to Flemm. The Court also concludes that the appropriation of the Singer was done with fraudulent intent or deceit. As discussed above, concealment is evidence of fraudulent intent and deceit. Where a debtor lies about his actions even after the fact, fraudulent intent and deceit can be found. Here, Trexler's testimony is simply not credible. Each time he was asked about the disposition of the Singer, the story changed. Trexler's lack of truthfulness regarding the disposition of the Singer establishes that his appropriation of it was done deceitfully and with fraudulent intent, thereby making the damages non-dischargeable under Section 523(a)(4).

The damages for the disposition of the Singer are also non-dischargeable under 11 U.S.C. § 523(a)(6). Trexler willfully disposed of Flemm's gun. The sale was intentional, and the Court concludes the injury to Flemm by the wrongful sale of the pistol was also intended. The injury is

willful when a debtor “commits an intentional act, the purpose of which is to cause or which is substantially certain to cause injury.” Hope v. Walker (In re Walker), 48 F.3d 1161, 1165 (11th Cir. 1995). Disposing of Flemm’s gun without providing him the proceeds of that disposition is at least substantially certain to cause injury to Flemm. The Court also concludes that Trexler’s actions with respect to the Singer were malicious as they were wrongful and Trexler had absolutely no basis upon which to dispose of the Singer. Flemm’s claim in the amount of \$37,500 for the disposition of the Singer is non-dischargeable under 11 U.S.C. § 523(a)(6).

The state court judgment included attorney’s fees in the amount of \$43,300 and costs of \$1,705.52. An award of attorney’s fees in connection with a debt that is non-dischargeable is likewise non-dischargeable. Cohen v. De la Cruz, 118 S.Ct. 1212 (1998). When a claim in connection with which attorney’s fees is awarded consists of both dischargeable and non-dischargeable components, it is appropriate to apportion the single fee award similarly. See Clear Lake Properties, LLC v. Roussel (In re Roussel), 536 B.R. 254, 263 (Bankr. E.D. Ark. 2015) and cases cited therein. The most common approach is to apportion the attorney’s fees award at the same percentage the non-dischargeable debt bears to the dischargeable debt. Id. The Court concludes that because \$37,500 of the \$160,000 judgment is non-dischargeable, the associated fees and costs are likewise non-dischargeable. Prorating the fees and costs on the same basis as the principal (23.4%), the fees of \$10,140.39 and costs of \$399.16 are non-dischargeable. Finally, the judgment included interest at the rate of 4.75% from the date of judgment. This interest, calculated on the amount of the judgment that is non-dischargeable, is likewise non-dischargeable.

Remaining Guns

As referenced above, the Court found that 13 other guns were delivered to Trexler by Flemm and not returned to Flemm. When determining dischargeability, the burden is on the plaintiff to prove by a preponderance of the evidence each element that will make a debt non-dischargeable. The Court cannot assume property has been embezzled just because it is missing. When there is no evidence to explain what happened to the property or from which the Court can infer what happened to the property, the plaintiff fails to meet his burden. Breeds Hill Insurance Agency, Inc. v. Fravel (In re Fravel), 485 B.R. 1, 18 (Bankr. D. Mass. 2013). The same is true with respect to proving willful and malicious intent to injure. Section 523(a)(6) requires more than just conversion.

There is no doubt that an act of conversion, if willful and malicious, is an injury to property within the scope of this exception ... but a willful and malicious injury does not follow as a course from every act of conversion, without reference to the circumstances.

Davis v. Aetna Acceptance Company, 293 U.S. 328, 332 (1932).

With respect to the remaining guns, the Court finds Flemm has not carried his burden of proving that Trexler appropriated the guns to his own use. In each instance, there was either directly contradictory testimony between the two parties, but with no evidence from a third party or other documentation to support what might have happened to the guns, or in many instances there was simply no testimony as to what happened to the guns, other than the fact that Flemm did not receive them. While a preponderance of the evidence standard only requires the Court to be slightly more persuaded by the plaintiff than the defendant, when the evidence is deadlocked, the tie goes to the defendant, here Trexler.

CONCLUSION

The Court concludes Flemm has carried his burden of proving the debt associated with the Singer pistol is non-dischargeable, but has not satisfied his burden with respect to the

remaining weapons. The Court will enter judgment for Flemm that his claim is non-dischargeable in the amount of \$37,500 plus fees of \$10,140.39, costs of \$399.16 and interest on the foregoing at 4.75% from the date of the State Court Judgment.

END OF ORDER

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