UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	
Larry Pittard Rountree and Constance Wood Rountree,	Case No. 00-12684C-7G
Debtors.	
Community Savings Bank, Inc.,	
Plaintiff,	
v.	Adversary No. 01-2003
Larry Pittard Rountree and Constance Wood Rountree,	
Defendants.	

MEMORANDUM OPINION

This adversary proceeding came before the court on March 5, 2002, for trial. E. Lawson Brown, Jr. appeared on behalf of the plaintiff and Phillip E. Bolton appeared on behalf of the defendants.

NATURE OF PROCEEDING

This is a dischargeability proceeding in which the plaintiff alleges that indebtedness of the defendants is nondischargeable pursuant to § 523(a)(2), (4) and (6) of the Bankruptcy Code. These claims arise out of loans made to Rountree Motor Cars, Inc., by the plaintiff, which were guaranteed by the defendants.

FACTS

On or about January 20, 1998, Rountree Motorcars, Inc. ("Motorcars") executed a promissory note and loan agreement under which the plaintiff extended a $500,000.00 line of credit to Motorcars for a term of one year. Motorcars operated a used car lot in Burlington, North Carolina, and it was contemplated by the parties that the line of credit would be used by Motorcars primarily to purchase automobiles which would be placed on the Motorcars lot and sold at retail. Contemporaneously with the execution of the loan agreement and promissory note, Motorcars executed a security agreement which stated that the plaintiff "will hold title to all vehicles purchased under the line." The terms of the loan were that interest was payable monthly, principal payments were to be made when vehicles were sold for the amounts that the plaintiff had advanced on the vehicles being sold and the remaining principal balance was due on February 1, 1999.

The plaintiff also obtained a guaranty agreement from the defendants on January 20, 1998, under which the defendants unconditionally guaranteed the payment of Motorcars' obligations to the plaintiff. The defendants were the sole shareholders, officers and directors of Motorcars. Mr. Rountree ran the business and was active in the affairs of Motorcars on a day-to-day basis. Mrs. Rountree had a full time job with The Veterans Administration and was not involved with Motorcars on a day-to-day basis.

Following the execution of the loan documents, Motorcars began to use its line of credit with the plaintiff. Under the practice initiated by the parties, Motorcars would notify the plaintiff of anticipated purchases of vehicles, the plaintiff would then transfer into the checking account used by Motorcars in making vehicle purchases the amount requested by Motorcars for the proposed purchases and Motorcars would then issue checks on that checking account to pay for the vehicles that were being purchased. When Motorcars received the titles to the purchased vehicles, which generally took two or three days, Motorcars would then deliver the titles to the vehicles to the plaintiff so that the plaintiff could hold the titles until the vehicles were sold by Motorcars. Mr. Rountree understood that when a vehicle was sold, the loan documents provided that Motorcars was to pay to the plaintiff the amount that the plaintiff originally had advanced for the purchase of the vehicle that had been sold and that such payment was supposed to be made in order for Motorcars to obtain from the plaintiff the titles to vehicles that had been sold.

Motorcars maintained two checking accounts with the plaintiff. One of the accounts was the one used for the purchase of vehicles. The loan advances by plaintiff were deposited into that checking account and the checks in payment of the purchase price of vehicles were written on that checking account. The other checking account was Motorcars' general business account. Throughout its relationship with the plaintiff, Motorcars deposited checks and cash proceeds from the sale of vehicles into the general business account and wrote checks on that account in order to make payments to the plaintiff when vehicles were sold.

The original promissory note from Motorcars was due on February 1, 1999. The loan was extended for another year by means of a loan modification agreement in March of 1999. At that time, the amount owed to the plaintiff was $341,360.00. The loan was extended for another year in March of 2000, at which time the loan balance was $427,300.00. During this period, Motorcars began to fall behind in paying the plaintiff the amounts that had been advanced on vehicles that were sold by Motorcars. When Motorcars sold a vehicle to a customer, the vehicle was delivered to the customer together with a thirty-day marker that enabled the customer to operate the vehicle until Motorcars could obtain the title from the plaintiff and forward the title to the Division of Motor Vehicles for the issuance of a new title to the customer. As the problem grew, Motorcars began using the proceeds from current transactions to pay for titles to vehicles that had been sold earlier. Such payments had to be made in order for Motorcars to deliver title to customers who already had paid Motorcars for the purchase of their vehicles and needed a title in order to register their vehicle and purchase insurance and a license plate. Motorcars did not disclose this problem to the plaintiff. Instead, during 2000, Motorcars continued to use proceeds from current sale transactions to make payments to the plaintiff in order to obtain titles involved in earlier transactions. The result was that unbeknownst to the plaintiff, the plaintiff held a number of titles to vehicles that already had been sold and delivered to customers by Motorcars and for which the plaintiff had not received payment.[1]

In early November of 2000, an employee of Motorcars told plaintiff that Motorcars was going out of business. After conducting an inventory of the vehicles remaining on the Motorcars lot and trying unsuccessfully to communicate with Mr. Rountree, the plaintiff filed suit against Motorcars on November 6, 2000. A subsequent inventory by the plaintiff disclosed that plaintiff held the titles to nine vehicles that had been sold and delivered to customers by Motorcars without making payment to plaintiff. The plaintiff also found that it had made advances to Motorcars for the purchase of 12 other automobiles and that neither the titles to these vehicles or the vehicles were on hand when plaintiff filed suit against Motorcars.

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[1]Pursuant to N.C. Gen. Stat. § 25-9-307(1), a buyer in the ordinary course of business other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by the seller even though the security interest is perfected and even though the buyer knows of its existence. Thus, customers of Motorcars were entitled to prevail over plaintiff's security interest even though plaintiff had possession of the titles to the automobiles sold by Motorcars. See North Carolina Nat'l Bank v. Robinson, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

DISCUSSION

A. Claim under § 523(a)(2)(B).

The plaintiff's first claim is that the defendants submitted financial statements to the plaintiff that were materially false and that defendants' debt to the plaintiff is nondischargeable under § 523(a)(2)(B) of the Bankruptcy Code. Under § 523(a)(2)(B) a debt is nondischargeable if it is for money or an extension, renewal or refinancing of credit obtained by the use of a statement in writing (1) that is materially false; (2) respecting the debtor's financial condition; (3) that is reasonably relied upon by the creditor; and (4) that was published by the debtor with intent to deceive. Along with the foregoing elements listed in § 523(a)(2)(B), a creditor seeking to establish the nondischargeability of a debt also must show that the debtor knew at the time the statement was made or published that it was false and that the creditor sustained a loss as a result of the statement. See In re Siriani, 967 F.2d 302, 304 (9th Cir. 1992); In re Jackson, 32 B.R. 549, 551 (Bankr. E.D. Va. 1983).

In an action under § 523(a)(2) the creditor has the burden of proof by a preponderance of the evidence on each of the elements required under that section of the Bankruptcy Code. See In re Stanley, 66 F.3d 664, 667 n.4 (4th Cir. 1995); In re Booker, 165 B.R. 164 (Bankr. M.D.N.C. 1994); In re Showalter, 86 B.R. 877 (Bankr. W.D. Va. 1988).

Although plaintiff offered into evidence two financial statements respecting defendants' financial condition that the defendants submitted to plaintiff, plaintiff's evidence was insufficient to establish a claim under § 523(a)(2)(B). One of the statements is dated December 17, 1997, shortly before the loan in question was made. The other financial statement is dated July 19, 1999, approximately seventeen months after the loan in question was made. Plaintiff's evidence failed to show that either of the financial statements was materially false. In asserting falsity, the plaintiff relied upon the fact that the schedules filed by the debtors in November of 2000 lists debts which are not shown on the financial statements. Plaintiff contends that this circumstance proves that the defendants fraudulently omitted debts from the financial statements. This contention is not accepted. One of the financial statements was prepared approximately three years before the schedules, and the other was prepared more than a year before the schedules. No evidence was offered as to when the debts in question were incurred or whether they existed at the time the financial statements were prepared. Without such evidence it is a matter of conjecture and speculation as to whether the defendants omitted the debts in question from their financial statements. Since there was no showing that the financial statements were inaccurate or false, there likewise was no showing that the statements were submitted with intent on the part of the defendants to deceive the plaintiff.

Plaintiff's evidence also was insufficient to show that the plaintiff relied upon either of the financial statements in approving or renewing the line of credit or any of the advances that were made to Motorcars. The financial statement dated December 17, 1997, in listing the defendants' assets contains the notation "see attached" and has a question mark beside this entry. In the portion of the statement for the listing of defendants' contingent liabilities, there is a notation which states "see attached financial statement." According to the plaintiff's evidence, the financial statement on record with the plaintiff does not have any attachments and the records of the bank do not include either of the attachments referred to in the financial statement. Plaintiff's witness, who was not employed by plaintiff when the line of credit was approved, admitted that it would be difficult to rely upon such an incomplete financial statement. The other financial statement, dated July 19, 1999, is on a form document entitled "Uniform Residential Loan Application." Defendants apparently obtained a personal residential loan from plaintiff and plaintiff's evidence did not reflect whether this statement was submitted or considered in connection with any credit that was extended to Motorcars.

Under § 523(a)(2)(B) reliance upon false statements need not be the sole reason that a loan was extended or renewed. See In re

Branham, 126 B.R. 283, 291 (Bankr. S.D. Ohio 1991); In re Barron, 126 B.R. 255, 259 (Bankr. E.D. Tex. 1991); In re Hall, 109 B.R. 149, 154 (Bankr. W.D. Pa. 1990). It is sufficient if a creditor shows that the false statement was a substantial factor in causing the creditor to extend money or credit, without which the loan would not have been made. See In re Dunston, 146 B.R. 269, 279 (D. Colo. 1992); Teachers Credit Union v. Johnson, 131 B.R. 848, 855 (D.W.D. Mo. 1991). Plaintiff's evidence did not include the testimony of any employee who was involved in approving or renewing the line of credit or any advances to Motorcars and failed to show even partial reliance upon the financial statements submitted by the defendants as guarantors of the indebtedness of Motorcars. A failure to show reliance upon a financial statement submitted by a guarantor is fatal to a dischargeability claim against the guarantor that is based upon § 523(a)(2)(B). See In re Broyles, 55 F.3d 980 (4th Cir. 1995).

B. Claim under § 523(a)(4).

Plaintiff's claim under § 523(a)(4) apparently is based upon the assertion that under the loan documents in this case proceeds received from the sale of automobiles that plaintiff had financed for Motorcars were held in trust by the defendants and that a defalcation by a fiduciary for purposes of § 523(a)(4) occurred when the defendants failed to make such payments to plaintiff from the sale proceeds.

Under § 523(a)(4) of the Bankruptcy Code, a discharge under Chapter 7 does not discharge a debt "for fraud or defalcation while acting in a fiduciary capacity. . . ." In order to prevail under this provision, plaintiffs have the burden of showing by a preponderance of the evidence that the defendant committed a "defalcation" while acting in a "fiduciary" capacity. See In re Swanson, 231 B.R. 145, 148 (Bankr. D.N.H. 1999).

The term "fiduciary" as used in § 523(a)(4) applies only to a fiduciary under an express or technical trust which must exist prior to, or independent of, the transaction from which the contested debt arose. See generally 4 COLLIER ON BANKRUPTCY ¶ 523.10[1][c] (15th ed. rev. 2002). Plaintiff contends that the loan documents in this case created such a trust and that defendants were trustees with respect to such trust. This contention cannot be accepted because nowhere in the loan documents is there any requirement that the sale proceeds be held in trust for the plaintiff.

The pertinent documents are the security agreement and the loan agreement that were executed by the defendants as officers of Motorcars. The security agreement specifically provides that the inventory may be sold in the ordinary course of business. There is no requirement under the security agreement that the proceeds from the inventory be held in trust. The loan agreement, in Schedule A, provides that "Principal reduction payments will be paid on the line at the time vehicles purchased under the line are sold." Again, however, there is no provision regarding the manner in which proceeds are to be handled and no reference to such proceeds being held in trust. Moreover, it is undisputed that under the course of dealing that was acquiesced in by plaintiff, the proceeds from the sale of automobiles were deposited into the general operating account maintained with the plaintiff by Motorcars rather than being segregated into a separate trust account. As plaintiff was aware, checks were written on that account to pay the general operating expenses of Motorcars as well as loan payments to plaintiff. Plaintiff's failure to prove that there was an agreement to hold the proceeds from inventory in trust or otherwise to segregate and handle such funds separately is fatal to the claim under § 523(a)(4) because, without such an agreement, there is no basis for treating the defendants as fiduciaries as required under § 523(a)(4).[2]

C. Claim under § 523(a)(6).

Section 523(a)(6) excepts from discharge any debt for willful

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[2]In fact, the cases are split as to whether such language, even if present in the agreements, would create a fiduciary relationship for purposes of § 523(a)(4). Compare In re Marinko, 148 B.R. 846, 850-51 (Bankr. N.D. Ohio 1992), concluding that under trust language in floor plan financing agreement debtor was a fiduciary, with In re Theis, 109 B.R. 474, 475 (Bankr. M.D. Fla. 1989), and In re Gallaudet, 46 B.R. 918, 924-25 (Bankr. D. Vt. 1985), reaching the opposite conclusion. Since the agreements in the present case contain no such language the issue need not be addressed in the present case.

and malicious injury by the debtor to another entity or to the property of another entity. Plaintiff bases its claim under § 523(a)(6) upon the assertion that automobiles in which plaintiff had a security interest were sold without notice to the plaintiff and without using the proceeds from such sales to pay the plaintiff the amount of its security interest in such vehicles. Plaintiff contends that such transactions were conducted with the knowledge and approval of the defendants and resulted in a willful and malicious injury by the defendants within the meaning of § 523(a)(6).

1. Property that was injured

Since the present case is based upon an alleged injury to plaintiff's security interest or collateral, it is incumbent upon the plaintiff to establish by a preponderance of the evidence that it had a security interest in collateral that was improperly disposed of by the defendants. See In re McAllister, 211 B.R. 976, 987 (Bankr. N.D. Ala. 1997). Although not a model of clarity, the agreements between the plaintiff and Motorcars were sufficient to provide plaintiff with a security interest in the vehicles purchased though the use of the line of credit provided by the plaintiff.

The commitment letter that was signed and accepted by Motorcars and the defendants (as officers of Motorcars and as guarantors) on January 20, 1998, provides that the line of credit extended to Motorcars "will be used . . . to acquire inventory", that the line of credit "will be a secured line of credit" and that:

> CSB will hold title to all vehicles purchased under the line. Rountree Motorcars, Inc. will provide to CSB an Inventory Sheet of vehicles purchased under the line, including Model Year, Make, Body Style, Serial Number and Amount Paid. At the time of sale, and prior to CSB releasing title, Rountree Motorcars, Inc. will pay a principal reduction in an amount equal to what was paid for the vehicle. No title will be released without this principal payment.

The loan agreement that was signed on the same date provides that the line of credit shall be secured by "[v]arious Car Titles purchased under the line" and that "[p]rincipal reduction payments will be paid on the line at the time vehicles purchased under the line are sold", with the amount of the payments to be "the amount initially advanced on each individual vehicle." On January 20, 1998, Motorcars also executed a security agreement which grants the plaintiff "a lien and a security interest in the property described hereinafter" and which then provides that "CSB will hold title to all vehicles purchased under the line." The court concludes that under the commitment letter, loan agreement and security agreement, Motorcars granted the plaintiff a security interest in "all vehicles purchased under the line" under which Motorcars was obligated to pay from the proceeds of the sale of such vehicles the amounts that plaintiff advanced for the purchase of the vehicles being sold.[3] This conclusion is also supported by the parties' course of dealing subsequent to January 20, 1998, in which Motorcars initially followed the procedure set forth in the commitment letter and loan agreement. At the outset and for some months thereafter, Motorcars paid the plaintiff the amounts advanced on vehicles as they were sold and obtained the titles to such vehicles on a current basis in accordance with its agreements with the plaintiff. Although Motorcars eventually departed from this course of dealing and fell behind in remitting proceeds to the plaintiff, it did so without the knowledge or approval of the plaintiff.

2. Requirement of "willful and malicious" injury

The next question is whether there was a "willful and malicious injury" to the security interest of the plaintiff within the meaning of § 523(a)(6). "Willful and malicious are two distinct requirements that [the plaintiff], as the party seeking to avoid the discharge of the debt, must prove by the preponderance of the evidence before the § 523(a)(6) exception to the discharge applies." See In re Scarborough, 171 F.3d 638, 641 (8th Cir.

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[3]The Chapter 7 trustee in Motorcars' bankruptcy case asserted that the plaintiff failed to perfect its security interest in the vehicles that were on hand when Motorcars filed. However, whether the security interest was perfected as to third parties does not affect the validity and enforceability of the security agreement as between Motorcars and the plaintiff. See N.C. Gen. Stat. § 25-9-201; In re Muto, 124 B.R. 610 (Bankr. M.D. Fla. 1991); In re Petsch, 82 B.R. 605 (Bankr. M.D. Fla. 1988).

1999). The absence of either of these elements means that the debt is dischargeable. See In re Markowitz, 190 F.3d 455, 463 (6th Cir. 1999).[4]

a. Willful injury

Consideration will be given first to whether the plaintiff established a willful injury within the meaning of § 523(a)(6). Clearly, the mere sale of vehicles to customers of Motorcars, standing alone, was not wrongful and did not give rise to a willful injury under § 523(a)(6) because the security agreement as prepared by the plaintiff explicitly authorized such transactions[5] and the plaintiff acquiesced in Motorcars making sales in the ordinary course of business. See Davis v. Aetna Acceptance Co., 293 U.S. 328, 55 S. Ct. 151, 79 L.Ed. 393 (1934). Thus, if there was a willful injury, it occurred when and as a result of Motorcars not remitting the proceeds of such sales to the plaintiff and, instead, using the proceeds for other purposes. The specific question that must be determined, then, is whether such disposition of sale proceeds constituted a willful and malicious injury to property of

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[4]There is some authority that "willful and malicious injury" is now a single standard requiring proof of an intentional injury as a result of the Supreme Court decision in Kawaauhau v. Geiger. See In re Miller, 156 F.3d 598, 605 (5th Cir. 1998); In re Longley, 235 B.R. 651, 656 n. 5 (10th Cir. BAP 1999).

[5]The security agreement provides that "inventory may be sold in the ordinary course of business."

the plaintiff.[6]

In Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), the Supreme Court dealt with the scope of "willful" injury as used in § 523(a)(6). The Court held that reckless or negligent conduct does not give rise to a "willful injury" and is not sufficient to render indebtedness nondischargeable under § 523(a)(6). Although the Court discussed at some length what does not constitute a willful injury, the Court did not articulate a test for determining what conduct does constitute a willful injury. The Court noted that the word "willful" in § 523(a)(6) modifies the word "injury," indicating that a deliberate or intentional injury is required and not merely a deliberate or intentional act that leads to injury. However, the Geiger opinion does not make clear exactly what type of conduct is required in order to satisfy the requirement of a "deliberate or intentional injury." As a result, there is considerable variance and inconsistency in the post-Geiger case law involving § 523(a)(6).

The inconsistency in the § 523(a)(6) cases is reflected in the

[6]Two different types of willful and malicious injury are encompassed by § 523(a)(6), namely, injury to an entity and injury to the property of an entity. This means that in a case such as the present case, involving an alleged improper disposition or destruction of a creditor's collateral, it is not necessary to show an intentional and malicious injury to the creditor, but only that there was an intentional and malicious injury to the creditor's security interest or collateral. See In re Wikel, 229 B.R. 6, 9-10 (Bankr. N.D. Ohio 1998).

cases involving unauthorized or improper disposition of collateral by a debtor. Some of the cases have read Geiger as establishing a subjective standard requiring an actual intent to injure the creditor in order to have a willful injury. Under these cases, if the debtor's unauthorized retention and use of proceeds was done in order to save the debtor's business and was not intended to injure the creditor, the court finds no willful injury even though the debtor was aware of the creditor's security interest in the proceeds and that such use by the debtor was not authorized. See In re Crump, 247 B.R. 1 (Bankr. W.D. Ky. 2000); In re Wikel, 229 B.R. 6 (Bankr. N.D. Ohio 1998); In re Tomlinson, 220 B.R. 134 (Bankr. M.D. Fla. 1998). These cases adopt a standard that this court is not willing to embrace. While a subjective intent to injure a creditor or its property certainly satisfies the willfulness requirement of § 523(a)(6), Geiger does not have to be read as requiring proof of subjective motivation to injure the creditor. See In re Russell, 262 B.R. 449, 454 (Bankr. N.D. Ind. 2001). This court agrees with the decision in Russell that the key to applying Geiger is to accurately identify the creditor's true injury and to focus on that injury, as opposed to the resulting damage, when determining whether the injury was intentional. In the context of a § 523(a)(6) claim involving unauthorized use of collateral or proceeds of collateral, the court in Russell employed the following analysis:

> Similarly, in the conversion of collateral scenario, the true injury is not that the creditor's debt goes unpaid. The true injury is that the creditor's collateral was wrongly or improperly disposed of and that the proceeds were used for purposes other than payment of the obligation that property secured. . . . Consequently, the proper question to ask is whether the debtor intended to improperly use the creditor's collateral and/or its proceeds for purposes other than the payment of the debt that property secured. If so, there is an intentional injury.

(Emphasis supplied). 262 B.R. at 455.

A similar approach was taken in In re Gagle, 230 B.R. 174 (Bankr. D. Utah 1999), where the debtor, being fully aware that the creditor had a security interest in his truck, sold off parts of the truck until it was nearly worthless without remitting the proceeds to the creditor. In holding that there had been a willful injury, the court stated:

> Matthew Gagle intentionally injured American First's property, its security interest in the truck, by destroying the Truck such that American First's security interest could no longer attach to its collateral. Matthew Gagle knew the Truck was pledged to American First, and he knew the destruction of the Truck would destroy American First's security interest. No evidence of an intent to injure is more definitive than deliberate destruction of the property right.

230 B.R. at 182. See also In re McKnew, 270 B.R. 593, 640-44 (Bankr. E.D. Va. 2001).

The true injury in the present case is that proceeds from plaintiff's collateral were improperly disposed of when such proceeds were used for other purposes instead of being remitted to the plaintiff. The test of whether such improper use involved a willful injury is whether Motorcars intended to improperly use such proceeds for purposes other than the payment of the debt owed to the plaintiff. The debtor's state of mind is relevant to the extent that an intent to improperly use the proceeds depends upon the debtor having knowledge of the security interest in the automobiles and the requirement that proceeds from the automobiles be paid to the plaintiff. Where such knowledge exists, the unauthorized use or disposition cannot be considered innocent or merely technical. If Motorcars, through its officers, was aware of plaintiff's security interest and entitlement to the proceeds, and nevertheless caused such proceeds to be used for purposes other than payment to plaintiff, there was a knowing and intended injury to property of the plaintiff which qualifies as "willful" for purposes of § 523(a)(6). This is true without regard to the subjective intent of Motorcars or the defendants in knowingly using the proceeds contrary to the security interest of the plaintiff.[7]

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[7]A number of cases decided since the Geiger case have concluded that the test for willfulness under § 523(a)(6) is satisfied by an intentional act that is "substantially certain" to cause injury. See In re Markowitz, 190 F.3d 455, 464 (6th Cir. 1999); In re Miller, 156 F.3d 598, 603 (5th Cir. 1998); In re Chlebowski, 246 B.R. 639, 643 (Bankr. D. Or. 2000); In re Speers, 244 B.R. 142, 144-45 (Bankr. E.D. Ark. 2000); In re Cox, 243 B.R. 713, 718-19 (Bankr. N.D. Ill. 2000). A deliberate and intentional disposition of a creditor's collateral or proceeds that is known by the debtor to be unauthorized and contrary to the security agreement should satisfy this test, as well, since such a misuse or

Although officers and directors of a corporation generally are not liable for the debts of the corporation, they are personally liable to the extent that their participation in the commission of a tortious act results in harm to a third party. This principle is applicable in the bankruptcy context where an individual debtor, as an officer of a corporation, actively participates in the improper disposition or conversion of property that is subject to the security interest of a third party. See Ford Motor Credit Co. v. Owens, 807 F.2d 1556, 1559 (11th Cir. 1987). In such a situation, the individual debtor becomes personally liable to the secured creditor and the debt resulting from such liability is nondischargeable. See id.; Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988), *abrogated on other grounds by* Grogan v. Garner, 498 U.S. 279 (1991). The critical factor in determining the corporate officer's personal liability and the dischargeability of the officer's obligation is whether there was personal involvement by the officer in the improper disposition or conversion of the secured creditor's collateral. If personal involvement on the part of an officer is shown, and the officer's conduct is shown to involve a willful and malicious injury, then the resulting personal debt of the officer is nondischargeable under § 523(a)(6). See Transamerica Commercial Finance Corp. v. James, 152 B.R. 994, 995

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conversion is substantially certain to cause injury to the creditor or its security interest.

(M.D. Fla. 1992); In re Collins, 151 B.R. 967, 970 (Bankr. M.D. Fla. 1993); In re Higginbotham, 117 B.R. 211, 216 (Bankr. E.D. Va. 1990).

In the present case, Mr. Rountree managed and controlled the operations of Motorcars and was actively and personally involved in conducting the business of Motorcars on a day-to-day basis. Such involvement was shown to include personal knowledge on the part of Mr. Rountree with respect to which cars were sold by Motorcars and that Motorcars was not complying with its agreement to make payments to the plaintiff as vehicles financed by the plaintiff were sold. The evidence showed that Mr. Rountree controlled Motorcars and it is a reasonable inference from the evidence that Mr. Rountree controlled when and how much was paid to the plaintiff when vehicles were sold and was personally responsible for the required payments not being made to the plaintiff. Based on such personal involvement and control on the part of Mr. Rountree, the court concludes that he is personally liable to the plaintiff for the losses resulting from the failure to remit payments to the plaintiff from the proceeds of the sale of vehicles that were subject to the security interest of the plaintiff. The court further concludes that Mr. Rountree's failure to remit proceeds from the sale of plaintiff's collateral constituted a willful injury to property of the plaintiff for purposes of § 523(a)(6) because Mr. Rountree was personally aware of plaintiff's security interest in the automobiles purchased under the line of credit and knew that Motorcars was obligated to remit such proceeds to the plaintiff. In short, the evidence established that Mr. Rountree intended to improperly use the proceeds from plaintiff's collateral for purposes other than the payment of the secured debt, which is sufficient to constitute a willful injury to property of the plaintiff under § 523(a)(6).

b. Malicious injury

Although the inclusion of "malicious" injury in the text of § 523(a)(6) incorporates "malice" into the § 523(a)(6) equation, "malice" does not mean the same thing for nondischargeability purposes under § 523(a)(6) as it does outside the bankruptcy context. In bankruptcy, a debtor may act with malice without bearing any subjective ill will toward the creditor or any specific intent to injure the creditor. See In re Stanley, 66 F.3d at 667. An act done deliberately and intentionally in knowing disregard of the rights of another and without just cause or excuse, satisfies the requirement of malice under § 523(a)(6). See id. Because there must be a deliberate act in "knowing" disregard of the rights of another, the debtor's state of mind is relevant in assessing the presence of malice. See id. However, such state of mind or knowledge may be proven by circumstantial evidence. See id. "Implied malice . . . may be shown by the acts and conduct of the debtor in the context of [the] surrounding circumstances . . . ." St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1008 (4th Cir. 1985). In the present case, the evidence established that without just cause or excuse, Mr. Rountree deliberately and intentionally diverted proceeds, knowing that such proceeds came from plaintiff's collateral and that Motorcars was obligated to remit such proceeds to the plaintiff. In doing so, Mr. Rountree inflicted a malicious injury to property of the plaintiff within the meaning of § 523(a)(6).

The situation is very different with Mrs. Rountree. She had a full time job elsewhere and was not involved in the day-to-day operations of Motorcars. The evidence did not disclose any personal involvement on her part in the sale of vehicles or the handling of proceeds received from such sales. Nor did the evidence disclose that she had any knowledge of or involvement in the failure to remit proceeds to the plaintiff when vehicles financed by the plaintiff were sold. Therefore, there is no basis for imposing liability upon Mrs. Rountree or finding that she was involved in a willful and malicious injury to property of the plaintiff.

3. Damages as to Mr. Rountree

The usual measure of damages in a dischargeability proceeding involving an improper disposition of collateral is the lesser of the balance owed on the secured obligation or the value of the collateral at the time of the unauthorized disposition. _See In re Higginbotham_, 117 B.R. at 216. In the present case, the usual rule must be modified to reflect that Motorcars was required to remit only the amount that had been advanced by the plaintiff on the vehicle being sold, rather than the entire purchase price. Plaintiff produced evidence of nine transactions in which Motorcars sold vehicles and did not pay the required amounts to the plaintiff.[8] The aggregate amount advanced by the plaintiff on the nine vehicles involved in these transactions totals $85,451.00. The evidence also indicated that when Motorcars filed its bankruptcy case, plaintiff was holding titles to 26 vehicles that were in the possession of the plaintiff when the bankruptcy case was filed and on which the plaintiff had advanced a total of $246,043.00. To the extent that plaintiff sustained a loss with respect to these vehicles, such loss resulted from plaintiff having failed to perfect its security interest in the vehicles. Since plaintiff's failure to perfect its security interest is not attributable to either of the defendants, none of the $246,043.00 is nondischargeable. As to the remaining amounts listed on Exhibit 45, the evidence failed to show why the plaintiff did not have the titles and vehicles in question and did not show by a preponderance any grounds for treating the remaining indebtedness as nondischargeable. The result is that the total indebtedness of Mr. Rountree that was established as nondischargeable under § 523(a)(6) is $85,451.00.

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[8]The vehicles involved in these transactions are listed on page 2 of Exhibit 45 and consist of a 1995 Pontiac (2618), a 1994 Chevrolet (3041), a 1995 Honda (3084), a 1997 Nissan (4876), a 1995 GMC (6242), a 1994 Lexus (6420), a 1993 BMW (7407), a 1986 Chevrolet (9049) and a 1997 Mazda (9783).

CONCLUSION

In accordance with the foregoing, a judgment will be entered contemporaneously herewith adjudging that the plaintiff is entitled to recover the sum of $85,451.00 from Mr. Rountree which is nondischargeable under § 523(a)(6) of the Bankruptcy Code, and dismissing this adversary proceeding with prejudice as to Mrs. Rountree with no recovery from Mrs. Rountree.

This 30th day of April, 2002.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

ENTERED

MAY 01 '02

U.S. Bankruptcy Court
Greensboro, NC
KWG

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE: Larry Pittard Rountree and Constance Wood Rountree, Debtors.	Case No. 00-12684C-7G
Community Savings Bank, Inc., Plaintiff, v. Larry Pittard Rountree and Constance Wood Rountree, Defendants.	Adversary No. 01-2003

JUDGMENT

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of Larry Pittard Rountree the sum of $85,451.00 which is hereby adjudged to be nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code; and it is FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have no recovery or relief from Constance Wood Rountree and this adversary proceeding is dismissed with prejudice as to Constance Wood Rountree.

This 30th day of April, 2002.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge