Not intended for publication

Dated: May 03, 2004
The following is SO ORDERED.

G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

NEIL BOND STEWART, JR. and
TINA R. STEWART, **Case No. 02-31651**

Debtors. **Chapter 7**

JIM'S USED CARS,

Plaintiff,

v. **Adv. Pro. No. 03-0612**

NEIL BOND STEWART,

Defendants.

MEMORANDUM OPINION AND ORDER RE
COMPLAINT TO DENY DISCHARGEABILITY OF DEBT AND FOR JUDGMENT BY JIM HOLLAND

The Court conducted a trial on the Plaintiff's Complaint to Deny Dischargeability on March 23, 2004. FED. R. BANKR. P. 7001 Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The parties in this matter submitted the following "Written Stipulation of Facts" to the Court at the trial in this matter:

> 1. Comes now your Plaintiff and Defendant and files the attached Written Stipulation of Facts. The Plaintiff paid the defendant $10,500.00 on May 15 and May 17, 2002 in exchange for the defendant building a trailer. The trailer was to be for transporting racecars [sic].
> 2. The defendant filed this Chapter 7 bankruptcy on July 17, 2002 and the defendant did not list Jim Holland [owner of Jim's Used Cars] as a creditor in the chapter 7 filing.
> 3. That Jim Holland filed a General Sessions lawsuit October 30, 2002 under docket number 931879 and a judgment was entered in favor of the plaintiff and against the defendant for $10,500.00, plus court costs, on January 6, 2003.
> 4. That the defendant did not advise the plaintiff that he was in a chapter 7 bankruptcy at the time.
> 5. After attempting to collect the debt, the defendant then advised that he had filed a Chapter 7 bankruptcy.
> 6. All of the welding equipment that the defendant was to use on this project was repossessed in the defendant's bankruptcy.
> 7. The trailer the plaintiff paid the defendant to build has never been delivered by the defendant to the plaintiff.

In addition to the stipulated facts, the Court makes the following findings of fact:

1. The total price for the trailer was $15,500.00. The plaintiff only paid the defendant $10,500.00.
2. The debtor estimated the trailer would take three months to complete.
3. The plaintiff, Jim Holland, looked at the uncompleted trailer in October or November 2002. At that time, the trailer had a rudimentary frame, but was far from completion. According to Holland's testimony, there was no evidence that the following components had been purchased for installation on the trailer:
    - necessary lighting
    - shelves and doors
    - generator
    - retractable electric reel
    - slides and hidden ramps
    - tire jacks
    - electric jack
    - steel modular wheels and tires

   Aluminum diamond plate flooring was at the defendant's workplace near the trailer, but had not been installed on the trailer.
4. At the time Holland inspected the semi-completed trailer in October or November 2002, the debtor was still in possession of the welding equipment which was later repossessed.
5. The debtor never delivered the trailer to the plaintiff nor did he return any of the plaintiff's money to him.
6. The debtor offered to sell the partially completed trailer to Jeff Waller in January 2004 for $4,200.00.

7. According to Holland's testimony, the fair market value of the trailer in its current condition is $1,500.00 to $2,000.00.
8. The debtor did not appear at the trial in this matter, although his attorney was present.

II. CONCLUSIONS OF LAW

Although the plaintiff argued that the debt at issue in this case is non-dischargeable under 11 U.S.C. § 523(a)(2) and (4), the Court finds that the proper section under which to analyze the case is 11 U.S.C. § 523(a)(6). Section 523(a)(6) of the Bankruptcy Code states:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt
>
> . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6). A creditor seeking to have a debt declared non-dischargeable under this section must prove § 523(a)(6)'s elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). Once a creditor establishes a prima facie case, the burden shifts to the debtor to present credible evidence that a defense to the liability exists. *Sears Roebuck & Co., v. Miller (In re Miller),* 70 B.R. 55, 56 (Bankr. S.D. Ohio 1987). Exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor. *Meyers v. I.R.S. (In re Meyers)*, 196 F.3d 622 (6th Cir. 1999).

Until recently, the Sixth Circuit's standard for § 523(a)(6)'s "willful" requirement was rather lenient. As long as a debtor could be shown to have intentionally committed an act which led to an injury, he would be found to have acted "willfully" under § 523(a)(6), regardless of whether or not he actually intended the injury. *Perkins v. Scharffe*, 817 F.2d 392, 394. Perkins was overruled in 1998 by the U.S. Supreme Court case of *Kawaauha v. Geiger*, 523 U.S. 57, 18 S.Ct. 974, 140 L.Ed.2d 90 (1998). In *Geiger*, the Supreme Court held that only acts done with the intent to cause the actual injury will rise to the level of a "willful and malicious injury" as used in § 523(a)(6). *Id.* In light of the Supreme Court's ruling in *Geiger*, the Sixth Circuit amended its definition of "willful" as used in § 523(a)(6):

> [W]e now hold that unless "the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it," he has not committed a "willful and malicious injury" as defined under § 523(a)(6).

Markowitz v. Campbell (In re Markowitz), 190 F.3d 455, 464 (6th Cir. 1999).

In addition to requiring a creditor to prove that a debtor acted willfully, § 523(a)(6) also requires the creditor to show that the debtor acted maliciously. 11 U.S.C. § 523(a)(6). "Under § 523(a)(6), a person is deemed to have acted maliciously when that person acts in conscious disregard of his duties or

without just cause or excuse." *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 923 (B.A.P. 6th Cir. 2000) (citations omitted); *River View Land Co., Inc., v. Bucak (In re Bucak),* 278 B.R. 488, 493 (Bankr. W.D. Tenn. 2002) (citations omitted) ("The definition of 'malicious,' for section 523(a)(6) purposes, is proven when a creditor shows that a debtor acted in conscious disregard of the rights of others, without just cause or excuse.").

As with § 523(a)(2)(A)'s requirement of establishing fraudulent intent, proving that a debtor acted willfully and maliciously under § 523(a)(6) can be difficult. Debtors will rarely, if ever, admit to acting in a willful or malicious manner. As a result, a creditor may establish that a debtor acted "willfully" by presenting circumstantial evidence:

> . . . the "willful" requirement of § 523(a)(6) may be indirectly established by the creditor demonstrating the existence of two facts: (1) the debtor knew of the creditor's lien rights; and (2) the debtor knew that his conduct would cause injury to those rights.
>
> . . .
>
> It therefore follows that, for purposes of determining whether a debtor knew his actions would injure the creditor's lien rights, a rebuttable presumption will arise when the debtor, despite having knowledge as to the implications of the security agreement, took no action to protect the creditor's interest therein.

J & A Brelage, Inc., v. Jones (In re Jones), 276 B.R. 797, 802 (Bankr. N.D. Ohio 2001) (citations omitted); *see also, O'Brien v. Sintobin (In re Sintobin)*, 253 B.R. 826, 831 (Bankr. N.D. Ohio 2000); *Rizzo v. Passialis (In re Passialis)*, 292 B.R. 346, 353 (Bankr. N.D. Ill. 2003).

This case was a difficult one for the Court to consider given the fact that the debtor did not appear at the trial and present the Court with his perspective. Given this fact, the Court must look to the evidence as presented to it and draw conclusions from it. According to the stipulation of facts and the testimony from the trial, the debtor entered into an agreement with the plaintiff to build a trailer to transport race cars. The debtor accepted the $10,500.00 from the plaintiff in May 2002 and gave him an estimated completion time of 3 months. Prior to completing the trailer, the debtor filed his chapter 7 petition and did not list Jim Holland or Jim's Used Cars as a creditor. The debtor never completed the trailer nor did he return the money to the plaintiff. Although the debtor did do some work on the trailer, the fair market value of the trailer in its current condition is only $1,500.00 to $2,000.00.

When the debtor did not purchase all of the necessary parts to complete the trailer, he knew that he would not be able to deliver a finished product to the plaintiff. By virtue of entering into the contract to build the trailer for the plaintiff, the debtor also knew that he was injuring the plaintiff's rights in the collateral when he did not complete the trailer. The Court also finds that when the debtor did not list the plaintiff in his bankruptcy schedules and did not inform the plaintiff of his bankruptcy filing during the pendency of the General Sessions lawsuit, the debtor was further trying to injure the plaintiff's rights in

the trailer. The debtor simply did not make a good faith effort to complete the trailer and comply with the contract. Although the debtor's attorney argued that the debtor was unable to complete the trailer because his welding equipment was repossessed, the plaintiff testified that the debtor had not even purchased the majority of the components necessary to complete the trailer at the time the debtor lost the equipment.

Given these facts, the Court concludes that the debtor willfully and maliciously injured the plaintiff when he did not complete the race car trailer. The Court will enter a non-dischargeable judgment against Neil Bond Stewart in the amount of $10,500.00.

III. ORDER

It is therefore **ORDERED** that the Plaintiff, Jim's Used Cars, is awarded a non-dischargeable judgment against the debtor Neil Bond Stewart in the amount of $10,500.00.

Mailing Information

William Cohn, Attorney for Debtor
David Drexler, Attorney for Plaintiff