UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
Andrew Lee Dilts	)	
	)	Case No. 11-3065
Debtor(s)	)	
	)	(Related Case: 10-38340)
United Ohio Insurance Company	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Andrew Lee Dilts	)	
	)	
Defendant(s)	)	

DECISION AND ORDER

This cause comes before the Court after a Trial on the Complaint of the Plaintiff, the United Ohio Insurance Company, to determine dischargeability. The Plaintiff brings its complaint pursuant to 11 U.S.C. § 523(a)(6), excepting from discharge any debt arising from a debtor's willful and malicious conduct. (Doc. No. 1). At the conclusion of the Trial, the Court took the matter under advisement so as to afford the opportunity to thoroughly consider the evidence submitted to the Court. The Court has now had this opportunity and, for the reasons set forth in this decision, finds that the debt in controversy is not excepted from discharge under § 523(a)(6).

BACKGROUND

The Debtor, Andrew L. Dilts (hereinafter referred to as the "Debtor"), is before this Court, having filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. The Debtor filed his petition for relief on December 22, 2010. On April 15, 2011, the Plaintiff, the United Ohio Insurance Company (hereinafter the "Plaintiff"), commenced this adversary proceeding seeking to except from discharge its claim against the Debtor. The claim held by the Plaintiff arises

from a relationship, both business and personal, maintained between the Debtor and a Mr. Kurt Sheldon.

Mr. Sheldon owns a farm approximately one mile from his residence. In 2002 and 2003, the Debtor, whose family personally knows Mr. Sheldon, worked on this farm. The work performed by the Debtor consisted primarily of menial labor such as tending to hogs raised by Mr. Sheldon. At the time he performed his work for Mr. Sheldon, the Debtor had not yet obtained the age of majority.

In late 2007, the Debtor approached Mr. Sheldon concerning the possibility of removing some scrap metal located on Mr. Sheldon's farm. For the several years prior, the Debtor had been collecting and then salvaging scrap metal for profit. Mr. Sheldon responded favorably to the Debtor's inquiry, taking the Debtor to one of the five buildings on his farm, called "Building 1," and indicating to the Debtor that he could remove certain piles of scrap metal located in the vicinity of the building.

This was the second time the Debtor had undertaken to remove scrap metal from Mr. Sheldon's farm. On the prior occasion, the Debtor removed the scrap metal from the Mr. Sheldon's farm immediately after receiving his permission, thereafter stopping at Mr. Sheldon's residence to obtain some additional metal. For the most recent undertaking, however, the Debtor did not actually remove the scrap metal until a number of months after permission was given by Mr. Sheldon. Specifically, it was not until February or March of 2008 that the Debtor, with the assistance of a couple of friends, with whom he offered to split any profits, proceeded to physically remove the scrap metal from Mr. Sheldon's farm.

The actual removal process occurred over a period of three days – a Tuesday, Wednesday and Thursday – beginning at approximately 6:30 in the morning and ending about one hour later. The Debtor and his friends then took the scrap metal to a junkyard with whom the Debtor had been doing business with on intermittent basis since 2004. The Debtor reported that he and his friends collectively received $600.00 to $800.00 for the metal removed from Mr. Sheldon's farm.

As a part of the metal removed from Mr. Sheldon's farm, the Debtor and his friends also removed some "hog feeders." These hog feeders were approximately 10 years old, and were no longer being used by Mr. Sheldon, who had switched to a different feeding system. Although separate from the other scrap metal removed by the Debtor, the hog feeders were located in the general vicinity of "Building 1." According to the Debtor, the hog feeders took some time to remove since they were bulky. The Debtor described the hog feeds as being composed of cheap stainless steel, with many of the feeders also being damaged. The Debtor also related to the Court that many of the hog feeders showed signs of non-use – *e.g.*, rust in the corners, lying on the ground and sunk into the dirt.

The Debtor claims that Mr. Sheldon gave him written permission to remove the hog feeders, but that the writing was later lost in a fire at his residence. Mr. Sheldon, however, disputes having ever provided the Debtor permission, whether written or oral, to remove his hog feeders. To the contrary, Mr. Sheldon treated the removal of his hog feeders as a theft, contacting the police and also making a claim against his insurer for the loss. In all, Mr. Sheldon testified to this Court that the Debtor and his friends improperly removed 40 hog feeders from his property.

In the ensuing police investigation, the hog feeders were located at the scrap yard. No effort, however, was made to recover the hog feeders, ostensibly because they were no longer in working order. The police investigation also resulted in criminal charges being brought against the Debtor, with the Debtor being indicted on a number of criminal counts including Grand Theft, Theft by Deception, Breaking and Entering, and Possession of Criminal Tools. Subsequently, the Debtor pled and was then adjudicated guilty to these charge: (1) three counts of Breaking and Entering in violation of O.R.C. § 2911.13(B), a fifth degree felony; and (2) Possession of Criminal Tools in violation of O.R.C. § 2923.24, another fifth degree felony. The Debtor entered his plea of guilty on these counts after conferring with and upon the advice of legal counsel.

On the insurance matter, Mr. Sheldon's insurer, the Plaintiff, the United Ohio Insurance Company, subsequently paid to Mr. Sheldon the sum of $23,419.51 for the loss of the hog feeders.

This sum represented, after a $2,500.00 deductible, the assessed value of 33 hog feeders at two years of age. Based upon its payment to Mr. Sheldon, the Plaintiff, as subrogee, commenced a civil action in state court for conversion and theft, seeking to recover its loss.

In the state court action, the Debtor responded neither to the Plaintiff's request for admissions, nor to a motion for summary judgment filed by the Plaintiff. Judgment was then entered in the Plaintiff's favor. In rendering judgment in favor of the Plaintiff, the state court did not make any specific findings of fact regarding the mental state of the Debtor.

DISCUSSION

In this adversary proceeding, the Plaintiff, citing to 11 U.S.C. § 523(a)(6), seeks to have its claim found to be a nondischargeable debt. A proceeding brought to determine the dischargeability of a particular debt is deemed to be a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Accordingly, the Court has the jurisdictional authority to enter final orders and judgments in this matter. 28 U.S.C. § 157(b)(1); § 1334.

Legal Background

In a case such as this brought under Chapter 7 of the Bankruptcy Code, the aim of the debtor is to obtain a discharge. *See, e.g.*, *In re Barcelo*, 313 B.R. 135, 149 (Bankr. E.D.N.Y.2004). Generally, a discharge entered by the court operates to permanently enjoin creditors from any act to collect on a prepetition obligation. 11 U.S.C. § 524; *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 444 (1st Cir.2000). But, for reasons of public policy, Congress placed certain categories of debts beyond the scope of the bankruptcy discharge.

One of the categories of nondischargeable debts are those which arise as the result of a debtor's morally reprehensible conduct, thus implementing a primary policy goal of the Bankruptcy Code – that of limiting its benefits to only the honest, but unfortunate debtor. *Grogan v. Garner*, 498

U.S. 279, 286–87, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991); *O'Brien v. Sintobin (In re Sintobin),* 253 B.R. 826, 831 (Bankr.N.D.Ohio 2000). Section 523(a)(6), as cited by the Plaintiff, serves as a cornerstone of this policy by excepting from discharge any debt which is shown to have arisen as the result of a debtor's "willful and malicious" conduct. In relevant part, § 523(a)(6) 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[.]

As with other exceptions to dischargeability, it is the movant's burden to establish, by at least a preponderance of the evidence, the applicability of § 523(a)(6). *Grange Mut. Cas. Co. v. Chapman (In re Chapman),* 228 B.R. 899, 906 (Bankr. N.D.Ohio 1998). *Graffice v. Grim (In re Grim),* 293 B.R. 156, 167 (Bankr. N.D.Ohio 2003). In making this assessment, two overall principles offer guidance. First, the willful and malicious standard of § 523(a)(6) is a stringent one. *CMEA Title Agency, Inc. v. Little (In re Little),* 335 B.R. 376, 383 (Bankr. N.D.Ohio 2005). Second, "discharge exceptions are to be narrowly construed in favor of the debtor." *Monsanto Co. v. Trantham (In re Trantham),* 304 B.R. 298, 306 (6th Cir. B.A.P. 2004).

Section 523(a)(6) is written in the conjunctive, meaning that the plaintiff must demonstrate that the debtor's conduct was both "willful" and "malicious." However, neither the term "willful" nor "malicious" is defined by the Bankruptcy Code. But in the case of *Kawaauhau v. Geiger*, the Supreme Court of the United States addressed the scope of the term willful. 523 U.S. 57, 118 S.Ct. 974, 975, 977, 140 L.Ed.2d 90, 92 (1998).

The issue before the Court in *Kawaauhau v. Geiger* was whether "§ 523(a)(6)'s compass cover acts, done intentionally, that cause injury, or only acts done with the actual intent to cause injury?" *Id*. at 61, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90. (internal parentheticals omitted). Put differently, the Court in *Kawaauhau v. Geiger* was asked to decide whether the *mens rea*

requirement of § 523(a)(6) looked only to the general intent of the debtor, or instead required a specific intent to cause harm.

The Supreme Court in *Kawaauhau v. Geiger* determined that § 523(a)(6) should be read restrictively so as to only encompass acts done with the specific intent to cause harm. In coming to this conclusion, the Court in *Kawaauhau v. Geiger* linked the mental state of § 523(a)(6) with that required of intentional torts. In the Court's words: "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself'" *Id*. at 61–62, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90.

Affording § 523(a)(6) a restrictive reading, the Court also found avoided undesirable results:

> [the] more encompassing interpretation could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor. Every traffic accident stemming from an initial intentional act – for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic – could fit the description. A knowing breach of contract could also qualify. A construction so broad would be incompatible with the well-known guide that exceptions to discharge should be confined to those plainly expressed.

Id. at 62, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (internal quotations and citations omitted). As applied to § 523(a)(6), the Sixth Circuit Court of Appeals has defined the "malicious" as an act done in conscious disregard of one's duties or without just cause or excuse. *Vulcan Coals, Inc. v. Howard*, 946 F.2d 1226, 1229 (6th Cir. 1991).

Application of 11 U.S.C. § 523(a)(6)

To except a debt from discharge under § 523(a)(6), the Plaintiff carries the burden to establish, by at least a preponderance, the section's applicability. *Grange Mut. Cas. Co. v. Chapman (In Re Chapman)*, 228 B.R. 899, 906 (Bankr. N.D. Ohio 1998). In the type of situation presented in

this matter, where the injury arises from a debtor's alleged conversion of property, this means showing that the debtor knew that the plaintiff had superior rights in the property converted. *First Nat'l Bank v. Stanley (In re Stanley),* 66 F.3d 664, 668 (4th Cir.1995). Hence, a debtor's honest and good faith belief that he had authority to sell or use the converted property will provide a defense to an action brought under § 523(a)(6). *Hoffman v. Anstead (In re Anstead),* 448 B.R. 202, 206-207 (Bankr. N.D.Ohio 2011); *see also Medved v. Novak (In re Novak),* 97 B.R. 47, 61 (Bankr. D.Kan.1987) ("good faith belief that one has authority to dispose of property will vitiate an allegation of willful and malicious conversion.").

As an evidentiary matter, a plaintiff will normally sustain their burden, not by producing a smoking gun, but by showing that the totality of the circumstances, as adduced from the cumulative weight of the evidence, indicate that the debtor caused it injury in a willful and malicious manner. *Rescuecom Corp. v. Khafaga*, 419 B.R. 539, 552 (Bankr. E.D.N.Y.2009). To this end, a number of evidentiary considerations weigh toward a finding that the Debtor must have known, or at least consciously disregard his lack of authority to remove Mr. Sheldon's hog feeders from his farm – thereby giving rise to a *prima facie* case for purposes of § 523(a)(6).

Particularly damaging for the Debtor is the fact that the Debtor failed to defend, and was then adjudicated guilty/liable, in both a criminal and civil action brought against him for the theft of Mr. Sheldon's hog feeders. Although this Court previously found that this particular circumstance did not preclude the Debtor from defending against the Plaintiff's § 523(a)(6) action,[1] it still follows that the Debtor's acknowledgment of guilt to the theft of Mr. Sheldon's hog feeders, and his acquiescence to civil liability for the same, provides strong evidence that the Debtor knew he was wrongfully taking Mr. Sheldon's hog feeders. Other evidentiary matters presented at the Trial further

[1] Previously, this Court denied a Motion for Summary Judgment filed by the Plaintiff, finding that the Debtor's plea and adjudication of guilt in the state court criminal matter did not preclude the Debtor from litigating in this Court the issue of whether he acted willfully and maliciously for purposes of the Plaintiff's complaint to determine dischargeability as brought under § 523(a)(6). (Doc. No. 25).

support the Plaintiff's position that the Debtor acted "willfully and maliciously" within the meaning of § 523(a)(6).

First, the Court finds the Debtor's break with his past practice telling. It is not contested that the Debtor removed scrap metal from the Mr. Sheldon's farm on two separate occasions. On the prior occasion, the Debtor took the scrap immediately after receiving permission. The Debtor also then visited Mr. Sheldon's residence on his way to the scrap yard, thereby allowing Mr. Sheldon to personally view the scrap metal removed. For the most recent occasion, however, the Debtor was not so open, removing the scrap metal some months after receiving permission and then proceeding straight to the scrap yard, without allowing Mr. Sheldon to inspect the materials removed. The metal was also removed at a time during the week when the Debtor, whose family knew Mr. Sheldon, could have known that Mr. Sheldon was at work.

The physical nature of the hog feeders, both in size and in location, also make the Debtor's intentions measurably suspect. According to the evidence presented, the hog feeders were bulky and generally more difficult to remove than the other scrap metal. Also, according to Mr. Sheldon's testimony, the hog feeders – although in the general vicinity of "Building 1," where the Debtor had been given explicit permission to remove the scrap metal – were distinct from and physically separate from the scrap metal the Debtor was allowed to remove.

Under these conditions, caution would dictate that the Debtor should have inquired of Mr. Sheldon as to whether it was proper to remove the hog feeders. No such inquiry, however, was conducted by the Debtor, even though he had ample time, having removed the hog feeders from Mr. Sheldon's farm over a three-day period. The Debtors' explanation, that he had written permission from Mr. Sheldon to take the hog feeders, but that the writing was lost in a residential fire, also strikes the Court as disingenuous as no evidence of the fire, such as from a local newspaper, was produced.

In furtherance of its claim under § 523(a)(6), the Plaintiff also relies heavily on the Trial testimony given by the Debtor in which the Debtor acknowledged that Mr. Sheldon never gave him explicit authority to take the hog feeders. According to the Plaintiff, in "light of this factual agreement, Defendant Dilts cannot claim an ownership interest or claim to have been given them by Insured Sheldon. Thus, the debt of Mr. Sheldon's insurer should be discharged under § 523(a)(6)." (Doc. No. 31).

The Debtor's admission, that Mr. Sheldon did not give him explicit permission to take the hog feeders, certainly weighs in the Plaintiff's favor. However, contrary to what seems to be suggested by the Plaintiff, the lack of explicit permission afforded to the Debtor to remove the hog feeders is not dispositive on the issue before the Court. To hold otherwise would clearly run afoul of the Supreme Court's decision in *Kawaauhau v. Geiger*, as discussed above.

As set forth, the Supreme Court's decision in *Kawaauhau*, by holding that an action under § 523(a)(6) requires that the actor intend 'the consequences of an act' and not simply 'the act itself,' means that it must be shown that the debtor acted with the specific intent to cause injury or was substantially certain that an injury would result. *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 167 (Bankr. N.D.Ohio 2003). This approach is subjective; thus, a good faith belief, even if objectively unreasonable, will provide a defense against an action brought under § 523(a)(6). *See Halliburton Energy Services, Inc. v. McVay (In re McVay)*, 461 B.R. 735, 744 (Bankr. C.D.Ill. 2012) ("A good faith belief and assertion of a property right takes a debtor's actions outside the scope of section 523(a)(6)."). Consequently, regardless of whether Mr. Sheldon provided the Debtor with explicit permission to remove the hog feeders, the pertinent question necessarily comes down to this: Did the Debtor personally believe that he had permission to remove Mr. Sheldon's hog feeders?

On this question, it does not stretch the bounds of credulity to see how the Debtor could have assumed that Mr. Sheldon's hog feeders were included within the scope of the materials he was given permission to remove from Mr. Sheldon's farm. The hog feeders, being near 'Building 1' on Mr. Sheldon's farm, were in the general vicinity of the scrap metal for which the Debtor was given

explicit permission to remove. The Parties also agree that the hog feeders showed signs of non-use – *e.g.*, rust in the corners, lying on the ground and sunk into the dirt – thus reasonably giving the hog feeders the appearance of scrap metal.

In addition, the Court, having observed the demeanor of the witnesses, finds further support for the Debtor's position. First, the Court found the Debtor's explanation regarding his plea of guilty to theft in the state-court matter to be genuine. In this regard, the Debtor explained to the Court that he only pled guilty to reduced criminal charges on the advice of legal counsel who warned him that if he was convicted on all counts, he could easily face time in prison.

Conversely, the Court also found the testimony of the Plaintiff's star witness, Mr. Sheldon, to be elusive and not entirely forthcoming. For example, Mr. Sheldon could not fully account for the fact that, while claiming the Debtor stole 40 hog feeders, he only claimed the actual loss of 33 hog feeders on his insurance claim. Also, with the insurance claim, a satisfactory answer was never given to the fact that the hog feeders, although approximately 10 years old, were assessed as being only two years old for purposes of Mr. Sheldon's insurance claim. Finally, it did strike the Court as strange that no effort was ever made by Mr. Sheldon to recover any of his hog feeders after their location was ascertained.

The circumstantial evidence presented to the Court at the Trial also produced a number of points which further mitigate in the Debtor's favor. In the first instance, the financial gain realized by the Debtor for the hog feeders was rather meager when compared to the risks involved. In all, the Debtor and his two friends, with whom he agreed to split the profits, only realized $600.00 to $800.00 from a sale of the scrap metal removed from Mr. Sheldon's farm. The Debtor's profit from a sale of the scrap metal was, thus, less than $300.00. Of this amount, moreover, the hog feeders only constituted a portion of the scrap metal removed from Mr. Sheldon's farm, meaning that the financial gain individually realized by the Debtor from the sale of just the hog feeders was probably less than $200.00.

The Debtor would also have likely had foreknowledge of the small gain to be realized from a sale of the hog feeders. For a number of years prior, the Debtor had intermittently been engaged in the business of scrapping metal. The Debtor had also previously removed scrap metal from Mr. Sheldon's farm.

The Plaintiff's position, thus, presents this conundrum: To sustain a finding that the Debtor willfully and maliciously converted Mr. Sheldon's hog feeders, it must be assumed that the Debtor, having full knowledge that he did not have permission to take Mr. Sheldon's hog feeders, and recognizing that he would not realize a meaningful gain from the sale of the hog feeders, was nevertheless willing to steal Mr. Sheldon's hog feeders and take the chance that no serious ramifications would arise therefrom. Any objective cost-benefit analysis would show this to be an unfavorable course of action. To be sure, property theft is often a crime of opportunity, committed by a person who does not thoroughly think through the consequences. *See U.S. v. Livesay*, 587 F.3d 1274 (11th Cir. 2009). But this does not appear to be the case here.

First, the Debtor did not, on a spur of the moment, trespass on Mr. Sheldon's property and take his hog feeders. Instead, the facts show that a considerable period of time passed between when the Debtor first sought Mr. Sheldon's permission to take the scrap metal located near 'Building 1' and when the Debtor actually entered upon Mr. Sheldon's property to remove the hog feeders. Even this aside, however, what particularly stands out to the Court, and what tips the balance in the Debtor's favor, is the fact: In removing the hog feeders from Mr. Sheldon's farm, the Debtor was mostly transparent in his actions.

When a person steals or otherwise intentionally misappropriates another's property, an often strong indicator of guilt/liability will concern the measures taken by the person to conceal their actions. Simply put, a guilty mind will normally take steps to cover their actions. *Republic of the Philippines v. Westinghouse Electric Corporation*, 139 F.R.D. 50, 53 (D.N.J.1991). The overall conduct of the Debtor with respect to Mr. Sheldon's hog feeders, however, does not resemble that of a person attempting to hide their actions.

In all, the Debtor removed between 33 and 40 hog feeders from Mr. Sheldon's farm, the scope of which would have been impossible to hide from Mr. Sheldon. The Debtor, thus, had to be fully cognizant of the fact that Mr. Sheldon would notice the hog feeders missing. The Debtor's was also rather open and blatant in his actions, removing the hog feeders from Mr. Sheldon's property over a three-day period and in broad daylight. Finally, the Debtor's lack of effort to conceal his actions is demonstrated by the ultimate destination of the hog feeders. The Debtor took the hog feeders to a scrap yard with whom he had regularly conducted business, a fact which would have presumably made it easy for any party to locate the hog feeders.

In sum, when those mitigating circumstances as discussed herein are considered in light of the fact that the Debtor did not take any serious measures to conceal his actions with respect to the hog feeders, the Court finds that Debtor has presented sufficient evidence to refute those evidentiary considerations which weighed in the Plaintiff's favor. Therefore, the Court must decline to enter judgment in favor of the Plaintiff on its action under § 523(a)(6). In reaching this conclusions, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that the Complaint of the Plaintiff, the United Ohio Insurance Company, to Determine Dischargeability, be, and is hereby, DISMISSED.

IT IS FURTHER ORDERED that any claim held by the Plaintiff, the United Ohio Insurance Company, in the Debtor's bankruptcy case (Case No.10-38340) is hereby determined to be a dischargeable debt.

Dated: May 4, 2012

Richard L. Speer
United States
Bankruptcy Judge