UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 02-35841
	)	
Adam Ehler Hall	)	Chapter 7
Shannon Annette Hall,	)	
	)	Adv. Pro. No. 02-3449
Debtors.	)	
	)	Hon. Mary Ann Whipple
PACCAR Financial Corp.	)	
	)	
Plaintiff,	)	
	)	
v.	)	
Adam Ehler Hall, et al.,		
Defendants.		

MEMORANDUM OF DECISION AND ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiff's motion for summary judgment [Doc. # 14], Defendants' amended response [Doc. # 25] and Plaintiff's reply [Doc. # 26]. In its complaint, Plaintiff seeks a determination that the debt owed to it by Defendants is nondischargeable pursuant to 11 U.S.C. § 523(a)(6). The court has jurisdiction over Defendants' underlying Chapter 7 case and this adversary proceeding pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district. Actions to determine dischargeability are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(I). For the following reasons, Plaintiff's motion is denied.

Factual Background

For purposes of this motion, the following facts are undisputed. Defendants Adam and Shannon Hall, husband and wife, jointly operated a business known as "Hall Trucking," which contracted with various companies to provide trucking services on a subcontractor basis. (Adam Hall Depo., p. 6-7, 10-11). Adam Hall drove one of the trucks, while Shannon Hall handled the company's bookkeeping and other

paperwork, including payment of the company's debt to Plaintiff and insurance on its vehicles. (Shannon Hall Depo., p. 4, 6). In the course of their business, on March 22, 2000, Defendant Adam Hall purchased a 2000 Dorsey DGTS 8-axle trailer for $68,660.00.[1] Plaintiff financed the purchase and acquired a security interest in the trailer as assignee of the seller's interest under a Security Agreement Retail Installment Contract with Defendants. Defendants agreed to keep the trailer insured against fire, theft, and collision and to "prevent any waste, loss, damage, or destruction of or to the Collateral. . . ." Plaintiff's Exhibit 1, p. 1, 3.

Payments were made to Plaintiff on a timely basis until August, 2001. At that time, Mr. Hall was diagnosed with metastatic cancer and was informed that he must cease driving his truck. As a result, the Halls could no longer operate their trucking business. (Shannon Hall Aff. ¶ 2-3; Plaintiff's Exhibit B). During the months that followed, Mr. Hall was in and out of the hospital. (Adam Hall Depo., p. 31). Due to his extensive medical treatment and his inability to work, the Halls became delinquent in their payments to a number of creditors and received numerous calls from various creditors regarding their past due balances. (Shannon Hall Aff. ¶ 4). Eventually, they simply stopped answering their phone; however, they maintained an answering device on their phone. (Adam Hall Depo., p. 5).

During the period from September 30, 2001, through November 6, 2001, agents of Plaintiff attempted unsuccessfully to contact Defendants by telephone twenty-one times and left a number of messages on the answering machine at Defendant's home. (Lawiztke Aff. ¶ 6). In addition, on November 1, 2001, Plaintiff sent a letter by certified mail to Adam Hall informing him that his account was past due and urging him to "[i]mmediately bring your account up to date, pay the entire outstanding balance, or return the truck to the selling dealer." Plaintiff's Exhibit 5. Mr. Hall signed for the letter on November 7, 2001. *Id.*

The Halls did not respond to the phone calls or to the November 7 letter. At some time in late November or early December, 2001, Mr. Hall parked the trailer at a well known truck stop where he had

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[1] Although both Adam and Shannon Hall signed the Security Agreement Retail Installment Contract, the trailer was titled in the name of Adam Hall only. Plaintiff's Exhibits 1 & 2.

parked trailers in the past. (Adam Hall Depo., p. 22, 27; Shannon Hall Depo., p. 7). Having no other place to park, Mr. Hall testified that he often parked his trucks there on weekends, as did a number of other truckers. (Adam Hall Depo., p. 27). The truck stop has security cameras and
Defendants had previously never encountered a problem while a trailer was parked there. (Adam Hall Depo., p. 27; Shannon Hall Aff. ¶ 6). Mr. Hall testified that he parked the 2000 Dorsey in plain view under a light post at the truck stop. (Adam Hall Depo., p. 27). Also in November or December, 2001, the insurance on the 2000 Dorsey was cancelled due to Defendants' inability to pay the premium. (Adam Hall Depo., p. 16; Shannon Hall Depo., p. 6-7).

Plaintiff made no further contact with Defendants until May 9, 2002, when Plaintiff's representative went to Defendants' residence to inquire about the trailer. At that time, Defendants advised the representative of the location where Mr. Hall had parked the trailer. (Shannon Hall Aff. ¶ 7). However, on May 10, 2002, the representative went to the truck stop and the trailer was no longer there. (Lawiztke Aff. ¶ 9, Plaintiff's Exhibit 6). On September 3, 2002, Defendants filed a petition for relief under Chapter 7 of the Bankruptcy Code. As of the commencement of the case, Defendants owed Plaintiff $58,314.91 under the contract, including an arrearage of $8,148.72. (Lawitzke Aff. ¶ 3). Plaintiff also presents evidence that the trailer was valued in the $45,000.00 to $50,000.00 range during the time period from November, 2001, through May, 2002.

Law and Analysis

I. Summary Judgment Standard

Under Fed.R. Civ. P. 56, made applicable to this proceeding by Fed.R.Bankr.P. 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

II. Exception to Discharge under § 523(a)(6)

Plaintiff seeks a determination that Defendants' debt owed to it for the 2000 Dorsey trailer is nondischargeable under § 523(a)(6) of the Bankruptcy Code.[2] That section provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is not dischargeable. 11 U.S.C. § 523(a)(6). In order to be entitled to a judgment that the debt is excepted from discharge, Plaintiff must prove by a preponderance of the evidence that the injury from which the debt arises was both willful and malicious. *J & A Brelage, Inc. v. Jones (In re Jones)*, 276 B.R. 797, 801-2 (Bankr. N.D. Ohio 2001).

Addressing the "willful" requirement of § 523(a)(6), the Supreme Court specifically held in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 526(a)(6)." *Id.* at 63. Rather, the Supreme Court explained that

> [t]he word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes *a deliberate or intentional injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, *i.e.*, "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, 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*

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[2] A Suggestion of Death has been filed indicating that Adam Hall died on April 27, 2003. However, the Court must determine dischargeability as to both Adam and Shannon Hall since a deceased debtor is entitled to a bankruptcy discharge. *See In re Wiesner*, 267 B.R. 32, 35 (Bankr. D. Mass. 2001); Fed. R. Bankr. P. 1016.

> *simply "the act itself." Restatement (Second) of Torts § 8A, Comment* a, *p. 15 (1964) (emphasis added).*

Id. at 61-62. The Supreme Court found that a more encompassing interpretation could place within the excepted category a variety of situations "in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor," including a knowing breach of contract. *Id.* at 62. The Court explained that such a broad construction "would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" *Id.* (citing *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)).

Noting that the Restatement of Torts defines intentional torts as those motivated by a desire to inflict injury or those substantially certain to result in injury, the Sixth Circuit further refined the holding in *Kawaauhau* by incorporating that definition into the § 523(a)(6) analysis. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999). The court held 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). *Id.*

In addition to proving a "willful" injury, Plaintiff must also demonstrate that Defendants acted maliciously. *Id.* at 463 (holding the absence of either the willful or malicious requirement creates a dischargeable debt). A person will be found to have acted maliciously when that person acts in conscious disregard of his or her duties or without just cause or excuse. *See Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986); *Jones*, 276 B.R. at 803; *Johnson v. Logue (In re Logue)*, 294 B.R. 59, 63 (B.A.P. 8th Cir. 2003)("In the context of breach of a security agreement, a willful breach is not enough to establish malice.").

Plaintiff's summary judgment motion rests on the following facts: Defendants failed to respond to its telephone calls from September 30 through November 6, 2001, and to the November 7, 2001, letter demanding full payment or return of the trailer to the dealer; Defendants parked the uninsured trailer at the truck stop and failed to take any action to notify Plaintiff as to the location of the trailer until Plaintiff sent a representative to their home in May, 2002; and Defendants were aware of the provisions of the security agreement requiring them to keep the trailer insured and to prevent any waste, loss, damage or destruction of or to the collateral. Relying on these facts, Plaintiff argues that it is entitled to a determination that the debt owed by Defendants is the result of a willful and malicious injury and, thus, is nondischargeable.

In support of its argument, Plaintiff relies on *In re Jones* for the proposition that a rebuttable presumption exists that Defendants knew that their conduct would cause injury. In *Jones*, the court found that such a presumption arises when the debtor, "despite having knowledge as to the implications of the security agreement, took no action to protect the creditor's interest therein." *Jones*, 276 B.R. at 802. However, this standard, without more, could encompass a failure to act that was merely negligent or reckless, which conduct does not fall under § 523(a)(6). *Kawaauhau*, 523 U.S. at 63; *Logue*, 294 B.R. at 63 ("[D]ebtor's knowledge that he or she is violating the creditor's legal rights is insufficient to establish malice absent some additional aggravated circumstances."). While such circumstantial evidence of the debtor's state of mind is certainly relevant, at a minimum, there must also be evidence that the debtor was aware that the injury to the collateral would occur or was substantially certain to occur if no action was taken to protect it. *See Markowitz*, 190 F.3d at 464.

Having reviewed all of the evidence presented, the Court finds that a genuine issue exists as to whether Defendants intended injury to Plaintiff's interest in the trailer or believed that such injury was substantially certain to result from their actions. The evidence shows that they chose a location to park the trailer that they had used many times in the past without any problems of vandalism or theft. The truck stop used is well known and employs security cameras on the premises. Mr. Hall parked the truck in plain view under a light post. A reasonable factfinder could conclude that, while a better course of action may have been available, Defendants did in fact attempt to protect the collateral at issue.

Plaintiff also relies heavily on the fact that Defendants did not return their phone calls, respond to the November 7 letter, or notify Plaintiff of the location of the trailer. Plaintiff cites several cases for the proposition that the "willful" standard of § 526(a)(6) is met where the debtor intentionally deprives the creditor of repossession of his property. *See Wurm v. Ridgway (In re Ridgway)*, 265 B.R. 853 (Bankr. N.D. Ohio 2001); *Heyne v. Heyne (In re Heyne)*, 277 B.R. 364 (Bankr. N.D. Ohio 2002); *ITT Financial Servs. v. Suydam (In re Suydam)*, 151 B.R. 436 (Bankr. N.D. Ohio 1992). To the extent that these cases stand for such a proposition, the court finds each of them distinguishable on their facts from this case. For example, in *Wurm*, the court found that the debtor not only failed to cooperate, but actively impeded the creditors efforts to regain possession of his property. *Wurm*, 265 B.R. at 856. In *Heyne*, the debtor's ex-

wife brought an action seeking a determination that the debt owed to her pursuant to their divorce decree was nondischargeable. During the course of the divorce, debtor had sold over $72,000 of marital assets in violation of a state court restraining order. *Heyne*, 277 B.R. at 366. The court found that the tort of conversion, if done deliberately and intentionally, will give rise to a nondischargeable debt pursuant to § 523(a)(6). *Id.* at 368-69. Finally, in *Suydam*, the court found a debt nondischargeable where items such as a stereo, television set, VCR, snowblower, camping equipment and tools that had been pledged as collateral for a loan were discarded, given away or sold. *Suydam*, 151 B.R. at 439-40.

Unlike the aforementioned cases, Defendants did not actively impede Plaintiff from repossessing its collateral. To the extent that Plaintiffs rely on Defendants' failure to respond to telephone calls, the evidence indicates that they responded to no creditors' calls because they were being harassed regarding past due balances. There is no evidence to suggest that Plaintiff inquired as to the location of the trailer to facilitate repossession until May, 2002, when its representative went to Defendants' home. At that time, Defendants informed the representative as to where Mr. Hall had parked the trailer. Although the November 7 letter demanded, as an alternative to full payment of the loan, that the trailer be returned to the dealer, it did not ask the location of the trailer for repossession purposes. Furthermore, there is no evidence that Shannon Hall ever saw the letter. It was addressed to Mr. Hall and he received it, as indicated by his signature on the certified mail return receipt. Mrs. Hall testified that she had no recollection of the letter. Furthermore, Mr. Hall had recently been diagnosed with metastatic cancer, requiring him to undergo extensive medical treatment. He was in and out of the hospital and testified that the trailer was simply not foremost in his mind. A reasonable factfinder could conclude that Defendants did not intentionally deprive Plaintiff of repossession of the trailer or cause willful injury to the collateral.

Finally, Plaintiff relies on the same evidence to support a finding that Defendants' actions were malicious, i.e. were done with conscious disregard of their duties or without just cause or excuse. However, in light of all of the evidence and for the reasons discussed above, the court finds that a genuine issue exists as to whether the debt owed by Defendants is the result of either an willful or malicious injury.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Plaintiff's motion for summary judgment [Doc. # 14] be, and hereby is,

DENIED; and

IT IS FURTHER ORDERED that, pursuant to Fed. R. Civ. P. 16(a), applicable to this adversary proceeding by Fed. R. Bankr. P. 7016, **a further pre-trial conference will be held on August 28, 2003, at 1:30 o'clock p.m.** for purposes of setting a trial date**.**

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge