THIS OPINION IS NOT INTENDED FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| In re: | ) | Case No. 03-23579 |
| | ) | |
| JOHN THOMAS FAY dba | ) | Chapter 7 |
| JOHN THOMAS FAY & ASSOCIATES, | ) | |
| | ) | Judge Pat E. Morgenstern-Clarren |
| Debtor. | ) | |
| | ) | |
| | ) | |
| HUNTINGTON NATIONAL BANK, | ) | Adversary Proceeding No. 04-1026 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | **MEMORANDUM OF OPINION** |
| | ) | **REGARDING MOTION FOR** |
| JOHN THOMAS FAY, | ) | **PARTIAL SUMMARY JUDGMENT** |
| | ) | |
| Defendant. | ) | |

The Plaintiff Huntington National Bank (the bank) filed this adversary proceeding to request a determination that debt owed to it by the defendant-debtor is nondischargeable under bankruptcy code § 523. The bank moves for summary judgment on counts I and II of its complaint which assert nondischargeablity under § 523(a)(6). (Docket 36, 41). The debtor opposes that request. (Docket 37). For the reasons set forth below, the bank's motion is denied.

## JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

## FACTS[1]

The debtor John Fay borrowed money and obtained credit from the bank in April and July of 1998. The bank initially extended a $2,250,000.00 line of credit to Fay on April 3, 1998. This loan was secured by six paintings (and additional items) which Fay pledged as collateral. Fay delivered the artwork to the bank. Under the loan documents, Fay agreed that he would not allow the artwork to have an appraised value of less than five million dollars "unless [the] [b]ank shall agree in writing to accept additional collateral." The amount of this line of credit was increased to $2,325,000.00 on July 27, 1998. At the same time, the bank made a $2,200,000.00 term loan to Fay. Fay pledged 71 additional pieces of artwork as collateral. The loan agreement provided that Fay would not permit the artwork which had been pledged as collateral to have an appraised value of less than $8,750,000.00 "unless [the] bank agrees in writing to accept additional collateral." Fay kept this additional artwork in his business office. Fay later defaulted on the loan.

On February 19, 1999, Fay filed a complaint against the bank in the Cuyahoga County Court of Common Pleas. The bank answered, filed a counterclaim against Fay, and removed the action to the United States District Court. On April 5, 1999, in an effort to preserve the bank's interest in its collateral pending a final disposition of the litigation, the district court entered an agreed order which required Fay to maintain possession of the additional artwork collateral. On September 29, 2003, the district court entered a judgment in favor of the bank against Fay and determined that Fay was liable to the bank in the principal amount of $4,523,618.91, plus late

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[1] These are the undisputed facts based on the pleadings and the evidence offered by the parties in connection with the summary judgment motion.

fees and interest. The order also granted the bank immediate possession of all of the artwork which Fay had pledged as collateral for the loans.

Mr. Fay filed his chapter 7 case on October 13, 2003.

## DISCUSSION

In counts I and II of the complaint, the bank seeks a judgment that the debt owed by Fay is not dischargeable under § 523(a)(6).[2] The bank argues in its summary judgment motion on these counts that the debtor willfully and maliciously disposed of the pledged artwork in violation of their agreement and in violation of the district court's order. The debtor denies via affidavit that he took any action intending to harm the bank and that he believes the value of the remaining artwork exceeds the debt.

### A. 11 U.S.C. § 523(a)(6)

Debts are not dischargeable under bankruptcy code § 523(a)(6) if they are:

> (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). To be nondischargeable under this section a debt "must be for an injury that is both willful and malicious." *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999). Such a debt must result from "a deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). "[T]he debtor must have intended not only his conduct, but also the consequences of his conduct." *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 921-22 (B.A.P. 6th Cir. 2000). An injury falls within the § 523(a)(6) exception if the debtor either: (1) desired

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[2] The bank also requests a determination that the debtor is in civil contempt of the district court order requiring him to maintain possession of the artwork

to cause the consequences of his act; or (2) believed that the consequences of his act were substantially certain to result from it. *See Kennedy v. Mustaine (In re Kennedy)*, 249 F.3d 576, 581 (6th Cir. 2001); *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999). A person acts maliciously when he acts in conscious disregard of his duties or without just cause or excuse. *See Moffitt*, 252 B.R. at 923 (citing *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 419 (Bankr. N.D. Ohio 1998)). Given appropriate facts, a debtor's conversion of a secured creditor's collateral may constitute a willful and malicious injury for purposes of § 523(a)(6). *See, for example, J & A Brelage, Inc. v. Jones (In re Jones)*, 276 B.R. 797 (Bankr. N.D. Ohio 2001). And so, too, may a debtor's violation of a court order. *See, for example, Sullivan v. Hallagan (In re Hallagan)*, 241 B.R. 544, 548 (Bankr. N.D. Ohio 1999).

**B. Summary Judgment**

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c), made applicable by FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d

727, 730 (6th Cir. 1994). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prod., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

The bank argues in its summary judgment motion that Fay disposed of the artwork with full knowledge of and in violation of the bank's security interest in it, and that he disposed of other pieces with full knowledge that the court order prohibited him from doing so. In response, Fay filed an affidavit in which he acknowledges selling some of the art work which constituted the bank's collateral. He denies, however, that he did so with an intent to harm the bank, asserting instead that it was his understanding that the value of the remaining collateral greatly exceeded the debt he owed to the bank. He also disputes the timing of the sales. Based on the evidence submitted, a genuine issue of fact exists as to Fay's intent in selling the artwork. Summary judgment is, therefore, not warranted.

Additionally, a factual issue exists as to the amount of the debt at issue under § 523(a)(6). "[T]he appropriate measure for non-dischargeability under § 523(a)(6) is an amount equal to the injury caused by the debtor rather than any sum owed by the debtor on a contractual basis." *Friendly Fin. Serv. Mid-City, Inc., v. Modicue (In re Modicue)*, 926 F.2d 452, 453 (5th Cir. 1991). The evidence submitted does not establish the dollar amount of the injury to the bank (if any) which was caused by Fay's sale of the bank's collateral. This factual issue must also be resolved by trial.

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## CONCLUSION

For the reasons stated above, the bank is not entitled to summary judgment on counts I and II of its complaint. A separate order will be entered reflecting this decision.

Date: 26 Oct 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

David Mayo, Esq.
Stephen Hobt, Esq.

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| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | **ORDER** |
| JOHN THOMAS FAY, | ) | |
| | ) | |
| Defendant. | ) | |

For the reasons stated in the memorandum of opinion entered this same date, the plaintiff's motion for partial summary judgment is denied. (Docket 36).

IT IS SO ORDERED.

Date: 26 Oct 04

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

David Mayo, Esq.
Stephen Hobt, Esq.