The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: September 28 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-36184
	)	
Joshua N. Trapp,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 05-3332
	)	
Lile Day,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Joshua N. Trapp,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on Plaintiff's complaint objecting to Defendant's discharge under 11 U.S.C. § 727(a)(2) and (4). Plaintiff also seeks a determination that a debt owed to her by Defendant pursuant to a state court judgment is nondischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6).

The court has jurisdiction over the Defendant's/ Debtor's underlying Chapter 7 bankruptcy case and this adversary proceeding under 28 U.S.C. § 1334(a) and (b) respectively. The case and all related

proceedings, including this adversary proceeding, have been referred to this court for decision. 28 U.S.C. § 157(a) and General Order No. 84-1 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This adversary proceeding is a core proceeding in which this court can make a final determination because it involves Defendant's right to a discharge and dischargeability of a debt. 28 U.S.C. § 157(b)(1) and (b)(2)(I), (J).

This memorandum of decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that Defendant is entitled to judgment in his favor as to Plaintiff's claims objecting to discharge. But the court further finds that the debt owed by Defendant to Plaintiff is nondischargeable under 11 U.S.C. § 523(a)(2)(A) and is nondischargeable in part under § 523(a)(6).

FINDINGS OF FACT

The transaction underlying Plaintiff's complaint involves the purchase and financing of two all terrain vehicles (ATVs), as well as a trailer and accessories for use with the ATVs (collectively "the Property"). The parties differ in their rendition of the events leading to the purchase of the Property and the agreement regarding payment of the debt incurred to obtain the Property.

In 2002, Plaintiff and Defendant were both employed at the Heinz Distribution Company ("Heinz") in Fremont, Ohio, Plaintiff as a billing clerk and Defendant as a forklift operator in the warehouse. Plaintiff explained that both office and warehouse employees take their breaks in the same room. Plaintiff testified that she learned from Defendant that he had a troubled family life in that he was "at odds" with his parents, and that she tried to be a mentor to him, having a son Defendant's age. She had invited him to her home with her husband and son on various occasions. During 2002, Defendant was working full time and earned $40,694.

According to Plaintiff, Defendant approached her in October 2002 and asked her if she would be willing to cosign on a loan with him so that he could purchase the Property. She knew that he had been in an automobile accident, and Defendant told her he would be receiving proceeds from a judgment relating to that accident in the anticipated amount of $40,000 and that he would use those funds to pay off the loan. Plaintiff agreed to be a cosigner, and an ATV dealer, Pilgrim Motorsports, located in Plymouth, Michigan,

contacted her at work to obtain credit information.

On October 9, 2002, Plaintiff, Defendant, and Defendant's friend, Nate Beck, who also worked at Heinz, went to Plymouth to buy the Property. Defendant indicated that Beck drove a truck that day in order to transport the ATVs back to Fremont. While at Pilgrim Motorsports, three sales agreements were executed, one for a 2003 blue Yamaha ATV for a total amount of $7,499.00, one for a 2003 black Yamaha ATV for a total amount of $7,499.00, and one for a total amount of $5,669.94, which included $919.00 for a trailer and $4,710.94 for accessories. [Pl. Exs. 1-3]. Both Plaintiff and Defendant signed all three sales agreements as purchasers, as well as the Rider Training Certificate. [Pl. Exs. 1-3, 6]. In addition, Plaintiff signed credit applications necessary for obtaining 100% financing for the two ATVs through Household Bank. Plaintiff explained that Defendant did not bring his driver's license or other identification with him and, as a result, could not sign the credit applications. Therefore, Plaintiff signed two sets of credit applications. Arrangements were then made for Defendant to return with his license or other identification in order to sign the second set of applications as the primary applicant and for those applications to then be submitted to Household Bank. According to Plaintiff, she only intended to cosign on the loan, not to incur sole liability. Defendant, however, never returned to sign the loan documents and the loans were issued in Plaintiff's name only as the only person with any liability to the lending institution. Although a security interest was granted in the two ATVs in order to obtain the loan from Household Bank, [s*ee* Pl. Ex. 7 & 8], there is no evidence before the court of a security interest being granted in the trailer and accessories, which were apparently financed separately through GE Capital Finance, Inc., [*see* Pl. Ex. 3]. Also because Defendant failed to bring any identification with him, the names of both Plaintiff and Defendant were required to be put on the title to the ATVs, with only Plaintiff's home address appearing on the titles. [*See* Pl. Ex. 4 & 5]. The trailer was an untitled vehicle. The parties agreed that the ATVs and trailer would be kept at the home of Beck's father, who lived in Ohio a rural area nearby Fremont.

According to Plaintiff, Defendant promised to make "double" payments on the loan in the total amount of $240 until he received the proceeds from the personal injury judgment. That amount is twice the amount of the initial payment on the black ATV, which finance terms required payment of 1.6% of the balance owed, or, at least initially, $120. [*See* Pl. Ex. 2]. The blue ATV was financed at 0% interest and

no payments for six months.[1] Plaintiff testified, however, that Defendant never made the full payment to which he agreed. She testified that the only payments made by him are as follows: $170 on November 21, 2002, two payments on July 30, 2003, in the amounts of $200 and $150, and $150 on October 20, 2003. Plaintiff testified that she had to "hound" Defendant on paydays in order to get any money from him. In addition, Defendant promised to obtain insurance on the ATVs through his own insurance policy. Defendant repeatedly told Plaintiff that he was working on getting insurance, however, he never did so.

Because Defendant was not paying on the loans as promised, and having incurred late fees and a default interest rate, Plaintiff began making payments on the loans. Within one year of the date of purchase, and before Defendant's employment at Heinz was terminated, Plaintiff asked Defendant to return the Property to her so it could be repossessed by the lender and decrease her liability. After Defendant failed to do so, Plaintiff called his family to seek their assistance. However, it was not until she filed a report with the sheriff's office that Plaintiff returned the two ATVs. One ATV was returned to her in operating condition, while the second ATV was not operable and was missing parts. The trailer was never turned over to Plaintiff since, according to Defendant, he gave it to a third party in payment of a $500 debt "at the end of 2002." [Pl. Ex. 16, Interrogatory No. 9].

Plaintiff's testimony is largely unrebutted by Defendant, with the following exceptions. According to Defendant, Beck and Plaintiff approached him about going with them to look at ATVs in Plymouth. He testified that they had already contacted the dealer there. Defendant denies telling Plaintiff that he anticipated a $40,000 judgment from his personal injury claim. In fact, his claim was settled for $5,000, of which Defendant received approximately $2,700 on or about April 29, 2005. [Pl. Ex. 15, pp. 6, 15]. In addition, Defendant testified that he agreed only to make payments on one ATV in the amount of $170, which payments, according to Defendant, he made, mostly in cash, until he lost his job at Heinz in October 2003. He testified that Beck was to make payments on the other ATV. Defendant explained that he, Beck and Plaintiff had agreed that Beck's name would not be on any documents relating to the purchase of the ATVs because Beck was not creditworthy. While Defendant agrees that the ATVs were not returned to Plaintiff until she had filed a report with the sheriff's office, he testified that she had not previously asked for their return. Defendant also agrees that one of the ATVs was not operable. According to Defendant,

[1] The record is silent regarding the terms of the agreement between the parties to repay the loan used to purchase the trailer and accessories. The sales agreement for those items indicates the terms of that loan are 3% of the balance or, at least initially, $170. [Pl. Ex. 3].

while driving the ATV, he had gone into a ditch and had gotten water in the engine. He had removed certain items from the ATV in an unsuccessful attempt to repair it.

The court does not find Defendant's version of events entirely credible. The court credits Plaintiff's testimony that Defendant approached her regarding cosigning on the ATV loans and that she, otherwise, had no use for the ATVs. There is no evidence that Plaintiff had an interest in ATVs or ever even rode on one of the ATVs. The court also credits Plaintiff's testimony regarding her agreement with Defendant. Defendant signed each of the sales agreements as a co-purchaser and did not refute Plaintiff's testimony that he was to return to Plymouth with his identification to sign the loan documents to be submitted to Household Bank. Under Defendant's version of the agreement, there would have been no reason for him to sign any documents relating to the second ATV. The court also credits Plaintiff's testimony regarding four payments made by Defendant on the debt owed to her. Although Defendant testified that he made payments until he lost his job at Heinz, in his Interrogatories submitted in this proceeding, he stated only that he "made *several* monthly payments" until he lost his job at Heinz. [Pl. Ex. 16, Interrogatory No. 7 (emphasis added)]. And Defendant did not refute Plaintiff's testimony that she had to hound him to receive any payment at all. Finally, the court credits Plaintiff's testimony that she began asking Defendant to turn the Property over to her within the year after the purchases were made and before he lost his job at Heinz. The court finds credible, however, Defendant's testimony regarding the damage to the engine of one of the ATVs and his attempt to repair it.

On October 6, 2004, Plaintiff filed a complaint against Defendant in state court, alleging claims of breach of contract, fraud, conversion and replevin. [Pl. Ex. 9, pp. 5-9]. On December 21, 2004, after finding that Defendant was "duly served with service of process" and that Plaintiff was entitled to judgment by default, the state court ordered that Plaintiff be "awarded judgment against [Defendant] in an amount to be determined at a damages hearing. . . ." [*Id.* at 3-4]. No other findings of fact or conclusions of law were set forth in the states court's Judgement Entry of Default and Order Setting Damages Hearing. Plaintiff offered testimony at the damages hearing, after which the state court awarded judgment on January 20, 2005, against Defendant in the amount of $25,051.77, plus attorney fees in the amount of $1,871.45. [*Id.* at 1-2]. Plaintiff testified that the damages awarded by the court were based on the total payments on the Property made by her plus the remaining balance owed on the loans. [*See* Pl. Ex. 17, p. 1].

On June 17, 2005, Defendant filed the underlying Chapter 7 petition. He did not disclose his personal injury claim in his schedules. He did, however, disclose his receipt of $2,700 in settlement

proceeds relating to his personal injury claim and how it was spent to the Chapter 7 Trustee at the first meeting of creditors. Plaintiff timely filed the instant complaint on September 19, 2005.

LAW AND ANALYSIS

Plaintiff seeks a ruling that the debt owed to her by Defendant as set forth in the state court judgment is nondischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6). In addition, Plaintiff objects to Defendant's discharge under 11 U.S.C. § 727(a)(2) and (a)(4). A creditor must prove exceptions to dischargeability for individual debts under 11 U.S.C. § 523(a), including the exception for fraud, by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). Likewise, a party objecting to a debtor's discharge has the burden of proving by a preponderance of the evidence the grounds for denial of discharge. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). Both exceptions to discharge and grounds for denial of discharge are to be strictly construed against the creditor and liberally in favor of the debtor. *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998); *In re Keeney*, 227 F.3d at 683.

I. 11 U.S.C. § 523(a)(2)(A)

Under § 523(a)(2)(A), a debt is excepted from discharge to the extent it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." In order to except a debt from discharge under this section due to false pretense or false representation, a plaintiff must prove the following elements by a preponderance of the evidence: (1) the debtor obtained money or services through a material misrepresentation, either express or implied, that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. *Rembert*, 141 F.3d at 280-81. A debtor's intent to defraud a creditor is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. *Id.* at 281-82. "If there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the debtor." *ITT Fin'l Servs. v. Szczepanski (In re Szczepanski)*, 139 B.R. 842, 844 (Bankr. N.D. Ohio 1991).

In addition, § 523(a)(2)(A) also addresses "actual fraud" as a concept broader than misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000); *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873 (B.A.P. 6th Cir. 2001). "Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some

legal right, and which accomplishes the end designed. It requires intent to deceive or defraud." *Vitanovich*, 259 B.R. at 877 (quoting *Gerad v.Cole (In re Cole)*, 164 B.R. 951, 953 (Bankr. N.D. Ohio 1993)). A finding of fraudulent intent may be made on the basis of circumstantial evidence or from the debtor's "course of conduct," as direct proof of intent will rarely be available. *Hamo v. Wilson (In re Hamo),* 233 B.R. 718, 724 (B.A.P. 6th Cir. 1999).

In this case, Plaintiff argues that she was fraudulently induced to sign the loan documents for the Property by Defendant's false representations that he would pay the loans and that he would insure the Property. Defendant does not dispute that he represented to Plaintiff that he would pay for one of the ATVs. And, as discussed above, the court finds Plaintiff's testimony regarding Defendant's agreement to pay for both the ATVs to be credible. Defendant also does not dispute that he represented to Plaintiff that he would obtain insurance on the Property. However, Defendant made only four sporadic payments to Plaintiff, and only after being hounded by Plaintiff to do so, and never obtained insurance on the Property. While a mere breach of a promise to pay or to insure will not support a finding of fraud, "any debtor who does not intend to perform a contract from its inception has knowingly made a false representation." *Stifter v. Orsine (In re Orsine),* 254 B.R. 184, 188 (Bankr. N.D. Ohio 2000).

Defendant's course of conduct is telling in this case. Defendant went to Plymouth, Michigan, on the day of the purchase with the intent to purchase the Property but without any identification that would be necessary for him to obtain credit approval to complete the purchase. He and Beck clearly intended to take the Property with them that day, as Defendant testified that Beck drove his truck that day so as to be able to transport the ATVs. The court notes that Plymouth, a suburb of Detroit in western Wayne County, is far enough away from Fremont, Ohio, that it would not have been convenient for Defendant to simply go back and get his identification while Plaintiff waited to sign the loan documents.[2] So instead, Defendant agreed to return to Plymouth to sign the second set of loan documents making him the primary applicant on the loans, which documents were then to be submitted to the lender. This he did not do. He also never insured the Property, although he repeatedly told Plaintiff that he was "working on it." In addition, as discussed above, he made only a few sporadic payments and only after being hounded by Plaintiff to do so. Although the first payment was made the month following the purchase, it was less than the agreed upon

[2] The court also notes that Plaintiff did not adequately answer the question as to why they went all the way to Plymouth in order to purchase the ATVs.

payment amount. The next monetary payment was not made for another eight months! There is no evidence that Defendant experienced any change in circumstances in the months following the purchase of the Property. Rather, he was working full time during the entire year after the purchase, earning over $40,000. The court finds from Defendant's course of conduct after making representations that he would sign the loan documents and pay for and insure the Property that he never intended to be financially responsible for the Property and never intended to carry through with his promises. The court further finds that he made those representations with the intent to deceive Plaintiff so that she would be willing to sign the loans necessary to obtain the Property.

The court also finds that Plaintiff justifiably relied on Defendant's representations. The Supreme Court has made clear that although the reliance must be justified, it need not be reasonable. *Field v. Mans*, 516 U.S. 59, 74-75 (1995). The test is a subjective one rather than an objective one. *Id.* at 70-71. The pertinent question is thus whether the creditor was justified in relying on the representation, rather than whether a reasonable person would have done so. "'Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.'" *Id.* at 71 (quoting Restatement (Second) of Torts (1976) § 545(A)). In this case, Plaintiff's relationship with Defendant, together with her knowledge that he was working full time at Heinz and that he expected to recover on a personal injury claim, justified her in relying on his representations. And the court credits Plaintiff's testimony that, but for her reliance on Defendant's multiple misrepresentations, she would not have signed the loan documents for funds used to purchase the Property. She did not use and had no use for the Property herself. As such, the court finds that the debt owed to Plaintiff by Defendant as set forth in the state court judgment is nondischargeable under § 523(a)(2)(A).[3]

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[3] Although Plaintiff argued at trial that issue preclusion principles also entitle her to judgment on her § 523(a)(2)(A) claim in light of the default judgment entered in state court, this court disagrees. "Issue preclusion precludes the relitigation of an issue that has been ***actually and necessarily*** litigated and determined in a prior action." *MetroHealth Medical Ctr. v. Hoffmann-LaRoche, Inc.*, 80 Ohio St. 3d 212, 217 (1997) (emphasis added); *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186 (B.A.P. 6th 2002). In determining whether the issue has been actually and necessarily litigated and determined where a default judgment has been entered in a prior Ohio state court lawsuit, the court considers, first, whether the state court plaintiff actually submitted to the state court admissible evidence apart from the complaint and, second, whether the state court, from the evidence submitted, actually made findings of fact and conclusions of law that are sufficiently detailed to support application of the doctrine of collateral estoppel in the subsequent action. *Sweeney*, 276 B.R. at 193 (following *Hinze v. Robinson (In re Robinson)*, 242 B.R. 380, 387 (Bankr. N.D. Ohio 1999)). The state court's Judgment Entry of Default and Order for Damages Hearing makes no findings of fact or conclusions of law as to any basis for liability.

Plaintiff subsequently offered testimony at a damages hearing, after which the state court awarded judgment in the

II. 11 U.S.C. § 523(a)(4)

Plaintiff also alleges that the debt owed to her by Defendant is nondischargeable under § 523(a)(4), which excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Since there is no allegation or evidence that Defendant was acting in a fiduciary capacity, the court must determine whether Defendant owes a debt for embezzlement or larceny. Embezzlement and larceny are defined and determined according to federal law. *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 165-66 (Bankr. N.D. Ohio 2003). The Sixth Circuit defines embezzlement for purposes of § 523(a)(4) as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). Proof of embezzlement requires the establishment of three elements: (1) the property was rightfully in the possession of a nonowner; (2) the nonowner appropriated the property to a use other than that for which it was entrusted; and (3) circumstances indicating fraud." *Jones v. Hall (In re Hall*), 295 B.R. 877, 882 (Bankr. W.D. Ark. 2003); *TransAmerica Comm. Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 555 (9th Cir.1991); *see also Brady*, 101 F.3d at 1173. Larceny is defined as "the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner." *Schreibman v. Zanetti-Gierke (In re Zanetti-Gierke)*, 212 B.R. 375, 381 (Bankr. D. Kan. 1997). Larceny differs from embezzlement in that it requires the original taking of the property to be unlawful. *Id.*

In this case, Defendant gave the trailer purchased for use in transporting the ATVs to a third party as payment of a debt, which Plaintiff contends constitutes embezzlement or larceny. While both the ATVs were titled in the names of Plaintiff "and/or" Defendant, the trailer is not a titled vehicle. Nevertheless, both Plaintiff and Defendant signed the sales agreement as purchasers of the trailer and there is no evidence indicating that the parties did not intend Defendant to be an owner of the trailer. As a general rule, "one

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amount of the total payments on the loans taken to purchase the Property that were made by Plaintiff plus the remaining balance owed on those loans. In addition, the court awarded Plaintiff her attorney fees. Although the state court set forth no findings of fact or conclusions of law, Plaintiff urges this court to infer from the state court's award of attorney fees that it found against Debtor on her fraudulent representation claim alleged in the state court complaint. However, under Ohio law, attorney fees may be recovered in tort cases involving fraud only if punitive damages are awarded. *Galmish v. Cicchini*, 90 Ohio St. 3d 22,25 (2000); *see Columbus Fin., Inc. v. Howard*, 42 Ohio St. 2d 178, 183 (1975); *Leal v. Holtvogt*, 123 Ohio App. 3d 51, 73 (1998). In turn, that standard requires a finding that the fraud has been gross or malicious. *Logsdon v. Graham Ford Co.*, 54 Ohio St. 2d 336, 339-40 (1978). Because punitive damages were not awarded, this court cannot determine the basis for the award of attorney fees and cannot infer that the state court found against Debtor on Plaintiff's fraudulent representation claim.

cannot be convicted of stealing or embezzling one's own property." *Id.* Because Defendant was a co-owner of the property, Plaintiff's larceny and embezzlement claims must fail. *See id.* (finding that for purposes of § 523(a)(4), a partner and, thus, an owner, cannot steal or embezzle partnership property); *Sides v. Futch (In re Futch),* 265 B.R. 283, 288 (Bankr. M.D. Fla. 2001) (finding that as co-owner of the subject funds, the defendant could not be held to have embezzled her own property). Plaintiff's larceny claim also fails since Defendant's original taking of the trailer was lawful.

III. 11 U.S.C. § 523(a)(6)

Section 523(a)(6) 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. *Markowitz v. Campbell (In re Markowitz),* 190 F.3d 455, 463 (6th Cir. 1999); *J & A Brelage, Inc. v. Jones (In re Jones),* 276 B.R. 797, 801-2 (Bankr. N.D. Ohio 2001). A willful injury occurs when "(i) the actor desired to cause the consequences of the act or (ii) the actor believed that the given consequences of his act were substantially certain to result from the act." *Monsanto Co. v. Trantham (In re Trantham),* 304 B.R. 298, 307 (B.A.P. 6th Cir. 2004) (citing *Markowitz*, 190 F.3d at 464). Under § 523(a)(6), "'malicious' means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent." *Id.* (citing *Wheeler v. Laudani,* 783 F.2d 610, 615 (6th Cir. 1986)).

In this case, Plaintiff contends that Defendant willfully and maliciously caused her injury by giving the trailer to a third party in payment of a debt owed to that party and by dismantling one of the ATVs before turning it over to her. With regards to the dismantling of the ATV, as indicated above, the court credits Defendant's testimony that he was simply attempting, albeit unsuccessfully, to repair the vehicle. There is no evidence that he removed parts from the vehicle with the intent to cause Plaintiff any injury or that he believed at the time he attempted to repair the vehicle that his actions were substantially certain to result in injury to Plaintiff.

The court finds, however, that Defendant giving the trailer to a third party in payment of another debt does rise to the level of a willful and malicious injury. He disposed of the trailer at the end of 2002, at which time he was not paying the debt owed to Plaintiff. Because, as the court already determined, he never intended to pay Plaintiff for the Property, Defendant knew that the disposition of the trailer to a third party was substantially certain to result in injury to Plaintiff, i.e. the trailer could not be used to satisfy the debt

owed by Plaintiff for its purchase. The fact that he was still working full time and that there is no evidence of a change in his financial circumstances from when he had purchased the trailer just a few months before, the court finds that he was without just cause or excuse in disposing of it in the manner that he did. Accordingly, that portion of the debt owed to Plaintiff by Defendant that is attributable to the trailer is also nondischargeable under § 523(a)(6).[4]

IV. 11 U.S.C. § 727(a)(2) and (4)

Plaintiff's objections to discharge are based on allegations that Defendant transferred or concealed settlement proceeds received in connection with his personal injury claim and that he failed to disclose receipt of those proceeds or the existence of the personal injury claim in his bankruptcy schedules filed in the underlying Chapter 7 bankruptcy case. Under § 727(a), a debtor will be denied a discharge if:

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed--
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;
>
> . . . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> (A) made a false oath or account.

11 U.S.C. § 727(a)(2) and (4).

In this case, Defendant received the settlement proceeds at issue, in the amount of approximately $2,700, six weeks before filing his bankruptcy petition. His receipt of the proceeds and how they were spent was disclosed by him to the Chapter 7 trustee at the first meeting of creditors. Plaintiff presented no evidence indicating that the proceeds were transferred or concealed with the intent to hinder, delay or defraud any creditor or officer of the estate. Nor did Debtor make a false oath or account by not including the proceeds or disclosing his personal injury claim in his bankruptcy schedules. The settlement proceeds had already been spent by the time the petition was filed and, presumably, the claim no longer existed since

[4] Plaintiff's complaint seeks a determination that the entire state court judgment is nondischargeable, which the court agrees it is under § 523(a)(2)(A). Although the sales agreement that includes the trailer indicates its cost was $919.00, Plaintiff has not set forth, and the court is not determining, her separate damages under § 523(a)(6). Whatever those damages are, they are subsumed in the total amount of $26,923.22 set forth in the state court judgment establishing the debt that is excepted from Defendant's discharge.

it had been settled.

V. Request for Attorney's Fees

The ad damnum clause in Plaintiff's complaint in this adversary proceeding includes a request for an award of attorney's fees. The Bankruptcy Code explicitly authorizes fees for litigating § 523(a)(2) claims only to prevailing debtors where a consumer debt is involved; there is no such statutory authorization for prevailing creditors. *See Martin v. Bank Germantown (In re Martin)*, 761 F.2d 1163, 1167 (6th Cir. 1985). Moreover, Plaintiff's request for attorney's fees suffers from a fatal procedural problem as well. Rule 7008(b) of the Federal Rules of Bankruptcy Procedure provides: "A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." Thus, attorney's fees must be sought in a bankruptcy adversary proceeding by a separate count of the complaint or other pleading and not merely in the prayer for relief, as it has been here. *Hartford Police F.C.U. v. DeMaio (In re re DeMaio)*, 158 B.R. 890, 892 (Bankr. D. Conn. 1993); *Leonard v. Onyx Acceptance Corp.*, Nos. 02-8125, Civ. 03-1117 ADM, 2003 WL 1873283, at *2 (D. Minn. Apr. 11, 2003); *Citibank USA, N.A. v. Spring (In re Spring)*, Nos. 03-35552 (LMW), 04-3007 (LMW), 2005 WL 588776, at *6 (Bankr. D. Conn. Mar. 7, 2005); *Garcia v. Odom (In re Odom)*, 113 B.R. 623, 625 (Bankr. C.D. Cal. 1990); *see V.M. v. S.S. (In re S.S.)*, 271 B.R. 240, 244 (Bankr. D.N.J. 2002). Plaintiff is not entitled to an award of attorney's fees for litigating this adversary proceeding.

CONCLUSION

For the foregoing reasons, the court will enter a judgment that the debt owed to Plaintiff by Defendant pursuant to the judgment entered by the state court be excepted from discharge under 11 U.S.C. § 523(a)(2)(A) and, to the extent the debt is attributable to the trailer at issue in this case, under 11 U.S.C. § 523(a)(6). However, judgment will be entered in favor of Defendant and against Plaintiff on her claims brought under 11 U.S.C. § 727(a)(2) and (4). A separate judgment in accordance with this Memorandum of Decision will be entered.