

IT IS SO ORDERED.

Dated: October 2, 2013
01:14:42 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MELISSA A. GRUSZKA,

Debtor.

* * * * *

WELLS FARGO FINANCIAL LEASING
MANUFACTURER SERVICE GROUP, A
DIVISION OF WELLS FARGO BANK,
N.A., d/b/a WELLS FARGO
FINANCIAL CAPITAL FINANCE,

Plaintiff,

v.

MELISSA A. GRUSZKA,

Defendant.

CASE NUMBER 11-43575

ADVERSARY NUMBER 12-4040

HONORABLE KAY WOODS

TRIAL OPINION REGARDING COMPLAINT OBJECTING TO DISCHARGE OF DEBT

Wells Fargo Financial Leasing Manufacturer Service Group, a Division of Wells Fargo Bank, N.A. d/b/a Wells Fargo Financial Capital Finance ("Wells Fargo") filed Complaint Objecting to Discharge of Debt ("Complaint") (Doc. # 1) on March 26, 2012. Wells Fargo requests the Court, *inter alia*, to find that the debt owed to Wells Fargo by Debtor/Defendant Melissa A. Gruszka is nondischargeable pursuant to 11 U.S.C. § 523(a)(6). Gruszka filed Answer (Doc. # 15) on June 25, 2012. On July 8, 2013, Wells Fargo filed Pre Trial Statement (Doc. # 52).

The Court conducted a trial in this proceeding on July 23, 2013 ("Trial"), at which appeared Dennis A. Dressler, Esq. on behalf of Wells Fargo and Samuel L. Altier, Esq. on behalf of Gruszka. Following the presentation of evidence, the Court orally dismissed Wells Fargo's claims pursuant to 11 U.S.C. § 727(a)(2), (3) and (5) - *i.e.*, the Second, Third and Fourth Claims for Relief.¹ The Court took the remainder of the Complaint under advisement. For the reasons set forth herein, the Court finds that the debt owed to Wells Fargo by Gruszka is dischargeable because it is not a debt for willful and malicious injury pursuant to § 523(a)(6).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (Gen. Order Nos. 84 and 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a).

¹To memorialize its ruling, the Court entered Order Dismissing Wells Fargo's Second, Third and Fourth Claims for Relief (Doc. # 62) on July 25, 2013.

Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (J). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. BACKGROUND

A. Lease and Amendment

AFM Machine & Design, Inc. ("AFM") entered into a Single Sided Lease Agreement ("Lease") with Greater Bay Capital, a division of Greater Bay Bank, N.A., to lease a Komatsu Forklift ("Equipment").² On December 29, 2006, Gruszka executed the Lease as President of AFM and as personal guarantor of AFM's debt to Greater Bay Capital. On January 2, 2007, a representative of Greater Bay Capital executed the Lease.

The Lease provides that AFM was to make 60 monthly payments of \$391.88 to Greater Bay Capital. AFM was granted the option to purchase the Equipment as follows: "Provided [AFM]³ is not in default and all charges under the Lease have been paid in full, [AFM] may exercise the option to purchase the Equipment under this lease for \$1.00. If [AFM] purchases the Equipment, it shall be after the end of the original lease term." (Lease ¶ 6.) Greater Bay Capital was granted "a security interest in

²The Lease was admitted into evidence as Exhibit A.

³The Lease identifies AFM as the Lessee.

the Equipment to secure all of [AFM]'s obligations under this Lease." (*Id.* ¶ 8.) The Lease prohibited AFM from selling or otherwise disposing of the Equipment without Greater Bay Capital's consent. (*Id.* ¶ 3 ("[AFM] agrees not to transfer, sell, sublease, assign, pledge, relocate, move or encumber either the Equipment or any rights under the Lease without [Greater Bay Capital's]⁴ prior written consent.").)

The parties⁵ changed the term and payment schedule of the Lease by entering into an Amendment.⁶ A representative of Wells Fargo executed the Amendment on March 23, 2009, and Gruszka executed the Amendment as President of AFM on March 24, 2009. The Amendment reduced monthly payments 27, 28 and 29 to \$0.00 and added 3 monthly payments of \$391.88 and 1 monthly payment of \$547.91 to the end of the original 60-month term of the Lease. The Amendment did not change any other terms of the Lease.

B. Main Case

On December 16, 2011, Gruszka filed a voluntary petition pursuant to chapter 7 of Title 11, United States Code. Gruszka received a discharge on July 26, 2013 (Doc. # 51).

On May 25, 2012, Wells Fargo Equipment Finance, a division of Wells Fargo Bank, N.A., filed an unsecured proof of claim in

⁴The Lease identifies Greater Bay Capital as the Lessor.

⁵Gruszka admits that the Lease was assigned to Wells Fargo. (*See infra* at 7.)

⁶The Amendment was admitted into evidence as Exhibit C.

the amount of \$5,486.32, which was denominated Claim No. 10-1 ("Claim 10").⁷ Attached to Claim 10 at pages 5 and 6 are the Lease and the Amendment, respectively. Attached to Claim 10 at page 4 is an untitled document indicating that (i) the Original Lease Balance was \$23,904.68; (ii) the Lease Payments were \$18,418.36; and (iii) the Amount of Claim is \$5,486.32. Gruszka did not object to Claim 10.

C. Complaint and Answer

In its First Claim for Relief, Wells Fargo states that Gruszka "falsely, willfully and maliciously . . . sold . . . the Equipment in contravention of the rights of [Wells Fargo] . . . with a knowing disregard [sic] [Wells Fargo's] rights to the Equipment." (Compl. ¶¶ 25-26.) Wells Fargo asserts that it did not consent to the sale and Gruszka retained all proceeds from the sale for her personal benefit. (*Id.* ¶¶ 22, 28.) Wells Fargo argues that Gruszka's actions have damaged Wells Fargo "to the extent of the value of the Equipment, or the debt of AFM under the Lease Agreement, whichever is greater." (*Id.* ¶ 30.) Wells Fargo requests the Court to find that Gruszka's debt to Wells Fargo is nondischargeable pursuant to § 523(a)(6).

In its Fifth Claim for Relief, Wells Fargo requests the Court to find Gruszka personally liable for the sale of the Equipment because Gruszka "personally caused or directed AFM to

⁷Although Claim 10 and the Complaint were filed by different entities, both were filed by divisions of Wells Fargo Bank, N.A.

. . . sell . . . the Equipment [and] . . . exercised such complete domination over . . . AFM with respect to the Equipment that the corporate entity AFM had no separate mind, will or existence of its own at the time of the . . . sale”
(*Id.* ¶¶ 53, 55.)

In her Answer, Gruszka generally admits or denies Wells Fargo’s allegations and does not assert any affirmative defenses.

D. Requests for Admissions

On December 21, 2012, Wells Fargo filed Motion to Deem Requests to Admit Admitted and to Prohibit Introduction of Unproduced Documents into Evidence (“Motion to Deem Admitted”) (Doc. # 29), in which it restated 22 unanswered requests for admissions (“Requests for Admissions”)⁸ and moved the Court to deem admitted the allegations contained therein. On January 3, 2012, Gruszka moved for leave to respond to the Requests for Admissions (Doc. # 32) and filed Responses to Requests for Admissions (Doc. # 33). The Court granted Gruszka leave to respond and accepted as timely filed the Responses to Requests for Admissions. (Docs. ## 41-42.)

In her Responses to Requests for Admissions, Gruszka admits the allegations contained in Requests for Admissions Nos. 1 through 14, 19 and 22, including the following:

⁸The Requests for Admissions are restated in paragraph 5 of the Motion to Deem Admitted.

1. AFM entered into the Lease with Greater Bay Capital to lease the Equipment. (Requests for Admissions No. 1.)
2. The Lease was assigned to Wells Fargo. (*Id.*)
3. Gruszka executed the Lease on behalf of AFM as its President and as personal guarantor of AFM's debt. (*Id.* Nos. 3, 5, 10.)
4. AFM accepted the Equipment on January 2, 2007 and used the Equipment in the operation of its business. (*Id.* Nos. 4, 6.)
5. AFM and Gruszka, as guarantor, defaulted under the Lease and the Amendment by failing to make the required monthly Lease payments. (*Id.* Nos. 7, 11.)
6. The Equipment was transferred or sold to a third party "over [sic] the rights and security interest" of Wells Fargo. (*Id.* Nos. 12, 14.)
7. Wells Fargo did not consent to the transfer or sale of the Equipment. (*Id.* No. 13.)
8. Gruszka "personally caused or directed AFM" to transfer or sell the Equipment. (*Id.* No. 19.)
9. AFM was the only party, except for Wells Fargo, that possessed an interest in the Equipment. (*Id.* No. 22.)

II. TRIAL

At the Trial, each party made opening statements, and the Court heard testimony from John Conlon and Melissa Gruszka. The

Court admitted into evidence Exhibits A, B, C, F, H, I, J, K, L, M, N, O, P and Q submitted by Wells Fargo, to which Gruszka did not object. The Court sustained Gruszka's objection to the admission of Exhibit R. Gruszka did not move to admit any exhibits.

Wells Fargo orally moved for a directed verdict following its case-in-chief, which the Court denied. Each party presented closing arguments.

A. Conlon's Testimony

John Conlon has been a loan adjuster in Wells Fargo's legal department since 2009. As part of his duties, Conlon works on bankruptcy matters and is familiar with the Lease that is the subject of this proceeding. Exhibit M is a CCAN Notes Reports ("CCAN") generated by Wells Fargo that contains all communications by Wells Fargo's collections and customer service departments regarding the Lease. Conlon testified regarding the history of the Lease by referencing the CCAN.

When the Lease became more than 30 days delinquent, Wells Fargo initiated standard collection efforts that included calling and emailing Gruszka. These collection efforts occurred throughout 2009, 2010 and 2011.

In March 2009, AFM and Wells Fargo entered into the Amendment in response to Gruszka's request to suspend the Lease payments for a period of three months. The Amendment provided

that the suspended payments would be paid at the end of the original 60-month term of the Lease.

On September 13, 2010, Gruszka called Wells Fargo to make a payment toward the Lease. Gruszka was told "several times" that Wells Fargo was "unable to accept one payment with no arrangement to bring current [and] the Lease would be forwarded to [Wells Fargo's] legal department." (Trial Tr. 10:16:58; see also CCAN at 2.)

On October 26, 2010, Wells Fargo sent AFM a deficiency demand letter, which was returned as undeliverable.⁹ The demand letter advised AFM that Wells Fargo would file suit if it failed to bring the Lease current by paying the full amount due of \$2,056.54 within ten days.

On November 29, 2010, Wells Fargo rejected Gruszka's offer of \$5,000.00 to settle the Lease. Wells Fargo threatened to repossess the Equipment if the Lease was not brought current within two weeks and requested that Gruszka verify the location of the Equipment.

On December 13, 2010, Wells Fargo received a payment of \$2,251.90, which brought the Lease current. This was the final payment received by Wells Fargo.

In February 2011, Wells Fargo resumed collection efforts and made numerous attempts to contact Gruszka, but did not

⁹The demand letter was admitted into evidence as Exhibit O.

receive any response from Gruszka or a representative of AFM until July 28, 2011. On that date, David Gornik, Esq.¹⁰ contacted Wells Fargo to discuss resolving the Lease.

On August 15, 2011, Gornik attempted to negotiate a repayment plan with Wells Fargo. Wells Fargo responded by advising Gornik that it wished to pick up the Equipment. Gornik stated that AFM needed the Equipment to operate its business and Wells Fargo would need to initiate a replevin action to recover the Equipment. This was Wells Fargo's first demand for return of the Equipment since November 2010. Wells Fargo believed at this time that AFM still possessed the Equipment.

On September 14, 2011, Gornik offered Wells Fargo \$2,500.00 in full satisfaction of the Lease,¹¹ which Wells Fargo rejected because the amount offered was less than Wells Fargo's valuation of the Equipment.

Conlon testified that it is Wells Fargo's policy for all customer communications, including emails, to be entered in the CCAN. Conlon identified (i) page 10 of Exhibit F as an email from Gruszka to Wells Fargo dated June 20, 2011; and (ii) page 11 of Exhibit F as two emails from Gruszka to Wells Fargo dated

¹⁰Conlon testified that Gornik represented either Gruszka or AFM.

¹¹Conlon testified that this \$2,500.00 settlement offer was made in August 2011 (Trial Tr. 10:12:57), but the CCAN reflects that it was actually made on September 14, 2011 (CCAN at 5).

June 23, 2011 and July 24, 2011, respectively.¹² In the June 20, 2011 email, Gruszka indicated that AFM could not bring the Lease current, but wished to discuss a repayment schedule or payment modification. Conlon admitted on cross-examination that these three emails are not referenced in the CCAN.

Wells Fargo does not know when the Equipment was sold but, based on the Statement of Financial Affairs, believes the Equipment was sold in June 2011. Conlon stated that, had Wells Fargo known the Equipment was sold, Wells Fargo would have accelerated the Lease and attempted to recover the Equipment from the purchaser. By searching comparable sales on Machinery Trader's website, Conlon estimated the value of the Equipment in June 2011 as \$9,000.00.¹³

Pages 12 through 15 of Exhibit F are a document entitled Payment History Report, which is time-stamped December 18, 2012. The final page of the Payment History Report indicates the following amounts with respect to the Lease: (i) Total Rental: \$22,337.16; (ii) Total Late Charge: \$1,175.70; (iii) Total Miscellaneous: \$964.00; and (iv) Total Paid: \$24,476.86. Conlon testified that the Payment History Report is an internal report

¹²Exhibit F is Gruszka's Responses to Request for Production of Documents. Pages 3 through 11 of Exhibit F are a series of emails between Gruszka and Wells Fargo.

¹³Conlon's testimony concerning the value of the Equipment is based on hearsay. Although no objection was raised at the Trial, the Court gives little weight to this testimony.

that includes not only amounts received by Wells Fargo, but also amounts credited by Wells Fargo. For example, late fees waived by Wells Fargo would be included in Total Paid, even though those amounts were not actually paid.

Exhibit L is an untitled payment history prepared by Conlon to clarify the Payment History Report ("Conlon Payment History"). The Conlon Payment History lists a total Amount Applied to Lease of \$18,418.36, which Conlon testified was the actual amount received by Wells Fargo.¹⁴ However, on cross-examination, Conlon testified that the Conlon Payment History lists only amounts applied to the monthly Lease payments. Including charges such as late fees, force-placed insurance and convenience fees, Wells Fargo received approximately \$19,200.00 toward the Lease. Conlon acknowledged that the total amount borrowed by AFM was \$19,500.00, as listed in Exhibit Q, which is an Invoice for the Equipment.

B. Gruszka's Testimony

Melissa Gruszka is 34 years old and has a bachelor's degree in communications and English. Since 2009, Gruszka has worked as an equipment programmer at Babcock & Wilcox Co. ("B&W"). For approximately one year prior to joining B&W, Gruszka had several short-term manufacturing jobs or was otherwise unemployed.

¹⁴Conlon stated that he created the Conlon Payment History by including only those amounts from the Payment History Report that have a corresponding check number because payments associated with the check number 0 are actually credits.

Gruszka had previously taught computer-related courses at a high school for several years. Gruszka has no business experience other than her experience with AFM.

Approximately fifteen years ago - *i.e.*, when Gruszka was 19 or 20 years old - Gruszka and her boyfriend started AFM, which mostly manufactured metal parts for motorcycles and automobiles. Gruszka's initial functions with AFM were primarily computer-related. Gruszka has been associated with AFM since its inception.

AFM was incorporated in 2005,¹⁵ at which time Gruszka functioned as programmer, print reader, salesperson and the "operating person that handled bookkeeping." (Trial Tr. 1:45:14.) Since the incorporation of AFM, Gruszka has held the position of President. Prior to that time, no positions or titles were given to the employees of AFM. While at AFM, Gruszka attended college, taught high school and held other jobs. Gruszka has never taken a salary from AFM or been on its payroll.

AFM originally funded its daily operations using credit cards issued to AFM and Gruszka's personal credit cards. Eventually, AFM was able to obtain lines of credit from various banks.

¹⁵Gruszka testified that AFM operated as a sole proprietorship until its incorporation in 2005, but did not specify whether she or her boyfriend was sole proprietor.

Gruszka performed the basic accounting functions for AFM by tracking incoming bills and outgoing invoices and preparing annual reports of income and expenses. AFM's accountant used this information to prepare annual tax returns, which are current. Gruszka was also responsible for reviewing and storing all documents for AFM.

Gruszka stated that no one represented her when she signed the Lease or explained the Lease to her. Gruszka did not review the Lease after signing it and eventually lost her copy of the Lease. However, Gruszka believed that she had "a basic principle understanding of what the Lease was. The Lease was so many payments per month over a time period. . . . I didn't really realize that there were a whole lot of other terms and red tape associated with the contract." (*Id.* 3:07:05.) Gruszka knew that "Wells Fargo had a lien on the Equipment," but she was not asked to elaborate on her understanding of what a lien is. (*Id.* 1:57:44.) Gruszka did not know that she needed Wells Fargo's consent to sell the Equipment because, in the past, AFM had sold equipment without obtaining the consent of third parties.

Gruszka began liquidating AFM's assets in 2010 and 2011 to repay its debts, including the Lease. AFM has no remaining assets of value and no longer manufactures or sells its products. During this liquidation period, AFM sold three

forklifts, including the Equipment, on Craigslist, which was used because it was free. Gruszka does not recall when the Equipment was sold, but it was between June 2011 and December 2011.¹⁶

Gruszka listed the Equipment on Craigslist for approximately 30 days with an asking price of \$5,000.00. The best offer received for the Equipment was \$3,000.00, which was accepted. Gruszka's boyfriend, Brian Shields, physically effectuated the sale of the Equipment. Shields did not receive documentation of the sale and cannot identify the purchaser of the Equipment. Gruszka never met the purchaser of the Equipment and likewise cannot identify him. Gruszka did not notify Wells Fargo of the sale.

Gruszka testified that she did not surrender the Equipment to Wells Fargo because she believed that her only obligation to Wells Fargo was to pay the amount due on the Lease, which she believed was \$3,000.00 to \$5,000.00. By selling the Equipment, Gruszka thought that she would be able to pay off the Lease or come close to being able to pay it in full. Gruszka also feared that, if she surrendered the Equipment, Wells Fargo would not maximize the value of the Equipment. She believed that Wells Fargo would simply liquidate the Equipment and hold AFM and her liable for the balance owed on the Lease. Gruszka based this

¹⁶Gruszka testified that the June 7, 2011 sale date listed in the Statement of Financial Affairs was simply an approximation.

belief on the experiences of friends who had property liquidated or foreclosed by creditors for "pennies on the dollar" and were still indebted to those creditors. (*Id.* 2:27:47.)

Gruszka did not immediately turn over the sale proceeds to Wells Fargo because she wanted assurance that the Lease would be satisfied when Wells Fargo received the money. Specifically, Gruszka testified:

I wanted to send the money, but I wasn't going to do it without documentation that said this loan has been satisfied. Since I didn't know where all my money had been going from this point, I wanted something in writing. Here I'm going to send you [\$3,000.00]. You'll need to send me or my attorney a letter of satisfaction or a removal of a UCC or whatever so that I know we're good and we're done. There's not gonna [sic] be further judgment or litigation or whatever. I didn't know how to end it.

(*Id.* 2:29:34.)

Gruszka hired Gornik¹⁷ to attempt to obtain a payoff amount and settle the Lease. Regarding Gornik's representation to Wells Fargo on August 15, 2011 that AFM needed the Equipment, Gruszka stated the Gornik did not necessarily know which piece of equipment the Lease concerned and was just attempting to settle the Lease.

Gruszka unsuccessfully attempted to satisfy the Lease debt with the offers of \$5,000.00 in December 2010 and \$3,000.00 in September 2011. Gornik also offered Wells Fargo \$2,500.00 in

¹⁷Gruszka testified that she hired Gornik, but did not specify whether Gornik represented her, AFM or both her and AFM.

September 2011. Prior to her December 16, 2011 petition date, Gruszka contacted counsel for Wells Fargo one final time to settle the Lease, but she was again unsuccessful. Gruszka testified that she always intended to remit the sale proceeds to Wells Fargo, but Wells Fargo did not seem "interested" in receiving the funds.¹⁸ (*Id.* 2:03:55.)

The \$3,000.00 received from the sale of the Equipment was ultimately used to pay debts of AFM. "The money and any other monies that were collected at that time were put into the AFM Machine & Design bank account and then offered to our creditors." (*Id.* 2:04:52.) The money in the account "was from a number of sources and I was just trying to send money to whoever I could." (*Id.* 2:08:05.)

III. LAW & ANALYSIS

At the Trial, the Court orally dismissed Wells Fargo's Second, Third and Fourth Claims for Relief. The Fifth Claim for Relief requests the Court to hold Gruszka personally liable for the sale of the Equipment, and the First Claim for Relief requests the Court to find that the debt owed to Wells Fargo by Gruszka is nondischargeable pursuant to § 523(a)(6). The Court will address the Fifth Claim, followed by the First Claim.

¹⁸Gruszka clarified that all funds received by AFM, including the sale proceeds, were deposited in AFM's bank account. Thus, any amount offered to Wells Fargo was not necessarily the sale proceeds.

A. Fifth Claim for Relief - Personal Liability of Gruszka

1. Standard

"The principle that shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation is ingrained in Ohio law." *Dombroski v. Wellpoint, Inc.*, 895 N.E.2d 538, 542 (Ohio 2008) (citing Ohio Const., Art XIII, § 3; *Belvedere Condo. Unit Owners' Ass'n v. R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993)). "[P]iercing the corporate veil is the 'rare exception' that should only be 'applied in the case of fraud or certain other exceptional circumstances.'" *Id.* at 544 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003)). The corporate form may be disregarded and officers may be held liable for the wrongs committed by a corporation if the party seeking to pierce the corporate veil establishes:

"(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud[, an illegal act, or a similarly unlawful act] against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong."

Id. at 543 (as modified by syllabus) (quoting *Belvedere*, 617 N.E.2d at syllabus ¶ 3).

"The first element is a concise statement of the alter ego doctrine; to succeed a plaintiff must show that the individual and the corporation are fundamentally indistinguishable."

Belvedere, 617 N.E.2d at 1086. Courts consider the following non-exhaustive list of factors when evaluating the alter-ego doctrine:

"(1) grossly inadequate capitalization, (2) failure to observe corporate formalities, (3) insolvency of the debtor corporation at the time the debt is incurred, (4) shareholders holding themselves out as personally liable for certain corporate obligations, (5) diversion of funds or other property of the company property for personal use, (6) absence of corporate records, and (7) the fact that the corporation was a mere facade for the operations of the dominant shareholder(s)."

Taylor Steel, Inc. v. Keeton, 417 F.3d 598, 605 (6th Cir. 2005) (quoting *LeRoux's Billyle Supper Club v. MA*, 602 N.E.2d 685, 689 (Ohio Ct. App. 1991)).

2. Analysis

In its Complaint, Wells Fargo requests the Court to disregard AFM's corporate form. (Compl. ¶¶ 52-59.) Wells Fargo argues that Gruszka is personally liable for the sale of the Equipment because she "personally caused" AFM to sell the Equipment and "AFM had no separate mind, will or existence of its own" at the time of the sale - *i.e.*, AFM is the alter ego of Gruszka. (*Id.* ¶¶ 53, 55.)

First, the Court notes that, during their testimony, Conlon and Gruszka continually referred to Gruszka personally and made little attempt to differentiate between Gruszka and AFM. However, Wells Fargo presented no evidence that Gruszka's

relationship with Wells Fargo was in any capacity other than as President of AFM or guarantor of AFM's debt to Wells Fargo. Accordingly, any testimony by Conlon or Gruszka that Gruszka, as opposed to AFM, committed certain acts is not dispositive of Gruszka's personal liability to Wells Fargo.

Second, Gruszka's admission that she "personally caused or directed AFM" to sell the Equipment (see Requests for Admissions No. 19) is not dispositive of her personal liability for the sale. This admission does not establish that Gruszka was acting in any capacity other than as President of AFM when she directed the sale. By necessity, all actions of AFM, as a corporation, must have been caused or directed by a person or group of persons.

Finally, the Court finds that Wells Fargo failed to establish that AFM is the alter ego of Gruszka. Wells Fargo did not present any evidence that AFM failed to observe corporate formalities or keep corporate records. Gruszka testified that AFM kept annual reports of income and expenses and filed income tax returns. Gruszka also testified that AFM maintained its own bank account into which revenues were deposited and from which AFM's expenses were paid. The only evidence of AFM's failure to observe corporate formalities was Gruszka's use of her personal credit cards to pay expenses of AFM. However, there is no evidence that the assets or expenses of Gruszka and AFM were

otherwise comingled or Gruszka diverted funds from AFM to pay personal expenses. Likewise, Gruszka stated that she never took a salary from AFM and was never on AFM's payroll. Furthermore, the record contains no information concerning the corporate structure of AFM to evidence Gruszka's alleged control over AFM, including the number of shareholders, directors or officers of AFM.

The record is also devoid of evidence that AFM was grossly under-capitalized or insolvent when the Lease was executed in December 2006. In fact, Conlon testified that AFM was current on its Lease payments in December 2010 - *i.e.*, approximately 48 months into the 64-month term of the Lease and the Amendment - which suggests that AFM had sufficient capital to fulfill its obligations pursuant to the Lease.

For the reasons set forth above, the Court finds that Wells Fargo failed to establish that Gruszka conducted business with Wells Fargo in any capacity other than as President of AFM or guarantor of AFM's debt. The Court further finds that Wells Fargo failed to establish that AFM is the alter ego of Gruszka and, thus, Wells Fargo may not pierce the corporate veil of AFM. As a consequence, the Court will deny Wells Fargo's Fifth Claim for Relief.

Because Gruszka personally guaranteed AFM's debt to Wells Fargo, the Court must next determine whether Gruszka's debt to

Wells Fargo, as guarantor of the Lease, is nondischargeable pursuant to § 523(a)(6).

B. First Claim for Relief – Section 523(a)(6)

1. Standard

Section 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[.]

11 U.S.C. § 523(a)(6) (West 2013). Section 523(a)(6) codifies the “long-standing bankruptcy policy that any debt which is shown to have arisen from a dishonest or otherwise wrongful act committed by a debtor is not entitled to the benefits of a bankruptcy discharge.” *Hoffman v. Anstead (In re Anstead)*, 436 B.R. 497, 500 (Bankr. N.D. Ohio 2010) (citing *Cohen v. De La Cruz*, 523 U.S. 213 (1998)). The creditor bears the burden of proving by a preponderance of the evidence that a debt is excepted from discharge pursuant to § 523(a). *Meyers v. I.R.S. (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (citing *Grogan v. Garner*, 498 U.S. 279, 290-91 (1991)).

The plain language of § 523(a)(6) requires the creditor to establish that the injury is both willful and malicious. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th

Cir. 1999). The Supreme Court has held that the inclusion of the term "willful" in § 523(a)(6) requires "deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). The Sixth Circuit Court of Appeals expanded the definition of willfulness to include the debtor's belief that injury is "'substantially certain to result'" from the debtor's actions. *Markowitz*, 190 F.3d at 464 (quoting Restatement (Second) of Torts § 8A, at 15 (1964)). The element of "malicious injury" in § 523(a)(6) requires action "taken in conscious disregard of the debtor's duties or without just cause or excuse." *Superior Metal Prods. v. Martin (In re Martin)*, 321 B.R. 437, 441-42 (Bankr. N.D. Ohio 2004) (citing *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)). "[T]he definition of malice requires a heightened level of culpability transcending mere willfulness." *Id.* at 442 (citing *Sateren v. Sateren (In re Sateren)*, 183 B.R. 576, 583 (Bankr. D.N.D. 1995)). However, "'[m]alicious' acts do 'not require ill-will or specific intent to do harm.'" *Cash Am. Fin. Servs., Inc. v. Fox (In re Fox)*, 370 B.R. 104, 119 (B.A.P. 6th Cir. 2007) (quoting *Wheeler*, 783 F.2d at 615).

To prevail in a § 523(a)(6) action, the creditor must establish by a preponderance of the evidence: (i) the debtor caused injury to the creditor or the creditor's property;

(ii) the debtor intended to cause such injury or the debtor's actions were substantially certain to cause such injury; and (iii) the debtor acted in conscious disregard of the debtor's duties or without just cause or excuse. *Palik v. Sexton (In re Sexton)*, 342 B.R. 522, 530 (Bankr. N.D. Ohio 2006).

2. Analysis

Wells Fargo contends that Gruszka willfully and maliciously sold the Equipment in contravention of and in knowing disregard of its rights. (Compl. ¶¶ 25-26.) Wells Fargo further states that Gruszka retained the sale proceeds for her own use and benefit. (*Id.* ¶ 28.) Wells Fargo argues that such conduct constitutes willful and malicious conversion:

[Gruszka] acted willfully and maliciously by causing injury to the property of another entity by knowingly converting Wells Fargo's Equipment by selling it without Wells Fargo's consent and over its security interest and not remitting funds to Wells Fargo. This is a classic intentional tort which satisfies the "willful and malicious" [sic] requirement.

(Pre Trial Statement ¶ 25.)

It is not disputed that Gruszka, as president of AFM, sold the Equipment to a third party and the sale proceeds were not remitted to Wells Fargo, which had a security interest in the Equipment. Although Wells Fargo maintains that this conduct constitutes willful and malicious conversion, the Supreme Court stated in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934), "[A] wilful and malicious injury does not follow as of course

from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice." *Id.* at 332 (citations omitted).

Comparable facts were before the Bankruptcy Court for the Northern District of Ohio in *National City Bank v. Wikel (In re Wikel)*, 229 B.R. 6 (Bankr. N.D. Ohio 1998), in which the debtor was the sole officer, director and shareholder of a corporation and guarantor of the corporation's debt to the creditor. The creditor had a security interest in the inventory, accounts receivable and fixed assets of the corporation. While attempting to sell the corporation, the debtor stopped taking sales orders and, instead, only filled previous orders, collected accounts receivable and paid ongoing expenses, including her own wages. The debtor did not inform the creditor of this change in business strategy and used sales revenues to pay unsecured debts. The Court concluded that the debt owed to the creditor was dischargeable.

While at first blush the facts of this case appear to present a close call, the Court does not find that Defendant intentionally injured Plaintiff's collateral. What makes this case appear close is the fact that the Defendant affirmatively acted to avoid contact with the Plaintiff's representatives after she had stopped taking orders for the business. It appears that she realized or at least suspected that had she told the Plaintiff that she was no longer taking orders, the Plaintiff would have taken action to collect its collateral, such as accounts

receivable, at that time. She clearly would have preferred to have sold the business and, hopefully, averted her present bankruptcy. These facts point toward an inference that she intended to dispose of the Plaintiff's collateral in a manner inconsistent with the Plaintiff's wishes. However, a review of the [sic] all the evidence . . . reveals that while the Defendant may have knowingly used the Plaintiff's collateral contrary to what would have been the Plaintiff's wishes, and in breach of contract, her intent was nevertheless to preserve the value of the collateral, not to injure it. The facts of this case indicate that the Defendant was indeed attempting to preserve the going concern value of the business so that it could be sold. Also, this Court does not find that she used proceeds of the business to further her personal concerns, other than to preserve the business itself.

Id. at 10. Concerning the creditor's argument that the debtor "blatantly breached the security agreement," the Court stated, "§ 523(a)(6) requires more than just a knowing breach of contract. In this case, this Court finds that while the Defendant may have acted negligently or recklessly, she did not intend to injure the Plaintiff's collateral. Thus, the Defendant's debt to the Plaintiff is dischargeable." *Id.* at 11 (internal citation omitted).

In *Mayfield Grain Co. v. Crump (In re Crump)*, 247 B.R. 1 (Bankr. W.D. Ky. 2000), the Bankruptcy Court for the Western District of Kentucky found that a farmer's debt to a creditor was dischargeable, even though the farmer sold crops in which the creditor held a security interest without remitting the proceeds to the creditor. The court concluded that there was no

evidence that the farmer used the proceeds of sale to pay anything other than farm expenses and his primary intent was to keep his farm afloat. The court also found credible the farmer's testimony that he did not understand that his failure to remit the proceeds of sale to the creditor constituted a breach of the security agreement. Specifically, the farmer "testified at trial that he understood this [provision in the security agreement that the amount due shall be paid in full by a date certain] to mean that he could sell his crops and use the proceeds as needed, exercising his discretion, as long as he 'settled up' with [the creditor] by [the date the amount owed was due]." *Id.* at 6. The bankruptcy court held that these facts supported its ruling that the farmer lacked an intent to harm the creditor or its collateral.

In contrast, in *Kimco Leasing Co. v. Wilson (In re Wilson)*, 383 B.R. 678 (Bankr. N.D. Ohio 2007), the Bankruptcy Court for the Northern District of Ohio concluded that a debt for conversion was nondischargeable pursuant to § 523(a)(6) because there was no viable justification for the debtor's actions and his testimony lacked credibility. In his personal capacity and as president of a corporation, the debtor leased office furniture from the creditor. After defaulting on the lease, the debtor failed to comply with the creditor's request for return of the furniture for more than one year and only returned the

furniture after the creditor filed its adversary proceeding. Moreover, the debtor failed to turn over the most valuable pieces of furniture.

The Court was "particularly concern[ed]" by the debtor's failure to turn over the furniture until after the adversary proceeding was filed and his failure to turn over the items of greatest value. *Id.* at 682. The Court noted that the debtor's testimony was unverifiable and elusive, particularly concerning his inability to (i) timely return the furniture, which the debtor alleged was due to vehicle trouble and his landlord changing the locks at his office; and (ii) locate the missing pieces, which the debtor stated may have been stolen by persons with access to his office. The Court concluded:

[T]he overall weight of the evidence shows that, endemic throughout their relationship, the Debtor exhibited a complete and utter disregard for the care of the Creditor's property. . . . Moreover, given the lack of credibility which can be attached to the justifications offered by the Debtor, the Court likewise concludes that there exists no viable justification for the Debtor's actions.

Id.

In the instant proceeding, it is not disputed that Gruszka, as President of AFM, intentionally sold the Equipment. The Court must determine whether the sale was intended to cause injury to Wells Fargo or the Equipment or was substantially certain to cause such injury. Gruszka testified that she knew

Wells Fargo had a lien on the Equipment, but she did not know that Wells Fargo's consent was needed to sell the Equipment. Regardless of her understanding of the Lease, Gruszka knew, based on her past dealings with Wells Fargo, that, because AFM had defaulted on the Lease, Wells Fargo had the right to recover the Equipment. Thus, Gruszka knew that selling the Equipment was substantially certain to cause injury to Wells Fargo by depriving Wells Fargo of its right to recover the Equipment. As a consequence, the Court finds that the sale of the Equipment caused willful injury, as that term is used in § 523(a)(6).

Whether the sale of the Equipment caused malicious injury presents a more difficult issue. Having reviewed all evidence in this proceeding, including the Exhibits admitted at the Trial and the testimony of Conlon and Gruszka, the Court finds that Wells Fargo failed to establish that Gruszka sold the Equipment in conscious disregard of her duties or without just cause or excuse. Accordingly, the Court finds that Gruszka's debt to Wells Fargo is not a debt for malicious injury, as that term is used in § 523(a)(6), and, as a consequence, the debt is dischargeable.

In the Complaint, Wells Fargo asserts that Gruszka caused malicious injury to the Equipment because she "retained the proceeds from the [sale of the Equipment] for her own use and/or benefit." (Compl. ¶ 28.) However, Wells Fargo presented no

evidence to this effect or that Gruszka diverted funds from AFM for her personal use. Moreover, Gruszka testified that all funds received by AFM, including the proceeds from the sale of the Equipment, were deposited in AFM's bank account and used to pay AFM's creditors. Gruszka also stated that she did not receive a salary from AFM and was not on its payroll. Thus, the Court finds that Gruszka did not personally benefit from the sale of the Equipment.

Although she knew that Wells Fargo had a lien on the Equipment, Gruszka was not examined concerning her understanding of liens. Gruszka credibly testified that she thought her only obligation to Wells Fargo was to pay the balance due on the Lease. Gruszka had no business experience prior to starting AFM, and Gruszka testified that she was not represented when she executed the Lease and no one explained the terms of the Lease to her. Her basic understanding of the Lease was that AFM was to make monthly payments to Wells Fargo until the Lease was paid in full. Gruszka also stated that AFM had sold equipment in the past without obtaining the consent of third parties, which lends credibility to her testimony that she did not believe Wells Fargo's consent was necessary to sell the Equipment.

Gruszka believed that, by selling the Equipment, AFM could pay the amount due to Wells Fargo and fulfill its contractual obligations. Gruszka advertised the Equipment on Craigslist for

\$5,000.00, but ultimately accepted the best offer of \$3,000.00. Because Gruszka believed that the balance due on the Lease was \$3,000.00 to \$5,000.00, accepting such an offer was not unreasonable. Although Gruszka misunderstood the consequences of the security agreement, her actions and explanations thereof do not demonstrate a conscious disregard of her duties or lack of just cause for her actions. Moreover, Gruszka testified that, when the Equipment was sold, AFM was in the process of liquidating all of its assets in an attempt to repay its creditors.

The Court also finds credible Gruszka's testimony that she desired to sell the Equipment in order to achieve the highest sale price. Gruszka was concerned that the value of the Equipment would not be maximized if Wells Fargo liquidated it, leaving AFM and her with a large debt to Wells Fargo. Gruszka based this belief on the experiences of her friends who had property liquidated or foreclosed by creditors for "pennies on the dollar" and were still indebted to those creditors. As a result, Gruszka wished to sell the Equipment for the highest price possible and pay off the debt to Wells Fargo. Even if unfounded, Gruszka's beliefs support a finding that her actions were not malicious.

It is undisputed that the sale proceeds were never turned over to Wells Fargo. Gruszka testified that the proceeds were

not given to Wells Fargo because Wells Fargo would not accept them in satisfaction of the Lease. The record establishes that Gruszka and Gornik unsuccessfully attempted to turn over at least some portion of the sale proceeds on several occasions. Gornik offered Wells Fargo \$2,500.00 in September 2011 to settle the Lease, but Wells Fargo rejected the offer because it was less than its valuation of the Equipment. Gruszka also testified that she personally offered Wells Fargo \$3,000.00 in September 2011 and, prior to filing her bankruptcy petition in December 2011, she attempted to settle the Lease with counsel for Wells Fargo.¹⁹

Gruszka's repeated attempts to settle the Lease prior to and following the sale of the Equipment support the Court's finding that she was not acting in conscious disregard of her duties to Wells Fargo or without just cause when she caused AFM to sell the Equipment. Gruszka testified that Wells Fargo did not seem interested in accepting anything less than full payment. This testimony is supported by the CCAN entry on September 13, 2010, which states that Wells Fargo would not accept any payment less than the amount needed to bring the

¹⁹Although these offers are not reflected in the CCAN, Conlon admitted on cross-examination that the CCAN does not contain all communications received by Wells Fargo. Specifically, three emails from Gruszka to Wells Fargo in June and July 2011 are not reflected in the CCAN, one of which discussed paying toward the Lease. In addition, the CCAN only reflects communications by Wells Fargo's collections and customer service departments, not its legal counsel.

Lease current. Although Gruszka had no right to demand that Wells Fargo accept the sale proceeds in full satisfaction of the Lease, her repeated efforts to remit payment to Wells Fargo are not indicative of malice.

Finally, the amount due pursuant to the Lease and the Amendment was \$24,060.71,²⁰ with the Lease containing an option to purchase the Equipment for \$1.00. Conlon stated that Wells Fargo received approximately \$19,200.00 of the \$19,500.00 that was loaned to AFM - *i.e.*, approximately 80% of the principal and interest required by the Lease and the Amendment. The Lease was last current in December 2010, which was approximately 48 months into the 64-month term of the Lease and the Amendment. AFM's substantial payment toward the Lease and repeated attempts to negotiate a payoff of the Lease do not support a finding that Gruszka disregarded her obligations to Wells Fargo.

Much like *In re Wikel*, the evidence before the Court indicates that Gruszka was honestly attempting to maximize the value of the Equipment in an attempt to repay AFM's creditors. Likewise, there is no evidence that the proceeds of sale were used for anything other than the repayment of AFM's debts. Similar to *In re Crump*, Gruszka credibly testified regarding her understanding of the Lease, which was that her only obligation

²⁰The Amendment provided for 60 payments of \$391.88 and 1 payment of \$547.91, totaling \$24,060.71. However, in Claim 10, Wells Fargo indicates that the Original Lease Balance was \$23,904.68. (Claim 10 at 4.)

was to repay Wells Fargo. Gruszka's lack of business acumen and her repeated efforts to keep the Lease current and pay off the Lease support this testimony. Finally, unlike in *In re Wilson*, Gruszka did not exhibit a total disregard for the rights of Wells Fargo or its rights in the Equipment. Regardless of whether she was correct, Gruszka believed that she was acting within her rights when she sold the Equipment to pay off the Lease.

For the reasons set forth above, the Court finds that Wells Fargo did not meet its burden of proof in establishing that Gruszka's debt to Wells Fargo is a debt for willful and malicious injury, as set forth in § 523(a)(6). Wells Fargo failed to establish that Gruszka acted in conscious disregard of her duties to Wells Fargo or that her conduct was without just cause or excuse. Although the sale of the Equipment was in contravention of the rights of Wells Fargo, Gruszka did not act with the malice contemplated in § 523(a)(6). The Court will deny the First Claim for Relief.

C. Damages

In its Complaint, Wells Fargo states that its damages are "the value of the Equipment, or the debt of AFM under the Lease Agreement, whichever is greater." (Compl. ¶ 30.) In its Pre Trial Statement, Wells Fargo states that it "was damaged by

[Gruszka's] actions in the amount of \$5,486.32 plus attorney fees." (Pre Trial Statement ¶ 31).

Wells Fargo filed Claim 10 in the amount of \$5,486.32 and, on page 4 of Claim 10, demonstrates that this amount is the Original Lease Balance less the Lease Payments. Wells Fargo presented evidence, in the form of the Affidavits of Conlon and Dressler,²¹ that it incurred (i) attorney fees of \$400.00 in a state court action filed by Wells Fargo against Gruszka and AFM prior to Gruszka filing her bankruptcy petition;²² and (ii) attorney fees of \$5,510.00 and costs of \$441.93 related to this proceeding as of July 8, 2013 (Dressler Aff. ¶ 5). Conlon testified that the value of the Equipment was \$9,000.00 in June 2011 - *i.e.*, when the Statement of Financial Affairs indicates the Equipment was sold.

1. Debt Owed to Wells Fargo

In Claim 10, Wells Fargo states that the amount of the debt owed to it by AFM is \$5,486.32. The attachment to Claim 10 indicates that this is the amount due pursuant to the Lease less the payments made by AFM. Gruszka did not object to Claim 10 and does not dispute that this is the amount due and owing.

²¹Affidavit of John Conlon and Affidavit of Dennis A. Dressler in Support of Request for Attorney's Fees were admitted as Exhibits K and H, respectively.

²²The Affidavit of John Conlon states that this \$400.00 was incurred in the "underlying bankruptcy proceeding." (Conlon Aff. ¶ 31.) However, at the Trial, Conlon testified that the \$400.00 was incurred in the state court proceeding. (Trial Tr. 12:00:55.)

Accordingly, the Court finds that Wells Fargo has an allowed claim against Gruszka, as guarantor of AFM's debt to Wells Fargo, in the amount of \$5,486.32.²³ See *First of Am. Bank v. Afonica (In re Afonica)*, 174 B.R. 242, 247 (Bankr. N.D. Ohio 1994) (citing *Sears Roebuck v. Lau (In re Lau)*, 140 B.R. 172 (Bankr. N.D. Ohio 1992)) (finding that when a creditor alleges conversion in a § 523(a)(6) proceeding, its damages are "the lesser value of the converted property or the amount of the indebtedness").

2. Attorney Fees

Federal Rule of Bankruptcy Procedure 7008(b) states, "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." FED. R. BANKR. P. 7008(b) (West 2013). "[A]ttorney'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." *Robinson v. Robinson (In re Robinson)*, Adv. No. 12-3017, 2012 Bankr. LEXIS 4592, *22 (Bankr. N.D. Ohio Oct. 1, 2012) (citations omitted); see also *Baker v. Wentland (In re Wentland)*, 410 B.R. 585, 602 (Bankr. N.D. Ohio 2009) ("Plaintiff's amended complaint does not set forth a separate

²³Conlon testified that the \$400.00 incurred in the state court proceeding was omitted from Claim 10. However, (i) there was conflicting testimony concerning the \$400.00 (see *supra* at 35 n.22); and (ii) Claim 10, which was filed on May 25, 2012, was never amended.

claim for attorney's fees; rather, his request is included only in the prayer for relief. Plaintiff is therefore not entitled to an award of the attorney fees incurred by him in bringing this adversary proceeding.").

Nowhere in its Complaint does Wells Fargo request attorney fees, either as a claim or otherwise. Instead, Wells Fargo repeatedly states that it "has been injured to the extent of the value of the Equipment, or the debt of AFM under the Lease Agreement, whichever is greater." (Compl. ¶¶ 30, 38, 45, 51.) Wells Fargo first requested attorney fees in its Pre Trial Statement,²⁴ which was filed only fifteen days prior to the Trial and does not meet the requirements of Rule 7008(b). Accordingly, the Court finds that Wells Fargo cannot recover attorney fees in this proceeding.

IV. CONCLUSION

Wells Fargo presented no evidence that Gruszka conducted business with Wells Fargo in any capacity other than as President of AFM or guarantor of AFM's debt and presented insufficient evidence to pierce the corporate veil of AFM. Accordingly, the Court will deny the Fifth Claim for Relief. Gruszka is liable to Wells Fargo solely as guarantor of AFM's obligations pursuant to the Lease.

²⁴Wells Fargo also requested attorney fees in its motion for default judgment (Doc. # 8), which was withdrawn (Doc. # 20).

In a nondischargeability proceeding brought pursuant to 11 U.S.C. § 523(a)(6), the burden is on the creditor to establish by a preponderance of the evidence that the debt is for willful and malicious injury. Wells Fargo failed to meet this burden.

Gruszka had knowledge from her past dealings with Wells Fargo that it could recover the Equipment if AFM defaulted on the Lease. Thus, Gruszka knew that selling the Equipment was substantially certain to deprive Wells Fargo of its right to recover the Equipment. As a consequence, the sale of the Equipment caused willful injury, as that term is used in § 523(a)(6).

However, Wells Fargo failed to establish by a preponderance of the evidence that Gruszka caused malicious injury to Wells Fargo or the Equipment by selling the Equipment. Gruszka credibly testified that she sold the Equipment with the intention of paying off the Lease and did so in order to maximize the value of the Equipment. At the time the Equipment was sold, Gruszka was in the process of liquidating the assets of AFM to repay its debts. Gruszka did not fully understand the effect of the security agreement and did not believe that she needed Wells Fargo's consent to sell the Equipment. Furthermore, Gruszka did not use the proceeds of sale for her personal benefit, and she attempted on several occasions to

settle the Lease with Wells Fargo. AFM paid approximately 80% of the original amount due pursuant to the Lease and the Amendment. Although the Court in no way condones Gruszka's actions, these facts, taken as a whole, establish that Gruszka did not act (i) in conscious disregard of her duties to Wells Fargo; and (ii) without just cause when she sold the Equipment. As a consequence, the Court finds that Gruszka's debt to Wells Fargo is not for malicious injury, as that term is used in § 523(a)(6). The Court will deny the First Claim for Relief.

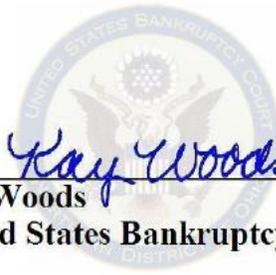
When a creditor seeks to hold a debtor liable for conversion, the creditor's damages are limited to the lesser of the value of the property or the amount of the indebtedness. Wells Fargo asserts in Claim 10 that \$5,486.32 is due pursuant to the Lease, which Gruszka does not dispute. Although Conlon testified that the value of the Equipment was \$9,000.00 near the time it was sold, Wells Fargo's damages are limited to \$5,486.32 and Claim 10 will be allowed as filed. Wells Fargo may not recover attorney fees in this proceeding because it failed to plead its request for attorney fees as a claim in the Complaint, as required by Federal Rule of Bankruptcy Procedure 7008(b).

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: October 2, 2013
01:14:42 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MELISSA A. GRUSZKA,

Debtor.

* * * * *

WELLS FARGO FINANCIAL LEASING
MANUFACTURER SERVICE GROUP, A
DIVISION OF WELLS FARGO BANK,
N.A., d/b/a WELLS FARGO
FINANCIAL CAPITAL FINANCE,

Plaintiff,

v.

MELISSA A. GRUSZKA,

Defendant.

CASE NUMBER 11-43575

ADVERSARY NUMBER 12-4040

HONORABLE KAY WOODS

ORDER FINDING THAT THE DEBT OWED TO WELLS FARGO
BY MELISSA A. GRUSZKA IS DISCHARGEABLE

Wells Fargo Financial Leasing Manufacturer Service Group, a Division of Wells Fargo Bank, N.A. d/b/a Wells Fargo Financial Capital Finance ("Wells Fargo") filed Complaint Objecting to Discharge of Debt ("Complaint") (Doc. # 1) on March 26, 2012. Wells Fargo requests the Court, *inter alia*, to find that the debt owed to Wells Fargo by Debtor/Defendant Melissa A. Gruszka is nondischargeable pursuant to 11 U.S.C. § 523(a)(6). Gruszka filed Answer (Doc. # 15) on June 25, 2012. On July 8, 2013, Wells Fargo filed Pre Trial Statement (Doc. # 52).

The Court conducted a trial in this proceeding on July 23, 2013, at which appeared Dennis A. Dressler, Esq. on behalf of Wells Fargo and Samuel L. Altier, Esq. on behalf of Gruszka.

For the reasons set forth in the Court's Trial Opinion Regarding Complaint Objecting to Discharge of Debt entered on this date, the Court hereby:

1. Finds that Wells Fargo failed to establish that Gruszka conducted business with Wells Fargo in any capacity other than as President of AFM Machine & Design, Inc. ("AFM") or guarantor of AFM's debt.
2. Finds that Wells Fargo failed to establish that AFM is the alter ego of Gruszka and, thus, Wells Fargo may not pierce the corporate veil of AFM.
3. Denies Wells Fargo's Fifth Claim for Relief.

4. Finds that Wells Fargo failed to establish that Gruszka acted in conscious disregard of her duties to Wells Fargo or that her conduct was without just cause or excuse.
5. Finds that Wells Fargo failed to meet its burden of proof in establishing that the debt owed to Wells Fargo by Gruszka is a debt for willful and malicious injury, as set forth in 11 U.S.C. § 523(a)(6).
6. Denies Wells Fargo's First Claim for Relief.
7. Finds that Wells Fargo failed to request attorney fees as a claim in the Complaint, as required by Federal Rule of Bankruptcy Procedure 7008(b).
8. Finds that Wells Fargo cannot recover attorney fees in this proceeding.
9. Finds that the debt owed to Wells Fargo by Gruszka is \$5,486.32, as set forth in Claim No. 10-1 filed by Wells Fargo.
10. Finds that that the debt owed to Wells Fargo by Gruszka is dischargeable.

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