

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:05-bk-09328-ABB
Chapter 7

JOHN D. DAMUTH,

Debtor.

**WELLS FARGO FINANCIAL
NATIONAL BANK,**

Plaintiff,

vs.

Adv. Pro. No. 6:05-ap-00317-ABB

JOHN D. DAMUTH,

Defendant.

MEMORANDUM OPINION

This matter came before the Court on the Motion for Entry of Judgment After Default (collectively with its supporting affidavits, the “Motion”)¹ filed by Wells Fargo Financial National Bank, the Plaintiff herein (“Plaintiff”), against John D. Damuth, the Defendant and Debtor herein (“Debtor”). The Plaintiff seeks to have a debt deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(6) and requests judgment by default on its Complaint.² An evidentiary hearing was held on March 13, 2006. Counsel for the Plaintiff appeared at the hearing and was granted leave to present witnesses or file supplemental evidence. The Plaintiff did not present witnesses or file supplemental evidence. After reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor purchased a Rolex Watch (the “Watch”) from Mayors Jewelers on or about April

19, 2005. The Plaintiff financed the purchase and was granted a security interest in the Watch. The Debtor took possession of the Watch and defaulted on his payment obligations to the Plaintiff. The Debtor filed an individual Chapter 7 case on August 19, 2005 (“Petition Date”). He did not list the Watch as an asset in Schedule B, nor did he list the Plaintiff as a secured creditor in Schedule D of his Schedules.³ The Plaintiff is listed as an unsecured creditor in Schedule F holding a claim for “Consumer Purchases” in the amount of \$5,518.00.

The Plaintiff filed its Complaint against the Plaintiff contending the Debtor, without the Plaintiff’s permission, transferred or sold the Watch to a third person and such transfer constitutes conversion. The Plaintiff contends it suffered willful and malicious injury as a result of the Debtor’s actions and the amount of \$5,293.49 (plus interest, late fees, costs and attorneys’ fees) is nondischargeable. The Plaintiff seeks the entry of a final judgment against the Debtor through its Motion. The Plaintiff filed two affidavits in support of the Motion: (i) Affidavit of Non-Military Service of Kristine R. Carroll, a bankruptcy representative for the Plaintiff, stating the Debtor is not in the Armed Services; and (ii) Affidavit of Claim of Kristine R. Carroll stating the principal sum of \$5,293.59 is due and owing to the Plaintiff by the Debtor.⁴ The Debtor has not responded to the Complaint or the Motion, nor has he appeared in this adversary proceeding.

CONCLUSIONS OF LAW

The Plaintiff challenges the dischargeability of the debt in the amount of \$5,293.49 pursuant to 11 U.S.C. 523(a)(6). It seeks the entry of a judgment against the Debtor pursuant to Federal Rule of Civil Procedure 55(b)(2), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7055.

Section 523(a)(6) provides a discharge pursuant to § 727 does not discharge any debt “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) (2005). The party objecting to the dischargeability of a debt carries the burden of proof and the standard of proof is preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); Fed. R. Bankr. P. 4005 (2005). Objections to discharge are to be

¹ Doc. Nos. 5, 6 and 7.

² Doc. No. 1.

³ Main Case Doc. No. 1.

⁴ Doc. Nos. 6, 7.

strictly construed against the creditor and liberally in favor of the debtor. In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986); In re Bernard, 152 B.R. 1016, 1017 (Bankr. S.D. Fla. 1993). “Any other construction would be inconsistent with the liberal spirit that has always pervaded the entire bankruptcy system.” 4 COLLIER ON BANKRUPTCY ¶523.05, at 523-24 (15th ed. rev. 2005).

The exception of a debt from discharge pursuant to § 523(a)(6) requires a plaintiff to establish by a preponderance of the evidence the debtor deliberately and intentionally injured the creditor or creditor's property by a willful and malicious act. In re Howard, 261 B.R. 513, 520 (Bankr. M.D. Fla. 2001). The United States Supreme Court ruled in Kawaauhau v. Geiger that in order to establish the requisite willful and malicious intent of § 523(a)(6), a plaintiff must establish the injury was intentional—that the debtor intended the consequences of his or her act. The Supreme Court explained, because “willful” modifies “injury” in § 523(a)(6), nondischargeability requires conduct that inflicts an injury intentionally and deliberately, “not merely . . . a deliberate or intentional *act* that leads to injury.” Kawaauhau v. Geiger, 523 U.S. 57, 61-2, 118A S. Ct. 974, 140 L. Ed. 2d 90 (1998).

The Plaintiff contends the Debtor converted the Watch and such act was willful and malicious, causing injury to the Plaintiff. The Plaintiff has presented no evidence substantiating its conversion allegation. The § 523(a)(6) exception to discharge requires evidence of an act by a debtor that is willful and malicious. There is no evidence the Debtor transferred, sold, or converted the Watch. The mere existence of an unpaid balance owed to the Plaintiff does not establish malicious and willful injury. The Plaintiff has not established the Debtor took or engaged in any action that could meet the willful and malicious standard of § 523(a)(6), as defined by the Supreme Court in Geiger.

Default judgments are disfavored by the federal courts. U.S. on Behalf of Time Equip. Rental v. Harre, 983 F.2d 128, 130 (8th Cir. 1993). The entry of a default judgment is “. . . committed to the discretion of the district court.” Hamm v. De Kalb County, 774 F.2d 1567, 1576 (11th Cir. 1985). Having considered the relevant facts of this case and the Plaintiff's failure to establish the elements of 11 U.S.C. § 523(a)(6), the entry of a default judgment against the Debtor is not proper.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Plaintiff's Motion is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that a status hearing on the Complaint shall be held on May 8, 2006 at 2:00 p.m.

Dated this 4th day of April, 2006.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge