

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

IRIS E. BOONE

CASE NO. 00-60416

Debtor

Chapter 7

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CHARTER ONE AUTO FINANCE CORP.,  
f/k/a AMERICAN CREDIT SERVICES, INC.

Plaintiff

vs.

ADV. PRO. NO. 00-80045

IRIS E. BOONE

Defendant

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APPEARANCES:

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Attorney for the Plaintiff  
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Of Counsel

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

The Court considers herein the complaint filed in the adversary proceeding commenced by Charter One Auto Finance Corp. (“Charter One”) on March 20, 2000. Charter One seeks a determination by the Court that a certain debt owed by Iris E. Boone (“Debtor”) is

nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). Issue was joined by the filing of an answer by the Debtor on May 3, 2000.

The trial of the adversary proceeding was conducted on July 17, 2000, in Utica, New York. The Court heard testimony from two witnesses called by Charter One. In lieu of closing arguments, the Court requested the parties to provide it with post-trial memoranda of law. The matter was submitted for decision on August 14, 2000.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction of these contested matters pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), and (b)(2)(I).

### **FACTS**

Charter One alleges in its complaint that it loaned \$17,757.51 to the Debtor in 1998 in connection with a retail installment contract for the purchase of a 1996 Honda Accord (“Vehicle”). Although Charter One offered no proof of the contract or its alleged security interest in the Vehicle either in its complaint or at trial, in her answer the Debtor does acknowledge a loan from Charter One in the amount of \$17,757.51. Furthermore, the Debtor did not deny that the loan from Charter One was secured by the Vehicle.

Michael A. McCarthy, Senior Business Analyst at Charter One, testified that as of the date of the trial the indebtedness on the loan totaled \$18,136.66, which included \$16,769.11 in

principal and \$876.89 in interest.

The Debtor filed a voluntary petition pursuant to chapter 7 of the Code on February 2, 2000. According to her Statement of Financial Affairs, filed with her petition, the “1996 Honda Accord was totally destroyed by fire.” Patrick A. DiCraastro (“DiCraastro”), a patrol officer with the Syracuse Police Department, testified that he responded to a request from the Syracuse Fire Department on February 4, 1999, for assistance with a suspicious vehicle fire at the 300 block of McLennan Avenue, Syracuse, New York. The interior of a grey Honda Accord was damaged by fire and DiCraastro testified that there was a strong odor of what he believed to be gasoline. He testified that there were no personal items or forms of identification found in the Vehicle, but that a registration check on the Vehicle identified the owner as the Debtor. DiCraastro telephoned the Debtor and informed her of the damage to her Vehicle. In response to his questions, the Debtor indicated that on the afternoon of February 3, 1999, she had been visiting her aunt on McLennan Avenue and en route home the Vehicle had overheated. She had been forced to park it a couple of blocks from her aunt’s house with the intent of having the vehicle towed to a garage the following morning. According to DiCraastro’s report, the Debtor “was subsequently arrested after her account of the incident had changed several times.” *See* Plaintiff’s Exhibit 2. It was DiCraastro’s testimony that the Debtor was charged with arson in the third degree, but in the 17 months since the incident he had not been subpoenaed as a witness, and he was not aware of any grand jury indictment or preliminary hearing in connection with the case. As far as he knew, the criminal charges were still pending.

## **DISCUSSION**

The Bankruptcy Code excepts from discharge those debts arising from the “willful and malicious injury by the debtor to another entity or to the property of another entity,” 11 U.S.C. § 523(a)(6). The burden of proof is on the creditor to establish that its debt is nondischargeable by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 659-60, 112 L.Ed.2d 755 (1991).

In this case, Charter One must prove willful and malicious injury to it as a result of the loss of its collateral under the retail installment contract. It must establish that the loss of its collateral arose as a result of the willful act of the Debtor, done with the actual intent to cause injury. *See Kawaauhau v. Geiger*, 118 S.Ct. 974, 977, 523 U.S. 57, 140 L.Ed.2d 90 (1998) (discussing the proper interpretation of the term “willful”). In addition, Charter One must establish that the act of the Debtor was wrongful and without just cause or excuse, and thus “malicious.” *See In re Heilman*, 241 B.R. 137, 172 (Bankr. D. Md. 1999) (citation omitted).

In *In re Malinowski*, 249 B.R. 672 (Bankr. D. Md. 2000), there had been a trial in which the state court found “the burning of the Corvette to have been deliberate, that [the debtor] was involved in its destruction, and that the destruction caused injury to the Bank as a result of the loss of the collateral under the financing contract.” *Id.* at 676. The bankruptcy court concluded that the state court’s findings “necessarily determine that his actions were willful and malicious.” *Id.*

Unlike *Malinowski*, there has been no determination made concerning the damage done to the Debtor’s Vehicle. Although arrested and charged with arson, Charter One offered no evidence that the Debtor had been convicted. Indeed, DiCraastro testified that he had not been called as a witness at any hearing and as far as he knew, the matter was still pending.

Keeping in mind that exceptions to discharge are to be strictly construed in favor of a debtor and against a creditor, *see National Union Fire Ins. Co. v. Bonnanzio (In re Bonnanzio)*, 91 F.3d 296, 300 (2d Cir. 1996) (citations omitted), the Court finds that the proof offered by Charter One does not establish by a preponderance of the evidence that it was the act of the Debtor that caused the damage to the Vehicle.<sup>1</sup> Therefore, the Court need not address whether the act was willful and malicious.

Based on the foregoing, it is hereby

ORDERED that Charter One's complaint seeking a denial of dischargeability of the debt owed to it by the Debtor is denied.

Dated at Utica, New York

this 3rd day of January 2001

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge

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<sup>1</sup> The Court refused to admit a statement which was allegedly made by Jessie Robertson ("Robertson") to DiCrastrro. Robertson, who did not testify, was apparently residing with the Debtor at the time of the vehicle fire. The Court found that while Charter One's counsel may have established that Robertson was unavailable to testify at the trial, she had not established that the statement was against his pecuniary interest pursuant to Federal Rule of Evidence 804(b)(3).