UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

FAYEK E. MEGEED
PHYLLIS L. MEGEED — CASE NO. 91-00772

Debtors

YVONNE H. JOY,

Plaintiff

vs. — ADV. PRO. NO. 91-60151A

FAYEK MEGEED
PHYLLIS MEGEED,

Defendants

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

By Memorandum-Decision and Order dated January 15, 1993, this matter was remanded by United States District Court for the Northern District of New York, Con G. Cholakis, U.S.D.J., for a determination under §523(a)(6) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") as to the dischargeability of a debt owed by Fayek Megeed ("Debtor") to Yvonne Joy ("Plaintiff"). The parties were thereafter given an opportunity to submit additional memoranda of law, neither party responded, and the matter was submitted for decision on March 4, 1993.

JURISDICTION

The Court has core jurisdiction over this proceeding pursuant to 28 U.S.C. §§1334(b), 157(a), 157(b)(1) and (b)(2)(I).

FACTS

The factual background relevant to the instant dispute was set forth in the Court's Memorandum-Decision of July 16, 1992 ("Memorandum-Decision"), to wit: Debtor was a licensed securities broker with Prudential Insurance Company ("Prudential") and prepared Plaintiff's personal income tax returns free of charge during much of the 1980's. He had been friends with Plaintiff for several years when he filed a petition for relief under Chapter 7 of the Code on March 20, 1991.

In 1986, Plaintiff inherited a relatively substantial sum of money upon the death of her longtime companion. Shortly thereafter, under Debtor's direction, Plaintiff invested over $178,000 in various securities through Prudential.

In September 1988, Plaintiff loaned Debtor $50,000, which she obtained by redeeming securities in her Prudential account. Concomitantly, Debtor executed and delivered to Plaintiff a document denominated as "Promise" ("Promise"), by which Debtor agreed to repay the loan in monthly installments over ten years, at an annual interest rate of 10.8%. It also appears that Debtor purported to give to Plaintiff a security interest in the equity in his house and "all personal and business property owned." See Plaintiff's Exhibit 5).

Debtor has been in default on his loan obligation since November 1990, at which time the outstanding principal balance on the loan stood at $45,000. Debtor apparently has only $15,000 of equity in his house. Also, Debtor owns no personal or business property of any substantial value, despite the fact that he told Plaintiff on several occasions prior to the loan transaction that he expected to receive an interest in an apartment building in Egypt.

Thus, on June 11, 1991, Plaintiff commenced the instant adversary proceeding seeking to have the debt in question declared nondischargeable pursuant to Code §§523(a)(2), (4) and (6). In its Memorandum-Decision, the Court determined that the debt was not exempt from discharge under any of the aforementioned subsections of Code §523(a). On appeal, the District Court affirmed the Court's rulings under Code §523(a)(2) and (a)(4). The District

Court, however, disagreed with the Court's determination that Code §523(a)(6) is inapplicable to debts arising from a breach of contract and remanded the matter for further consideration under that provision of the Code.

DISCUSSION

Code §523(a)(6) excepts from discharge debts which arise from the infliction by the debtor of a willful and malicious injury. 11 U.S.C. §523(a)(6). The District Court, relying on Rivera v. Moore-McCormack Lines, Inc., 238 F.Supp. 233 (S.D.N.Y. 1965), concluded that Code §523(a)(6) is applicable to debts arising out of a breach of contract as well as to debts arising from tortious liabilities. Accord In re Pasek, 983 F.2d 1524, 1526-27 (10th Cir. 1993); In re Riso, 978 F.2d 1151, 1154 (9th Cir. 1992); In re Long, 774 F.2d 875, 882 (8th Cir. 1985); In re Ketaner, 149 B.R. 395, 400 (Bankr. E.D.Va. 1992). Thus, Plaintiff's theory of recovery, in this case breach of contract, is immaterial, and the only relevant inquiry is whether the debt in question arose as a result of a willful and malicious injury inflicted by the Debtor.

As used in Code §523(a)(6), the term "willful" means intentional or deliberate conduct which necessarily leads to injury. In re Long, 774 F.2d at 880 (citations omitted); In re McGuffey, 145 B.R. 582 (Bankr. N.D.Ill. 1992); In re McDowell, 145 B.R. 977 (Bankr. W.D.Mo. 1992); In re Kassoff, 146 B.R. 194 (Bankr. N.D.Ohio 1992). Thus, only an intentional breach of contract falls within the Code §523(a)(6) exception to discharge, and only then if such breach also results in malicious injury. See In re Pasek, 983 at 1526-27; In re Ketaner, 149 B.R. at 400-01; In re Riso, 978 F.2d at 1154 (citations omitted); But see In re Colclazier, 134 B.R. 29, 32-33 (Bankr. W.D.Okl. 1991) ("§ 523(a)(6) exempts from discharge only damages from tortious breaches of contract.").

Plaintiff must prove the willfulness and maliciousness of Debtor's conduct by a preponderance of the evidence. Grogan v. Garner, __ U.S. __, 11 S.Ct. 654, 661 (1991). In the instant case, there is nothing in the record to indicate that the Debtor's act of default which triggered the breach was willful. Debtor defaulted on the loan obligation in question two years after contracting for the loan, and after reducing the principal balance on the loan by $5,000.

Indeed, it appears that he made at least one payment on the loan in March 1991 even after his original default in November 1990. (See Defendant's Exhibit A). In short, it appears that the Debtor's default resulted in pertinent part from an unanticipated decrease in brokerage commissions, apparently due to the prevailing economic recession. It therefore cannot be said that such default was willful within the meaning of Code §523(a)(6), and the Court need not determine whether the default was malicious under that section.

Nor do the instant facts support a determination of nondischargeability under Code §523(a)(6) based upon tortious conversion of property. As stated in In re Hazelwood, 43 B.R. 208, 213 (Bankr. E.D.Va. 1984), "the mere breach of a contract," (i.e. unintentional breach) "[is not] sufficient to constitute tortious conversion." (citing In the Matter of Morris L. Haynes, 19 B.R. 849, 9 B.C.D. 226 (Bankr. E.D.Mich. 1982)). Moreover, to establish a claim for conversion, Plaintiff must show that Debtor wrongfully asserted dominion or control of her property inconsistent with her ownership of it. See In re Criswell, 52 B.R. 184, 203 (Bankr. E.D.Va. 1985) (citing Matter of Lambillotte, 17 B.R. 256, 258 (Bankr. M.D.Fla. 1982)). Here, upon delivery of the funds to Debtor, they were no longer Plaintiff's property. Hence, the funds loaned by Plaintiff to Debtor pursuant to the contract were not subject to conversion because Debtor never exercised dominion or control over same inconsistent with Plaintiff's ownership of the funds.

Based upon the foregoing, the Court concludes that the debt in question does not fall within the exception to discharge contained in Code §523(a)(6), and that Plaintiff's complaint seeking a determination of nondischargeability under that section must be, dismissed.

IT IS SO ORDERED.

Dated at Utica, New York
this day of May, 1993

STEPHEN D. GERLING
U. S. Bankruptcy Judge