

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: MARVIN A. POSEY

CASE NO. 03-54627

FRIGIDAIRE FINANCIAL CORPORATION

V.

ADV. PROC. NO. 03-05412

MARVIN A. POSEY

OPINION

The matter before the court is the complaint for determination of dischargeability pursuant to § 523(a)(4) and § 523(a)(6) of the Bankruptcy Code filed by Frigidaire Financial Corporation (“Frigidaire”) against Marvin A. Posey (“Posey”), the debtor herein. The court concludes that the debt should be excepted from discharge pursuant to § 523(a)(6).

I. FACTUAL BACKGROUND

1. Marvin A. Posey filed his petition for relief under Chapter 7 of Title 11 of the United States Code on September 18, 2003.

2. Frigidaire Financial Corporation filed its complaint for determination of dischargeability on November 19, 2003.¹ In its two count complaint, Frigidaire

¹ The plaintiff filed the briefs in this matter as Electrolux Financial Corporation (“EFC”), formerly Frigidaire Financial Corporation. The plaintiff is generally referred to herein as Frigidaire.

alleges fraud or defalcation while acting in a fiduciary capacity, and conversion. The plaintiff requests that the debt owed by Posey in the amount of \$128,483.00 be determined nondischargeable under § 523(a)(4) and § 523(a)(6) of the Bankruptcy Code. The complaint alleges that the debtor's business, Posey Enterprises, Inc., d/b/a Posey's Western Auto, d/b/a Western Auto, entered a security agreement with the plaintiff for inventory financed that required proceeds of sales of the inventory be held in trust for the plaintiff separate and apart from the debtor's funds and goods. Posey entered into a personal guarantee with the plaintiff for the indebtedness of his business. Frigidaire has alleged that Posey breached fiduciary duties owed to the plaintiff by spending money out of trust and that he willfully and maliciously converted proceeds to his own use.

3. The parties submitted the matter to the court for determination on briefs without an evidentiary hearing.

4. Posey does not dispute that he entered the security agreement that required Western Auto to remit payment to the plaintiff upon sale of inventory and required that sale proceeds be held in trust. Nor does Posey dispute that he entered into a personal guaranty. Posey also admits that he continued to pay Western Auto's rent to himself so he could pay the land note; that he paid himself compensation; and, that he made loan payments to himself and to his father. Posey does, however, take issue with several factual matters. He claims that he was not aware that the plaintiff required a separate trust account. Posey claims

the plaintiff had full knowledge Western Auto had only one account for all of its transactions. Posey indicates that the course of dealing and customary practice was that the plaintiff's inventory counters would come to Western Auto and inform Posey that payment was due and Posey would remit payment three or four times a year. Posey also claims that he acted in good faith and that he intended to pay the plaintiff with proceeds from the sale of the shop equipment and building, but that there was not enough money generated from the sale thereof. Frigidaire takes issues with many of the matters Posey raises and claims that they are simply untrue.²

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. § 157. The court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157.

Section 523(a)(6) of the Bankruptcy Code provides the following:

(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;

² Normally, the court would be inclined to require an evidentiary presentation in light of the number and nature of factual disputes raised on the complaint requesting an exception from discharge. However, the court does not consider these factual issues to be relevant to its determination of nondischargeability under § 523(a)(6).

11 U.S.C. § 523(a)(6). The Fifth Circuit has provided the test for whether a debtor's actions are willful and malicious under this section:

The test for willful and malicious injury under Section 523(a)(6), thus, is condensed into a single inquiry of whether there exists "either an objective substantial certainty of harm or a subjective motive to cause harm" on the part of the debtor.

Williams v. International Brotherhood of Electrical Workers Local 520 (In re Williams), 337 F. 3d 504, 509 (5th Cir. 2003). See also, *Raspanti v. Keaty (In re Keaty)*, 397 F. 3d 264 (5th Cir. 2005).

In applying this standard to the facts before the court, the court concludes that there was an objective substantial certainty of harm when Posey allowed funds to be spent out of trust in violation of the security agreement with the plaintiff, and that the plaintiff was harmed by Posey's actions. The court does not find it necessary to make factual determinations on issues relating to the course of dealing with Frigidaire, and whether or not the debtor actually kept a separate account, or knew he was supposed to segregate funds in order to make its conclusion. Posey entered the security agreement with Frigidaire. He spent the funds out of trust in violation of that agreement. Frigidaire lost the benefit of its collateral because of his actions. The court concludes that Frigidaire has met its burden by a preponderance of the evidence and the debt should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). Because of this conclusion, the court does not find it necessary to make determinations based upon Count I of the

complaint relating to nondischargeability under 11 U.S.C. § 523(a)(4).

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 11th day of August, 2005.

/s/ Edward R. Gaines

EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

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