UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re: Chapter 7

Peter D. Merante and
Robin A. Merante, Case No.: 99-17052

Debtors.

American General Finances, Inc.

Plaintiff,

-v- Adv. Pro. No.: 00-90065

Peter D. Merante and Robin A. Merante

Defendants.

APPEARANCES:

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John M. Dubuc, Esq.
Of counsel

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision and Order

American General Finance, Inc. ("Plaintiff") initiated this adversary proceeding seeking a determination that the debt owed to it by the Debtors ("Defendants") is nondischargable pursuant to 11 U.S.C. § 523(a)(6).

Jurisdiction

The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a)(2)(A) and (I) and 28 U.S.C. § 1334(b).

Facts

This court has previously denied a motion for summary judgment in this case. The objective material facts have not changed and based upon the court's previous findings and the evidence adduced at trial, the court finds the following:

A. The Plaintiff is a corporation duly licensed to do business in the state of New York.

B. On April 23, 1999, pursuant to a note and security agreement, the Plaintiff loaned the Defendants $4,204.31. In exchange for the loan, the Plaintiff received a security interest in certain personal property of the Defendants. This personal property consisted of the following: health rider exercise equipment, a Sanyo TV, a Mitsubishi 35" TV, a Quasar TV/VCR, two 17" Sony TVs, a Webb triple dresser, a full/queen headboard, a full/queen footboard, a door chest, and a full Serta plush set. The value of this property on April 23, 1999 was approximately $4,750.00.

C. Prior to the filing of the Chapter 7 petition, at a lawn sale, the Defendants sold the Sanyo Mitsubishi 35" TV, the Quasar TV/VCR, the Webb triple dresser, the full/queen headboard, the full/queen footboard, the door chest, and the full Serta plush set.

D. The property was sold for approximately $500.00.

Discussion

11 U.S.C. § 523(a)(6) states, in part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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.

Willful Injury

The Supreme Court has recently analyzed the term "willful" as utilized in this subdivision, stating:

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." *Kawaauhau v. Geiger*, 118 S. Ct 974, 977 (1998).

While this interpretation may have narrowed the scope of § 523(a)(6) it did not depart from the standard that conversion of another's collateral is, and remains, a basis for nondischargeability pursuant to this section. *Id.* at 978.

Presently, it is undisputed the Defendants intentionally sold the property securing the loan. However, the issue is whether they intentionally injured the Plaintiff; whether they intended to "deprive the creditor of its lawful exercise of rights in the collateral or its proceeds by disposing of or retaining it without the creditor's knowledge or consent." *In re LaGrone*, 230 B.R. 900, 903 (Bankr. S.D. Ga. 1999) (citing *Kawaauhau v. Geiger*, 118 S. Ct. at 977). The Plaintiff contends that it has established this intent. The court disagrees.

Initially, there is a question of whether the Defendants understood that the Plaintiff had lawful rights in the collateral. This is not a purchase money security interest where the collateral and the loan are inextricably intertwined and these are not sophisticated debtors. Rather, here the Defendants needed a cash loan and the Plaintiff took the application over the phone determining what property the Defendants already owned that could be pledged as collateral. When questioned by the court about the loan process, the Plaintiff's employee testified as follows:

> Q. Just so I understand, how - - you communicate that a lot of this

information is taken over the phone?

A. Correct.

...

Q. So somebody calls up - - a prospective borrower calls up on the phone and says I want to borrow $1,000, and then they would be told it would have to be collateralized in here's our list of acceptable collateral, bicycles, televisions, pool tables, whatever. So, you go down the list and they say, one of those?

A. No, we go over the list after they're approved, prior to the loan closing.

...

Q. So all of that is done over the phone and then - - then they - - they indicate which items they have and then - - and then just so you can have this form ready, is that - -

A. Correct.

Q. That's taken over the phone?

A. Right.

Q. So we have a bicycle, we have a camcorder, we have - - so, then this is prepared and then they come in and they ascribe the value to it?

A. They'll generally tell us the value over the phone as we're getting the listing from them over the phone.

...

Q. Are they given any idea from you or from you anyone else as to how to put a value on it?

A. No, we just ask for the replacement value. We just - - it states at the top what the replacement value is.

Q. So you read them the definition that you have on here, and then they pick out a number, give you that number, that is never questioned, independently verified, anything?

A. No. (Tr. 17-19.)

The manner in which the Plaintiff explained the ramifications of a default is equally troubling to the court. The exchange follows:

> Q. Do you explain to them what happens with the collateral if they default?
>
> A. Well, we tell them that if they do fall behind we do go through attorneys. Now we have arbitration clauses on our loans. We tell them that now they'll be handled through arbitrators if they fall behind. (Tr. 10.)

Similarly, Mr. Merante testified that he did not comprehend the result of a default. He stated:

> Q. Okay. Now, did they explain to you, when you were taking out the loan, what would be expected of you, as far as payments?
>
> A. Everything was ready. We got there. We were there ten minutes. We signed and we were out the door.
>
> ...
>
> Q. Okay. You understood that they had a security interest?
>
> A. Somewhat, yes. They never said they would take these items back if we defaulted or anything.
>
> Q. Okay. So, you – if – it was your understanding that if you failed to make the payments you did not know they would take the items back?
>
> A. Correct. (Tr. 19.)

The Plaintiff established that Mrs. Merante had previously worked for a bank and that Mr. Merante "somewhat" understood the loan process. However, the manner in which this loan was processed and the testimony at trial leads the court to conclude that the Defendants did not understand the nature and extent of the Plaintiff's rights in the collateral, and thus, did not intend to injure the Plaintiff when they sold it.

The Defendants' subjective intent at the time of sale substantiates this lack of awareness.

At the evidentiary hearing both Defendants credibly testified that they did not intend any injury to the Plaintiff. Mrs. Merante testified as follows:

> Q. Okay. Did you have any intent at the time of this sale to injure American General?
>
> A. No. None at all.
>
> Q. How did this sale come about? Of - - of the collateral? Of the bedroom set in particular?
>
> A. Of my selling it?
>
> Q. Yeah.
>
> A. We - - we were in trouble. I had - - I had quit my job at the bank, was out of work. My husband and I had both been out of work on - - for health reasons and we needed the money. (Tr. 7.)

This court found this witness's demeanor and testimony to be forthright and honest and is convinced that she did not intend any willful injury to the Plaintiff.

Likewise, the court finds Mr. Merante to be a credible witness and his testimony authentic. He testified as follows:

> Q. Did you ever think of what would happen to American General's interests in your collateral if you sold it?
>
> A. No.
>
> ...
>
> Q. That they could be injured?
>
> A. No.
>
> Q. Did you ever intend to pay back any of the loans?
>
> A. We were trying to, yes. But it got so bad we couldn't pay anybody. (Tr. 29.)

The Plaintiff simply did not produce enough evidence, subjective or objective, to contradict this believable testimony.

The manner in which this Plaintiff undertook this pledge of collateral and the credible testimony of the Defendants leads this court to conclude that the Plaintiff has failed prove a willful injury.

Malicious Injury

Even if the Plaintiff had established a willful injury, the inquiry would not end. To succeed under § 523(a)(6) a plaintiff must also demonstrate a malicious injury. However, since the court concludes that the injury was not willful, it is unnecessary to determine whether it was malicious.

Conclusion

For the reasons stated, the court concludes that the Plaintiff has failed to demonstrate the requirements of 11 U.S.C. § 523(a)(6). Thus, this debt is discharged.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge