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JUDGE: M. A. Mahoney

PARTIES: T. Allen Reimer, New South Architects, Inc., New South Interiors, Trueman Allen Reimer

CHAPTER: 7

ATTORNEYS: M. A. Posey, N. B. Moseley

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

T. ALLEN REIMER,

Case No. 95-10558-MAM

Debtor.

NEW SOUTH ARCHITECTS, INC.,
NEW SOUTH INTERIORS,

Plaintiff.

v.

Adv. No. 95-1063

TRUEMAN ALLEN REIMER,

Defendant.

**ORDER AND JUDGMENT PARTIALLY SUSTAINING COMPLAINT
PURSUANT TO 11 U.S.C. § 523 AGAINST TRUEMAN ALLEN REIMER
AND PARTIALLY GRANTING PLAINTIFF'S RELIEF FROM STAY MOTION**

Melissa A. Posey, Mobile, AL for Plaintiff

N. Bruce Moseley, Mobile, AL for Debtor/Defendant

This matter came before the Court on the complaint of New South Architects, Inc. (“NSA”) to determine the dischargeability of debt owed by Trueman Allen Reimer (“Debtor” or “Reimer”) to NSA pursuant to 11 U.S.C. § 523. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Proper notice was given and appearances were as noted in the record. For the reasons indicated below, the Court grants partial relief to NSA and awards it a nondischargeable judgment against Trueman Allen Reimer in the amount of \$5,139.25. Plaintiff’s motion for relief from stay is granted.

PROCEDURAL POSTURE

On March 16, 1995, Debtor filed a petition under Chapter 7 of the Bankruptcy Code. Debtor scheduled NSA as an unsecured, nonpriority creditor with a claim in the amount of \$25,000.¹ This debt arises from a work relationship gone sour. Although NSA has a \$25,000 state court judgment in Mobile County Circuit Court against Reimer, NSA did not rely on that judgment in bringing suit against Reimer in this court. NSA tried its case anew. In fact, that may have been necessary since the state court judgment is silent as to the basis for the award, simply awarding judgment in NSA's favor for the \$25,000 amount. The judgment also enjoins Debtor from further use of NSA's proprietary symbols. Accompanying this dischargeability action was a motion for limited relief from stay by the Plaintiff for the purpose of allowing the Circuit Court of Mobile County, Alabama to have a hearing to determine what, if any, amount of prepetition attorney's fees of the Plaintiff are to be paid by the Defendant as an unsecured claim. The Court held the hearing in conjunction with the trial in this case and continued the stay pursuant to 11 U.S.C. § 362(e) pending this ruling. Until the dischargeability case was tried, a determination could not be made as to where the attorney's fee issue should be decided. The relief from stay motion is due to be granted. The state court is a better place to determine the appropriate amount of the unsecured claim for attorney's fees. Any attorney's fees claimed to be nondischargeable incurred either prepetition or as a part of this trial will be set for hearing in this Court at a later date since no proof has been provided to date.

¹Debtor also scheduled David Mugg ("Mugg"), the sole shareholder and president of NSA as a disputed claimant in an unknown amount. Melissa Posey, NSA's attorney, is scheduled as a disputed claimant of \$30,000 in attorney's fees for services rendered in trial of the NSA case resulting in the \$25,000 judgment. She filed a secured claim for \$30,719.05 on March 17, 1995 for these same fees.

FINDINGS OF FACT

Allen Reimer, the Debtor/Defendant in this case, is a certified interior designer. As such, he does space planning and interior design work. He has worked in this field for over 20 years; however, he was only licensed as an interior designer in 1990.

Allen Reimer went to work for New South Interiors in September 1990. NSA is an architectural firm located in Mobile, Alabama. David Mugg, a licensed architect and the president and sole shareholder of NSA, hired Reimer to head a division of NSA to be established at Reimer's arrival. The division, New South Interiors, was to provide interior design and space planning services, a natural adjunct to NSA's work.

Reimer did interior design work at his prior job at T. S. Wall.² He had also learned to do architectural drafting by computer with Mugg's help and worked part-time for Mugg for 6-8 months before his full employment. While at T. S. Wall, Reimer had drafted the floor plan of the Executive Center office complex ("EC"). He used a computer aided design program ("CAD") to do the work. Mugg trained Reimer in the CAD process and allowed Reimer to borrow his VersaCAD computer program and symbols library³ to do the drawings. Reimer completed the work for T. S. Wall with Mugg's assistance. EC was billed for the drawings by T. S. Wall. The plans were saved on computer disk, like most CAD projects.

²While at T. S. Wall, Reimer sold furniture to T. S. Wall clients under his dba AR Designs. The products sold could have been sold by T. S. Wall. This evidence impacts on Reimer's pattern of side jobs. The conditionally received Plaintiff's Exhibits 93 and 94 are received without condition.

³A symbols library is a group of computer drawn objects or characters such as plumbing or lighting fixtures and logos that are saved on a computer or in a software package. The symbols are "called up" from the computer memory or the software and the symbol is drawn automatically without the drafter drawing any of the lines. Symbols in Mugg's library included both sets of symbols from several commercial software packages and symbols he had drawn and saved in memory.

Within one month of completing the EC project, Reimer left T. S. Wall and began work at NSA. Reimer, according to Mugg, was the “president, so to speak” of NSI. NSI was not a separate corporation. It was formed as a division of NSA. The plan was for NSI to become a self-sufficient entity under Reimer’s leadership. Reimer worked as a draftsman for NSA since he was not fully occupied by NSI business at all times. NSI, for a variety of reasons, never turned a profit. Reimer therefore performed drafting duties for NSA throughout his employment at NSA.

The terms under which Reimer was employed are in dispute. Mugg and Reimer agree Reimer was a full-time employee from September 1990 to February 1992, but what that full-time employment meant (in terms of other jobs) and whether Reimer remained a full-time permanent employee after February 1992 is in dispute. NSA had no written employment agreement with employees or employment handbook. Reimer, as will be discussed below, at times did work for parties under his own name or through his separate trade names, Designworx or AR Designs. Reimer also used NSA facilities and supplies to do this work. Mugg and Reimer disagree as to whether the work was competitive with NSA, whether outside jobs were forbidden and whether Mugg had agreed that Reimer could use NSA supplies for his outside activities. Reimer also alleges that his employment status changed in February 1992 to an arrangement in which he could stay at NSA as long as he generated work to cover his salary. Reimer in essence believed that the employment relationship was “looser” with fewer restrictions than before on his activities. Mugg alleges the relationship didn’t change at all.

Mugg alleged that Reimer was to be employed only on NSA/NSI work after accepting a job at NSA. Reimer was to have no “outside” interior design jobs since he was to be developing a similar business for NSI. Mugg believes the duty not to compete was implicit in the employment relationship. Under the Alabama Code, drafting work requires the services of an

architect on most projects on commercial buildings with total square footage of over 2,500 feet.⁴ Therefore, Mugg believed that Reimer would do no drafting work on his own. However, Mugg did not present a noncompetition agreement to Reimer to sign until 6-8 weeks before he terminated him. (See Plaintiff's Exhibits 5, 11, 12, 68 and 69).

Reimer did do side jobs while working at NSA/NSI. (See, e.g., Plaintiff's Exhibits 57, 58 and 59.) He did work for McDonald's, Bo Lum, the Laurindines, Janelle Wilkins Fowler and Frances Ashcraft.⁵ All but the work for McDonald's and Frances Ashcraft was done after February 1992 when he alleges his employment status changed. Reimer alleges Mugg knew he was doing these jobs because they had discussed Reimer's use of his computer and drafting paper for side projects. Reimer testified that they had agreed he could use materials if he replaced them, which he did. Mugg believed Reimer was using office supplies and facilities only for Designworx and more than once Reimer had told him that Designworx was not a business in competition with NSA because it was a computer design and installation business only. Initially, this was true according to Reimer but the company's activities then changed. He never specifically told Mugg when Designworx business changed, but Reimer testified "he never particularly kept it a secret."

Reimer and Mugg agree that in February 1992 Mugg informed Reimer that NSA was having cash flow problems. Mugg states that he told Reimer that he could continue as an employee but his employment was at risk due to lack of business. It was Reimer's understanding that he was welcome to stay at NSA's offices and use the professional facilities and equipment, but in order to continue to receive a regular paycheck, he would have to provide sufficient design

⁴ALA. CODE § 34-2-32 (1975).

⁵See facts developed below under a heading as to each client.

work income to pay it. Reimer never missed a paycheck. Business at NSA picked up. Reimer continued to have all federal, state and FICA taxes deducted from his salary. He received a W-2 federal tax form at year end. In fact, after February 15, 1992, Reimer continued to come to work as usual, did work at Mugg's request, wrote and signed NSI checks and solicited business in the name of NSI. Reimer wrote a letter of resignation to Mugg in September 1992 giving two weeks' notice.

Reimer claims his employment was terminated in February 1992. However, he didn't vacate NSA's premises until September 15, 1992. Mugg claims he terminated Reimer on September 15 and told him to leave immediately. Reimer's vacation of NSA's offices was quick and unceremonious. While Reimer removed his belongings, Mugg "helped." Mugg placed many items outside the offices himself. The rush of Reimer's termination did not allow time for either side to carefully examine what items Reimer took with him.

Ownership of Plans

The parties also disagree as to who actually owns the plans drafted at NSA. Prior to and throughout Reimer's employment with NSA, all of the drawings produced by the company were labeled with a copyright symbol.⁶ A copyright symbol was placed on both the computer disks containing the drawings and the drawings themselves.⁷ An expert witness for the Plaintiff,

⁶Although a few drawings failed to contain the copyright symbol when first drafted, Mugg insisted it be placed on the final product before delivery to the client. Plaintiff's Exhibits 79 and 84 are two drawings for a McDonald's restaurant on which Reimer deleted the copyright symbol from the title block but was later told by Mugg to replace the symbol to the appropriate place.

⁷In 1993 and 1994, Mugg began filing copyright applications for plans. He did not do so before that time.

Mr. Starr Proldsorfer⁸, who himself has been an architect for over 30 years, stated that it is customary industry practice for the architect to retain ownership of the actual work done for a client, with the client receiving only a copy. According to Proldsorfer, these copies are also known as “instruments of service” and are normally copyrighted as a course of business. Proldsorfer admitted that while this is the industry standard, he does not know if Mugg and NSA followed this practice.

Reimer testified that he believed all clients of NSA/NSI had paid to receive the computer data and the original drawings, not merely copies. Mugg claims he and Reimer had discussed the issue of copyrights and ownership a dozen times, although Reimer recalls only two occasions, both taking place near the end of his association with NSA. NSA claims that after leaving NSA Reimer used copyrighted drawings (both hard copies and computer disks) to perform work for NSA/NSI clients whom he had obtained work from after termination from NSA. Reimer obtained this property either through drawings or disks he had when he left NSA/NSI or from drawings former NSA clients provided him with from previous projects.

At trial, Reimer admitted that he made a practice of keeping some NSA/NSI clients’ working files on his home computer. Also, Reimer admitted finding computer disks containing work for Springhill Memorial Hospital (“SMH”), formerly one of NSA’s largest clients, in boxes of personal belongings he had in his possession when he left NSA. The disks were later used by Reimer and Designworx for projects with former NSA clients. When Reimer ended his

⁸Starr Proldsorfer has been a practicing architect in Mobile since 1947 and licensed since 1951. In NSA’s rebuttal case, Plaintiff called Proldsorfer to offer expert testimony about Alabama law on required use of architects under the State Building Code. The Court refused to allow the testimony since Reimer had not been given notice of this possible area of testimony before trial. Even if the Court had received the evidence (for which an offer of proof was made), it would not change the result in this case.

association with NSA, he made no effort to return any of these plans to NSA. Reimer testified that he thought those files were owned by the client and not NSA.

Symbols

As discussed above, NSA had a library of approximately 3,000 symbols useful to architecture and design firms. The symbols were both commercially produced ones and individual creations of NSA employees. Mugg has gathered his symbols library over a number of years. At least one of the software symbol packages in NSA's library is no longer commercially available. NSA claims Reimer used these symbols without permission. The symbols were contained in drawings done for NSA clients including SMH, EC and McDonald's. Reimer had these symbols on disks he took with him when he left NSA on September 15, 1992.

Paul Wolfe⁹ testified as an expert for the Plaintiff that some of the symbols used in drawings produced by Reimer which were not for NSA exactly matched symbols used in NSA's symbols library. (See Plaintiff's Exhibits 33, 34, 36 and 37.) Reimer did not deny that he used drawings and computer data that contained symbols designed by NSA, but he thought that the clients had purchased this material and were free to use it in any way they deemed appropriate. This did not explain his use of the symbols in projects for clients other than former NSA clients. All four drawings for a restaurant, The Last Nacho, had at least one use of NSA symbols. (See Plaintiff's Exhibits 86-89.) These plans were drawn after the state court had entered a judgment prohibiting any use of NSA symbols by Reimer.

The value of the symbols library and Reimer's use of it are in dispute. Commercial symbols libraries cost about \$100 at present. Some of Mugg's commercial symbols are whole or

⁹Paul Wolfe owns Advanced Computergraphics. His business does projects for businesses converting paper drawings to CAD program format. He analyzed the CAD plans at issue to determine similarities.

partial libraries which are no longer sold. Wolfe testified that it was common practice to copy symbols and designs with permission. He testified that Mugg's personal symbols were "sloppy" and had no real resale value. Starr Prolsdorfer stated that the value of a symbols library was in the uniqueness to the creator and in the speed with which it allowed an architect to draft. Neither Wolfe nor Prolsdorfer valued Mugg's symbols library. Mugg's evaluation of his symbols library also gives some unspecified value to the unique character which he personally values highly. Mugg never placed any value on his symbols library in any financial statement or other corporate document. Mugg testified that symbols are not assets for accounting purposes.¹⁰ The symbols have not been copyrighted. Mugg does not know if they can be.

Mugg alleges damages from conversion of the symbols to be \$60,000. This amount is calculated on a one-hour drawing time for each symbol multiplied by an hourly rate of \$65 times the number of time he estimates Reimer used each symbol. If only symbols drawn by NSA employees are included and not commercially drawn symbols, the damage claim is \$25,740. On cross-examination Mugg admitted that he never charged a client a rate as high as \$65 when the symbols were actually drawn.

Reimer claimed that most of the symbols are very basic and took only a few minutes to draw, not one hour. Reimer stressed that at no time had NSA or Mugg been deprived the use of the symbols; therefore, any damages are minimal at best. Also, Reimer testified that he had purchased some commercial symbols libraries which are like NSA's.

¹⁰Mugg claimed that the symbols were "assets" when he used the term in his memo of November 1, 1990. (Plaintiff's Exhibit 1a.)

Sales Tax

Mugg testified that when he established NSI, Reimer was to run the day-to-day operation of the interior design division. Mugg told Reimer that one of his tasks was to “keep good records and pay taxes.” Reimer did not always do this successfully. In 1991, some sales taxes of NSI went unpaid, resulting in an assessment against NSA. After the tax assessment, in an attempt to correct this problem, NSI invoices were handled by the NSA bookkeeper who was to ensure tax compliance. Also, to help clear the confusion, the State of Alabama provided NSA with information as to the current tax laws. Although this new system was more efficient, NSA was still assessed \$1,582.05 in 1992 for unpaid sales taxes. (See Plaintiff’s Exhibit 7.) As of June 1995, \$800 of this \$1,582.05 had been collected from clients. Rooster’s, Inc. has paid its \$800 sales tax obligation. Three other NSI clients, Robin Chastang, the Coast Guard and Reimer’s mother, still have outstanding sales tax debts which total \$782.05—\$89.75 from Reimer’s mother and the remainder from Ms. Chastang and the Coast Guard. Although not denying that errors were made, Reimer testified that he had little knowledge of tax and accounting procedures, and did not willfully violate the law. Essentially, Reimer claims he was a mediocre to bad manager and should not be punished for his ignorance.

Supplies and Computer Use

Reimer used Mugg’s VersaCAD program for doing his side projects. If Reimer had purchased his own new copy, it would have cost about \$3,000-4,000. Mugg did not know the value of a used copy. Mugg estimated the value of the use of NSA’s plotter at \$50. Mugg says Reimer used 10 sheets of his paper but admits Reimer left some paper he purchased at NSA. Reimer testified he fully replaced what he used.

Rooster's, Inc.

While at NSI, Reimer performed a job at Rooster's nightclub. He hired Larry Schenher, a carpet installer, to work on the project with him. According to Reimer, Rooster's informed him that it would pay the applicable sales taxes directly. Rooster's did not do it. Later, during a sales tax audit by the State, NSA was billed for and had to pay these sales taxes. Rooster's eventually reimbursed NSA for its sales tax obligation.

Meanwhile, NSA never actually received payment for the work it performed. According to Reimer, Schenher personally collected the money paid by Rooster's and left town. In fact, Schenher's name, not NSA's or NSI's, appears on the Rooster's invoice. (See Plaintiff's Exhibit 19.) The Plaintiff blames Reimer for this loss and alleges Reimer deceived it about the project. Schenher's involvement caused a loss to NSA of \$2,012.50. NSA thought the bill would be payable to it. The amount of the unpaid bill after Rooster's paid the taxes is \$2,012.50.

Lake Forest Yacht Club

While at T.S. Wall, Reimer had helped Lake Forest Yacht Club ("LFYC") in the planned renovation of its clubhouse. Sometime after Reimer was employed full-time at NSA, LFYC hired NSA to do field measurements and drawings of the clubhouse for further renovation. According to William F. Pace, the former General Manager of LFYC, those anticipated renovations did not take place as scheduled. In July 1993, after Reimer had left NSA, LFYC decided to hire a contractor to begin renovations. Pace contacted Mugg and requested the previously completed drawings without asking NSA to complete the renovation project. In anger, Mugg sent them to LFYC with a C.O.D. bill of \$1,653. LFYC refused the package. Eventually, LFYC paid NSA \$1,653 for the drawings. Pace asserted that the original plans drawn by NSA were purchased by LFYC; Mugg, of course, disputes this. Pace testified that it was his belief that upon full payment, LFYC owned the work produced by NSA.

In 1993, upon the recommendation of the contractor doing the renovation, Scotty Moore, Pace contacted Reimer for design work needed on the new renovations. To produce new drawings, Reimer used the drawings produced by NSA for the earlier project as a starting point. These drawings contained characters from the NSA symbols library. Reimer was subsequently paid \$1,500 by LFYC for his work on this project.

Mugg claims damages of \$3,543 for Reimer taking this project. This is based on 54.5 hours of time NSA spent on the project.¹¹

McDonald's

Reimer first began working with Jack Smith, owner of several local McDonald's fast food restaurants in approximately 1980. Over the years, Reimer recalled completing 20-30 design projects for Smith. Reimer continued this relationship when he became a full-time employee of NSA.

While employed full-time with NSA, Reimer (for NSA) did approximately six jobs for McDonald's. Reimer charged McDonald's a rate of \$20.00 per hour for his services. Mugg was not happy with this rate and wanted to increase it 150%. Smith would not agree to such a rate increase and this issue remained unresolved during Reimer's employment. NSA successfully completed one large job for McDonald's, a renovation of their downtown store. Although McDonald's always paid their bill to NSA with Reimer's \$20 hourly rate, Mugg continued to express his dissatisfaction with the hourly rate being charged. In 1991, Reimer individually did a job for McDonald's Highway 90 business and charged \$76.25 which he retained.

¹¹It is not completely clear if this is the \$1,693 bill and some unbilled time or the \$1,693 bill together with Reimer's bill for his post NSA services. The exact amount claimed and the allocation does not change the result in any event.

After the February 1992 job crisis, Reimer continued to do small projects or jobs for Smith and McDonald's. Reimer estimated the total he collected from these jobs was \$300-400.¹² When Reimer finally moved out of the NSA offices in September 1992, he took with him computer disks that contained some of the work done for McDonald's. Reimer claims he did not take the disks intentionally. However, after discovering them, he made no attempt to return them to NSA or to McDonald's. Included on these disks was a symbols library and some designs. This library contained an NSA produced symbol for the McDonald's logo (the golden arches) as well as NSA symbols for plumbing fixtures. Reimer used these NSA symbols after leaving the employment of NSA for projects for other McDonald's. Again, Reimer claims McDonald's owns these drawings and symbols because they were bought and paid for previously, so he thought he had the right to use them if McDonald's gave permission. Mugg and NSA claim ownership of the plans and symbols and claim that any use without NSA's permission was improper and actionable. No one from McDonald's testified.

NSA has alleged \$26,796.25 in damages. NSA and Mugg arrived at this amount by multiplying a \$60.00 hourly rate by the total number of hours NSA/NSI devoted to various McDonald's projects during the 1990-92 period. Mugg admitted that he did not recall what hourly rate NSA was charging McDonald's for this work, and could only determine this by checking the bookkeeper's invoices which were never put in evidence. Mugg assumes that NSA was fully paid for all of this work, but is unsure of this fact because Reimer was in charge of these projects. NSA did not offer any evidence as to projects that they lost to Reimer during this period. The only actual damages substantiated are the use of the McDonald's logo by Reimer

¹²Reimer was a "mystery shopper" for McDonald's. He would go to a franchise, eat there, and evaluate the food and service. Some or all of his pay may have been for this work, but he did not clarify this.

found in the NSA symbols library and the small projects admitted to by Reimer totaling \$300-400 and \$76.25.

Executive Center

As stated earlier, Reimer had done work for Executive Center prior to his full-time employment with NSA. This relationship continued while Reimer was with NSA and still continues today. Once at NSA, Reimer was involved in planning and designing offices for new and existing tenants of EC as well as some of EC's common areas. Some of the redesign plans produced by NSA were for EC tenants that were federal government agencies (e.g., the Drug Enforcement Agency).¹³

As was the case with other clients, when Reimer finally left the NSA offices, copies of the EC working files and computer disks were among the items taken. The NSA produced file on EC included an updated version of the "as-built" drawings done by Reimer in 1990 while still employed at T.S. Wall.¹⁴ They contained plumbing fixtures, electrical fixtures, and a reflective ceiling drawing.¹⁵ NSA was fully paid for all of the work performed for EC.

Adam Metcalf, the Manager of EC, testified as to the ownership of the work prepared by Reimer and NSA. He recalled personally handing a check to Mugg, receiving drawings, and believing that EC owned these drawings. Metcalf testified that each time drawings were developed and paid for, it is his belief that EC then could use them in any fashion they wished.

¹³In order to get a proper permit for such renovations, Mugg, as a licensed architect, had to sign the plans. This, among other reasons, is why Mugg believes the prohibition on Reimer's side was implicit.

¹⁴T.S. Wall's permission was not obtained before Reimer used his 1990 drawings.

¹⁵A reflective ceiling drawing shows the ceiling area of the room or building drawn.

Like all of NSA's clients who testified, Metcalf had no written contract with NSA and never had discussed any limitations on the use of the drawings with Mugg or Reimer.

Reimer has continued to use the NSA database for EC projects since leaving NSA. Reimer estimates he has been paid \$1,300-1,500 by EC since leaving the employment of NSA. Reimer now rents office space at EC. Both Reimer and Metcalf testified that each receives a discount for the other's services because of this professional arrangement. Currently, EC has no business relationship with NSA, using the services of Reimer exclusively.

Mugg claims \$25,251.85 in damages for Reimer's use of the Executive Center plans and NSA's symbols contained in the plans. The amount was arrived at based on NSA's hours spent in creation of the original plans and database.

Springhill Memorial Hospital

When Reimer came to work full-time for NSA, Springhill Memorial Hospital ("SMH") was already a major client of NSA. NSA had successfully completed several drawings for interior renovations for SMH. NSA had been compensated timely by SMH for the work it completed. NSA had no written contract with SMH, usually working from the purchase order for a particular project. In September 1992, upon leaving NSA, Reimer took computer disks containing the SMH files, including the floor plan of the hospital. Reimer claims he did not know that those disks were in boxes of his personal belongings, and made no attempt to return them to NSA when he did discover them.

According to Reimer, he began working for SMH again after his departure from NSA in late 1993 or early 1994. Reimer did not do architectural work, but simply provided drafting and computer services. Steven Crenshaw, the Director of Plant Services and Engineering for the

entire SMH facility, testified that he employed Reimer because his work was satisfactory and his rate was very competitive.¹⁶

SMH purchased a CAD program for its use in late 1993 or early 1994 and needed assistance in programming the current “as-built” data into the new system. Reimer was hired for the job. Reimer incorporated data provided by SMH which included designs from the original architect, the current architect, and various other drawings to develop a computer program of floor plans similar to the original “as-built” drawings. The data included the NSA plans. Reimer admitted incorporating NSA produced drawings into the SMH database. Reimer explained this as a cost savings measure and stated that it does not make sense to redo work that has already been developed. Reimer was paid \$3,000-3,500 for this project by SMH.

Crenshaw, who has worked with SMH for 19 years, testified that he was under the impression that SMH owned all of the drawings and designs for which it has paid, including any computer disks containing this information. In fact, when questioned, Crenshaw testified that he thought that the copyright symbol in the title block of a set of drawings related to the name of the architectural firm and not the drawings themselves. Consequently, Crenshaw had no reservation about using past NSA project drawings as a basis for subsequent designs or computer data. Reimer testified that he shared this belief, not only about SMH drawings, but about all drawings purchased by a client. Reimer was hired by SMH to load this data onto SMH computers. Much of the data was previous NSA work. Reimer also trained Crenshaw and other SMH employees on the use of the CAD computer program which SMH had recently purchased.

Reimer has been engaged by SMH on other drafting projects as well. Crenshaw stated that Reimer’s work has been satisfactory and that he has been compensated accordingly.

¹⁶Reimer charges SMH \$25 per hour for his services.

After Reimer left NSA, the NSA/SMH business relationship did not end. NSA had successfully completed a project involving a parking lot at SMH. According to Crenshaw, during this project, Mugg became difficult to deal with, creating more problems than necessary.

According to Mugg, the parking lot project was a precursor to a much larger project known as the “signature building” or frontispiece building on the SMH grounds. NSA, as well as a number of other architecture firms, placed bids on the “signature building” project. After the bidding process was closed, HBE Architects, Inc. was awarded the project. According to Crenshaw, the major factor in choosing HBE over NSA and the other bidder was money. The winning bid was \$2.3 million dollars less than that of NSA.

NSA and Mugg see the situation differently. NSA alleges that Reimer caused SMH to choose another architect for the signature building through the unauthorized use of past NSA designs or poisoning NSA’s relationship with SMH. For months prior to the acceptance of the HBE bid, NSA had been courting SMH for the signature building contract. The signature building is an entirely separate facility from the existing SMH buildings. There was no evidence offered that Reimer’s activities affected NSA’s bid on this project. Reimer did not work on the signature building project. Crenshaw stated Reimer has never tried to undercut NSA or attempt to take business from NSA.

NSA claims damages of \$62,614.50 for Reimer’s use of NSA plans and symbols in later work for SMH. NSA’s damage claim is based upon the fee charged by NSA in the original creation of the plans. NSA was actually paid \$49,332.50 of this amount but Mugg claims Reimer’s later use obligates him to pay again. The other \$13,312 is Reimer’s time on SMH projects after leaving NSA using NSA’s hourly rate of \$65. Reimer was not charged out at this rate. Reimer actually collected \$3,000-5,000 for his work.

NSA also claims \$413,000 for its loss of the winning bid on the plans for the SMH signature building. The number is based upon the gross amount NSA would have received for the work based on Mugg's estimate.

Janelle Wilkins Fowler

Janelle Wilkins Fowler ("JWF") is a local interior designer who had a working relationship with Reimer prior to his employment at NSA. JWF and Reimer worked on a project for a bank in Brewton, Alabama while Reimer was at NSI. NSA was fully paid for this work. According to Reimer, after the Brewton project, Mugg told Reimer that he no longer wanted NSA/NSI to work with JWF. Mugg viewed JWF as competition and did not want NSA/NSI to be her drafting service. Mugg agrees that he did tell Reimer NSI should not be JWF's drafting service, but denies ever forbidding Reimer or NSA from working with JWF in the future.

After Reimer's alleged employment status changes in February 1992, he worked with JWF on a number of projects. Reimer testified that for two reasons such activity was not in competition with NSA. First, Mugg had told him he had to produce work to cover his salary. Secondly, Mugg had expressed his desire not to work with JWF after the Brewton bank project; therefore, he could not be taking business away from NSA.

In August 1992, Reimer and JWF worked on a large project involving the Gold Coast and Horseshoe casinos in Biloxi, Mississippi. Reimer did draftsman work only. Reimer stated that he never discussed the casino projects with Mugg. Reimer's fee for the projects was \$1,500-1,600.¹⁷ NSA received none of this money. Reimer worked with JWF on other projects after February 1992. Reimer's work for JWF was done at NSA on its computer, using NSA equipment, supplies and symbols. Reimer claims that he told Mugg of this use, and Mugg

¹⁷The invoices produced show fees and expenses of \$1,239.00.

agreed as long as Reimer replaced the used supplies. Mugg denies giving such permission and claims that Reimer was an employee of NSA until September 1992, and that any such behavior on Reimer's part was nothing more than self-dealing. Also, Mugg claims that because the work on the casino was a commercial project, a licensed architect had to sign plans and assume liability and the work is directly in competition with NSA. Mugg believes another architect was employed to approve the plans in conformance to the Alabama Code and Reimer was only a draftsman. NSA alleges that damages are appropriate. There is no evidence as to any architect being involved with this casino project.

NSA claims \$15,161.25 in damages for Reimer's work with JWF. The amount is based upon Reimer's use of NSA supplies and, apparently, the value of the work based upon Mugg's estimate although that fact is not clear.

Ashcraft

Frances Ashcraft, a local decorator, and Reimer have had a professional relationship for many years. Their arrangement was that if Ashcraft bid on a project and was awarded a job, Reimer would be awarded any resultant carpet sales. Reimer confirmed this arrangement, stating that the venture was purely contingent and often did not result in the collection of any fees because bids were not accepted. After coming to NSA in 1990, Reimer continued his work with Ashcraft.¹⁸ Reimer admitted he did at least one job with Ashcraft during July 1991. He admitted that this was a time when he was clearly employed by NSA, but would not admit to competing with NSA. He did not have the fees he received funneled through NSA. There was no evidence as to the fees generated by this project, but no fees were paid to NSA/NSI.

¹⁸Plaintiff's Exhibit 57 is a drawing of a deck and bedroom for a private home renovation dated July 1991 that involved Reimer and Ashcraft.

Laurindine

The Laurindines renovated their home in 1992. In June 1992, Reimer did work for them on this project. Reimer used NSA equipment and supplies for the job. Reimer claimed that Mugg had no objection to this practice and that the used supplies were replaced. Mugg denied the existence of such an arrangement. Reimer remembers his fee for the project being \$400-600. NSA/NSI received none of this money.

Lum

In June 1992, Reimer (as Designworx) completed a project for Bo Lum. Reimer stated that the job was a bathroom modification drawing for an old friend for which he received \$50. NSA/NSI received no fees.

Alleged Violations

After Reimer filed bankruptcy, NSA brought this adversary proceeding seeking damages based on four types of alleged violations: (1) the unauthorized taking and use of symbols, designs and drawings from the NSA library; (2) the mishandling of NSI sales tax; (3) self-dealing while an NSA employee; and (4) the loss of future projects. Each of these allegations is discussed below.

LAW

NSA seeks relief under 11 U.S.C. §§ 523(a)(2), (4) and (6) of the Bankruptcy Code.

11 U.S.C. § 523 states in relevant part that discharge of a debt is not allowed:

- (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
 - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

. . . .

(4) for fraud or defalcation with acting in a fiduciary capacity, embezzlement, or larceny;

. . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

NSA has the burden of proving each and every element of its § 523 action by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, L. Ed. 2d 755 (1991).

While a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy “a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt,” . . . the [Bankruptcy Code] limits the opportunity for a completely new beginning to the “honest but unfortunate debtor.”

In re St. Laurent, 991 F.2d 672, 680 (11th Cir. 1993), *citing*, *Grogan*, 498 U.S. at 286-87, 11 S. Ct. at 659 (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934)).

The *St. Laurent* court recognized that creditors should be protected from “egregious conduct” by a debtor and a sinister debtor should not be allowed to “hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct.” *In re St. Laurent*, 991 F.2d at 680 (citations omitted).

This Court is obligated to construe exceptions to discharge liberally in favor of the debtor, recognizing that the reasons for denying the discharge must be substantial and not merely conjectural. *Gleason v. Thaw*, 236 U.S. 558, 35 S. Ct. 287, 59 L. Ed. 717 (1915); *Equitable Bank v. Miller (In re Miller)*, 39 F.3d (11th Cir. 1994).

§ 523(a)(2)(A)

According to *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577 (11th Cir. 1986), NSA must prove the following elements in a § 523(a)(2)(A) nondischargeability action:

(1) debtor made a false representation with the purpose and intention of deceiving the creditor; (2) the creditor relied on such representation; (3) his reliance was reasonably founded; and (4) the creditor sustained a loss as a result of the representation.

Id. at 1579 (citations omitted).¹⁹

To be excepted from discharge under § 523(a)(2)(A), Reimer's indebtedness must have been incurred through actual fraud or misrepresentations, not merely fraud implied in law. *In re Scoggins*, 52 B.R. 86, 89 (Bankr. N.D. Ala. 1985) (citations omitted) (emphasis added). "Actual fraud," according to *In re Nogami*, 118 B.R. 846 (Bankr. M.D. Fla. 1990), consists of:

Any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another—something said, done, or omitted with the design of perpetrating what is known to be a cheat or deception.

Id. at 848. *See also, In re Grocki*, 147 B.R. 274 (Bankr. S.D. Fla. 1992).

NSA's claim under § 523(a)(2)(A) is based on alleged false statements and misinformation supplied by Reimer to NSA about his outside employment or omissions of facts about his side jobs on which NSA relied and through which NSA was ultimately damaged. Although not clearly articulated, NSA claims that all of the money Reimer earned in "outside" income while employed at NSA should have been paid to NSA. To the extent there is evidence

¹⁹On May 1, 1995, the U.S. Supreme Court granted certiorari in *Field v. Mans*, U.S. Sup. Ct., No. 94-967, to examine whether the Bankruptcy Code, § 523(a)(2)(A) requires a creditor to prove that it reasonably relied upon a debtor's fraudulent representation. The creditors in *Field* asserted that the Fifth Circuit's ruling conflicts with the Eighth Circuit's in *In re Ophaug*, 827 F.2d 340 (8th Cir. 1987), where the court found that a showing of reasonableness is not required under § 523(a)(2)(A) even though it is required under § 523(a)(2)(B).

of actual payments, the amount claimed is approximately \$2,175.25-2,736.25.²⁰ NSA alleges that Reimer disregarded the truth or lied when he told Mugg that Designworx was not in competition with NSA/NSI and that, even if no discussion about Designworx had ever occurred, Reimer was precluded from competing with his employer based on the parties' employment agreement.

Reimer did do a series of small jobs that he believed NSA would not seek because of their size or residential character. Reimer alleges that this "cleanses" him of liability for competing—at least as to those jobs (Laurindine, Lum and Ashcraft). As to the McDonald's jobs and the casino job with Fowler, this defense rings less true. Reimer also alleges that his belief that his employment status changed in February 1992 makes a difference. However, the facts belie this employment change. He was an employee with the same rights and duties from 1990 through September 1992. His paychecks continued; he allowed himself to be treated as an employee for tax purposes; and he wrote a resignation letter to end his employment in September 1992. Mugg states that he knew nothing about Reimer's side jobs while they were occurring. Reimer alleged that Mugg knew of some of them in general terms. The Court finds Reimer was an employee of NSA—and knew it—from 1990 through September 1992. Therefore, the only ways Reimer's failure to tell Mugg about the side jobs is not actionable fraud is (1) if the failure to disclose was unintentional or (2) if Reimer's employment arrangement with Mugg allowed competition or (3) if the jobs were not competition.

Reimer did side work for McDonald's during his employment at NSA. NSA did work for McDonald's too. Reimer could not negligently or unintentionally forget to tell NSA that he

²⁰McDonald's—\$300-400 and \$76.25; J. Fowler—\$1,500-1,600 (or \$1,239); Laurindine—\$500-600; Lum—\$60; Ashcraft—unknown.

was doing work for an NSA client or potential client. This omission is fraudulent. The proven damage from this side business is \$420.25 (the midpoint in the damage range given).

The same rationale applies to JWF's casino projects. Even though Mugg did not want NSA to be a draftsman for others, the casino projects were clearly nonresidential, large jobs which Reimer should have known NSA might have had an interest in. If Mugg had been told of the possible project and rejected it, the matter likely would not be actionable. However, Reimer cannot claim his failure to disclose such a large project resulting in \$1,500-1,600 in fees was mere negligence or recklessness. For Mugg not to see the project designs in the office or hear of the work required intentional behavior by Reimer to conceal it. Therefore, the average fee of \$1,419 (\$1,239-1,600 range) is a nondischargeable debt.

Reimer did not disclose the work for Laurindines or Lum. Given the minimal personal projects that the Laurindine and Lum matters were and the fact that NSA/NSI did few or no residential projects, the Court finds these omissions were negligent, but were not intentional fraud. The jobs could reasonably be viewed as noncompetitive.

The work Reimer did for Ashcraft was also competitive with NSI which did interior design work. However, no actual damage amount was proven.

NSA also claims \$2,012.50 in damages for Reimer's failure to collect the Rooster's receivable. NSA claims Reimer fraudulently set up a job so that Schenher collected the payment, not NSA. Reimer clearly was negligent in regard to this project. He did not take the care a reasonable employee would to ensure that the invoice was made payable to NSA and collected by NSA. However, the Court finds the facts do not show intentional deceit. Carelessness, without more, will not sustain a Section 523(a)(2)(A) claim. At best, the evidence is in equipoise. The sales tax situation shows Reimer was at best a mediocre manager. This fits this pattern.

Therefore, the sum of \$1,739.25 is nondischargeable under 11 U.S.C. § 523(a)(2)(A).

§ 523(a)(4)

Section 523(a)(4) provides that a debt incurred “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny” is not dischargeable. NSA alleges Reimer violated this section (1) by his use of plans owned by NSA after he left NSA; (2) by his use of NSA’s symbols library; and (3) by his use of NSA supplies and computers to conduct his side business while at NSA. The Court will discuss the issue of embezzlement first as to each of the three alleged wrongs and then will discuss “fraud or defalcation while acting in a fiduciary capacity.” The Court concludes that the claims for use of the plans, supplies and computer and the claim for use of the symbols library are sustainable.

Plans

Essentially, there are three elements that must be proved by a preponderance of the evidence in order for an embezzlement claim to be satisfied:

- (1) property rightfully in the possession of a nonowner; (2) nonowner’s appropriation of the property to a use other than which it was entrusted; and
- (3) circumstances indicating fraud.

In re Littleton, 942 F.2d 551, 555 (9th Cir. 1991), *citing*, *In re Hoffman*, 70 B.R. 155 (Bankr. W.D. Ark. 1986); *In re Schultz*, 46 B.R. 880 (Bankr. D. Nev. 1985); *see also*, *Matter of DeMaio*, 159 B.R. 383 (Bankr. D. Conn. 1993).

There is little case law relating to the proprietary interest of instruments of service (architectural plans). In *Kunycia v. Melville Realty Co., Inc.*, 755 F. Supp. 566, 572 (S.D.N.Y. 1990), the court held, based on industry custom, an architect owns his drawings unless there is an express agreement otherwise. Two cases in particular establish this very point. In *Joseph J. Legat Architects, P.C. v. U.S. Development Corp.*, 625 F. Supp. 293 (N.D. Ill. 1985) and *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Const. Co.*, 542 F. Supp. 252 (D. Neb. 1982), both

courts ruled that architectural drawings are not works made for hire and remain the property of the creator. In *Legat*, there existed a written agreement to this effect. In *Aitken*, the contract was oral. In this case, Starr Proldorfer stated industry contract forms make clear that the architect owns the original drawings. Paul Wolfe confirmed this theory and always requested permission to use architects' plans when he converted plans to CAD format.

Reimer used EC, SMH and LFYC plans to do work for them after leaving NSA. All of these parties testified that they believed they owned their plans. No written contracts were produced which showed otherwise. The testimony is in direct dispute. NSA claims ownership; the parties do too. With four different people misunderstanding the arrangement with Mugg, it seems unlikely ownership was ever clearly defined by Mugg even if industry custom would normally be that the architect owns his plans. Therefore, the Court finds the Plaintiff has not established ownership of the plans in this case by a preponderance of the evidence. If the architect does not establish ownership, then the clients have a right to use their plans as they see fit. This issue does not arise often because, if an architect believes he owns the original plans, he never lets them out of his possession and, regardless of the law or contract, the architect has possession. Here, the originals did leave NSA with Reimer and, when ownership was not clearly established prior to his termination, the plans were more easily accessible to the clients. This is a situation where an oral contract and industry custom are not enough. It is clear Reimer and Mugg had trouble understanding each other's position at times. It is equally clear, and part of the same pattern, that Mugg and his clients didn't understand each other's position either. Mugg too often "assumed" that someone understood what he meant. Proof of NSA's ownership fails. Reimer's use of the plans with his client's permission was therefore not embezzlement.

The issue of whether Reimer engaged in "fraud or defalcation while acting in a fiduciary capacity" when he used the plans is also not proven. The facts proven do not show that the plans

belonged only to Mugg and Reimer used them without permission. The facts show that Reimer used the plans with EC, SMH and LFYC's permission and that is enough. He did not engage in any improper activity when the owner of the plans consented to their use.

Symbols

Reimer knowingly converted some symbols and designs of NSA for his own use and financial gain. Paul Wolfe, the CAD design expert witness of NSA, gave uncontroverted testimony that proprietary symbols from NSA drawings and designs were used by Reimer for projects that ultimately benefitted Reimer, not NSA. This is use of property he rightfully obtained in a wrongful manner. *Littleton, supra*.

For a claim of embezzlement, NSA can support its case through circumstantial evidence. *In re Jenkins, supra; In re Corwin*, 76 B.R. 221 (Bankr. S.D. Fla. 1987); *Energy Marketing Corp. v. Sutton (In re Sutton)*, 39 B.R. 390 (Bankr. M.D. Tenn. 1984). There is ample evidence from which the Court can infer that Reimer was aware that the symbols were not his, but he chose to use them anyway. Reimer admitted to keeping copies of many client files at his home, a practice Mugg did not condone. Some, if not all, of these files contained either proprietary or commercial symbols which were part of the NSA library. Reimer admits to taking several computer disks with him when he finally left the NSA offices in September 1992. These disks contained working files for various NSA/NSI clients and symbols libraries.

Wolfe examined some of the McDonald's and the Last Nacho Restaurant drawings produced by Reimer and Designworx and compared them to drawings produced by NSA. Using a digitizer, which converts hard copies of drawings to computer data, Wolfe unequivocally testified that some symbols found in the NSA drawings exactly matched those found in the Designworx drawings. Wolfe did not draw any conclusions as to the ownership of the various drawings; he simply concluded that when the Reimer drawings were compared to some of NSA,

it was clear that much of NSA's work had been duplicated. Further, Reimer acknowledges that he has made no attempt to return those symbols to NSA.

Reimer contends, and in fact Wolfe confirmed, that NSA's proprietary symbols are "sloppy" and have little, if any, commercial value. Reimer also showed that computer software packages of commercial symbols are available for purchase locally for as little as \$100. Finally, Reimer contends, and Mugg reluctantly admitted, that NSA has never been deprived of the use of its symbols library. Proldorfer, the Plaintiff's architect expert, testified as to the nature of symbols and how they are more important and valuable to the designer than they are to anyone else. Each designer has their own unique style, which makes valuation of such work highly speculative. This personal value is not recoverable.

The Court finds that Reimer used the symbols for non-NSA projects during and after his employment at NSA. Work product produced by Reimer after September 1992 included NSA symbols and some of the side jobs he did before September 1992 contained Mugg's symbols. He used NSA symbols and designs that he obtained through the course of his employment with NSA/NSI for his own financial gain. The question is whether he used them without permission. Since the Court cannot find on the evidence before it that EC, SMH and LFYC don't own their plans, use of the symbols in those plans and drawings for those clients is not actionable. However, Reimer did use the symbols in McDonald's side jobs and he continued to use the symbols in his work after September 1992 until enjoined. Some embezzlement did occur. The Court is hard pressed to determine damage.

Mugg claimed that Reimer's use damaged NSA \$65 per use but the number of uses was not firmly pinned down. Also, commercial packages are negligibly expensive—\$100—and NSA's own symbols were not as good as commercial ones. If Reimer were required to produce the symbols and drawings himself, it would have taken some time. The Court estimates that the

value of the symbols and the actual unauthorized usage can have only a minimal value due to the cost of commercial replacements, the poor quality of the symbols, and the limited usage (due to injunction terminating use). The Court finds he owes NSA \$3,000 for unauthorized symbols usage.

Since the Court finds that the symbols usage is an embezzlement, there is no need to determine if the embezzlement was also a defalcation while acting in a fiduciary capacity. The proof required for defalcation is less than that required for embezzlement, so any defalcation claim is subsumed by the embezzlement claim.

Supplies and Computer

NSA claims Reimer used NSA's computer and supplies while he worked at NSA to do side jobs. Reimer claims Mugg knew he was doing so and claims that he replaced all supplies he used. Four projects were done for which Reimer collected fees per the evidence—the casino project with JWF for \$1,500-1,600; the Laurindine and Lum projects for which \$550-650 was collected; and the McDonald's projects for \$420.25. The materials and facilities for side jobs were valued at \$50 by Mugg for the plotter use and an unknown amount for a used VersaCAD program use for a limited period. The Court values the use at \$150. Mugg valued total computer use for two years at \$720 based on the depreciation schedule for the assets. Therefore, limited use is valued at \$200.

Reimer did not tell Mugg about competitive side jobs he had as detailed above. Yet he used NSA's equipment and supplies to do it. The testimony does not indicate NSA would have allowed usage for the casino project with JWF or the McDonald's work for instance. Reimer used his NSA work supplies in a manner inappropriate for an employee and did not tell NSA of the usage.

The Court finds Reimer damaged NSA in the amount of \$400 and the debt is nondischargeable under Section 523(a)(4) as embezzlement. To the extent the usage is a defalcation, it is subsumed in the embezzlement discussion.

§ 523(a)(6)

11 U.S.C. § 523(a)(6) prohibits the discharge of any debt “for willful and malicious injury by the debtor to another entity or property of another entity.” Reimer’s debt to NSA would be nondischargeable for any willful injury which he intentionally caused or for any act the purpose of which was to cause injury or was substantially certain to cause injury. NSA claims Reimer (1) stole clients from NSA (McDonald’s, LFYC, EC, SMH); (2) caused NSA to lose the bid for SMH’s signature building; and (3) stole plans which Reimer used to NSA’s detriment. As discussed below, NSA does not meet its burden pursuant to § 523(a)(6) as to any of the three allegations.

Recently, the Eleventh Circuit restated its interpretation of § 523(a)(6) in *In re Walker*, 48 F.3d 1161 (11th Cir. 1995). “Willful” requires a showing of intentional or deliberate act, which is not done merely in reckless disregard of the rights of another. *Id.* at 1163, *citing, Lee v. Ikner (In re Ikner)*, 883 F.2d 986, 991 (11th Cir. 1989); *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1263 (11th Cir. 1988). “Malicious” means “wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill will.” *Walker* at 1164, *citing, In re Ikner*, 883 F.2d at 991; *Sunco Sales, Inc. v. Latch (In re Latch)*, 820 F.2d 1163, 1166 n.4 (11th Cir. 1987). There are two types of malice—constructive and implied. Neither requires a showing of specific intent to harm. *Walker* at 1164. The *Walker* court found that “willful” under § 523(a)(6) “requires a deliberate and intentional injury” intended by the debtor and not merely a finding that the act results in an injury. *Id.* at 1164, 1165. In other words, the Debtor must have considered the resulting injury of his actions in order for a debt to be

nondischargeable pursuant to § 523(a)(6). Therefore, an injury is “willful” if it was done intentionally, and it is “malicious” if it is the result of an intentional or conscious disregard of one’s duty. *Matter of Lutz*, 169 B.R. 473, 477 (Bankr. S.D. Ga. 1994); *citing, In re Lindberg*, 49 B.R. 228 (Bankr. D. Mass. 1985); (*quoting, In re Askew*, 22 B.R. 641 (Bankr. M.D. Ga. 1982), *aff’d, Askew v. Brawner*, 705 F.2d 469 (11th Cir. 1983).

In *Walker*, a contractor failed to secure the appropriate workers’ compensation insurance for a subcontractor who was subsequently injured on the job. The subcontractor contended that this intentional failure to secure the insurance constitutes a “willful and malicious injury” by the contractor. Both of the lower courts disagreed with the subcontractor’s argument, concluding that the contractor’s behavior was not “substantially certain” to result in the subcontractor’s injury. *Id.* at 1165. The Eleventh Circuit sustained this finding. *Id.*

Stolen Plans

Reimer claims that he used NSA symbols and plans when doing work for former NSA clients because he thought the clients owned their plans and the contents. He saw no reason to recreate work that had been previously purchased. There is insufficient evidence, based upon the clients’ ownership of plans, to find intent to cause injury. The evidence presented is insufficient to establish that Reimer’s actions created a situation which was substantially certain to cause NSA injury. Representatives of three clients—SMH, LFYC and EC—testified that they thought they owned previously purchased NSA projects. Further, these clients testified that their relationship with Reimer is strictly professional and it is not based on any spite or vindictiveness toward NSA or Mugg.

Stolen Clients and Jobs

Some clients of Reimer—McDonald’s, JWF, Ashcraft, Lum and Laurindine—had professional relationships with Reimer prior to his employment with NSA, some continuing even today. It is reasonable to assume that if a client was willing to follow Reimer to NSA, they would be inclined to follow him when he left NSA. Client loyalty is always an issue at termination of an employee. Without a noncompetition agreement, client shifts are not actionable. The evidence established the clients, not Reimer, made the switch without prompting from him. The reason SMH didn’t use NSA in the signature building project was money—not Reimer. No evidence substantiated any abuse of NSA by Reimer in his dealings with NSA’s former clients.

As to all of Reimer’s actions re SMH, EC, McDonald’s and LFYC, the question boils down to whether Reimer’s actions guaranteed NSA’s economic injury. Based on the evidence before this Court, the answer must be no. The evidence presented does not substantially provide the requisite basis for finding NSA’s claim of nondischargeability pursuant to § 523(a)(6).

Dischargeability of the Sales Tax Debts

To some extent the Plaintiff argued that the debts related to the uncharged sales tax should be deemed nondischargeable debts of Reimer. As noted above, both § 523(a)(2)(A) and § 523(a)(6) require a showing of intent for a debt to be excepted from discharge. Under either Code section, the Plaintiff did not sufficiently prove such intent.

Reimer admitted that he failed to collect the applicable sales tax from a number of NSA/NSI clients during his employment. Reimer claims that he either forgot to collect the taxes or that the client had intended to pay the taxes directly. NSA failed to sufficiently prove otherwise. NSA/NSI was a small, unsophisticated business with a loose accounting and corporate structure. It operated without obtaining written agreements with clients and

employees. Because of this, some things are going to slip through the cracks. The evidence does not establish willful or malicious intent on the part of Reimer in failing to collect taxes. Reimer admitted that he is no businessman; therefore, it is not unreasonable to assume that the timely payment of all of the necessary sales taxes is an example of such mistakes.

CONCLUSION

The Plaintiff has failed to prove the elements of an exception to discharge pursuant to 11 U.S.C. § 523(a)(6). However, the Plaintiff met its burden pursuant to 11 U.S.C. § 523(a)(2) and § 523(a)(4) with respect to the items specifically detailed above:

1. Reimer's performance of work for pay for McDonald's and Janelle Wilkins Fowler while employed at NSA pursuant to § 523(a)(2)(A). The damage is \$1,739.25.
2. Reimer's unauthorized use of symbols in non-NSA projects pursuant to § 523(a)(4). The damage is \$3,000.
3. Reimer's unauthorized use of supplies and facilities of NSA to do side jobs pursuant to § 523(a)(4). The damage is \$400.

Therefore, it is ORDERED and ADJUDGED that Plaintiff is awarded a nondischargeable judgment of \$5,139.25 against Trueman Allen Reimer.

A hearing on the propriety and amount of any nondischargeable attorney's fee award is set for December 5, 1995 at 9:30 a.m. A written detail of time and expenses claimed shall be filed and served on opposing counsel by November 30, 1995. Both counsel shall file briefs regarding the propriety of a nondischargeable fee award by December 4, 1995.

Dated: October ____, 1995

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE