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PARTIES: Jonathan Dwight Cook, Sweet Water State Bank
CHAPTER: 7
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

JONATHAN DWIGHT COOK — Case No. 99-10955-MAM-7

Debtor

SWEET WATER STATE BANK

Plaintiff

v. — Adv. No. 99-1086

JONATHAN DWIGHT COOK

Defendant

ORDER AND JUDGMENT OF NONDISCHARGEABILITY OF DEBT OWED TO SWEET WATER STATE BANK

Jonathan Dwight Cook, pro se
Barry Thompson, Mobile, Alabama, Attorney for Sweet Water State Bank

This case is before the Court for the trial of the adversary case of Sweet Water State Bank against Jonathan Cook seeking to have the Court declare Cook's debt to the Bank nondischargeable pursuant to 11 U.S.C. § 523(a)(6). 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). For the reasons indicated below, the court is declaring the debt of $3,400 plus interest and fees nondischargeable.

FACTS

Jonathan Cook borrowed $5,618.54 from the Sweet Water State Bank on January 16, 1998. The loan agreement stated that the purpose of the loan was "to purchase golf carts." According to the loan officer, the loan agreement when signed said "to purchase golf carts sn's

[blank space]" indicating that the serial numbers of the golf carts to be purchased were not yet known but were to be added. The loan agreement also stated that the loan was secured by the goods being purchased. Prominently on the form it stated: "I will pay this note as follows: To be paid when carts are sold."

The debtor signed a UCC-1 form at the time the loan was taken out. It did not include any serial numbers of the golf carts. Mistakenly, it was filed in the Marengo County Probate Court on February 2, 1998 by the Bank.

The debtor had previously had at least two other loans from the Bank--both secured vehicle loans.

On January 30, 1998, Cook or his former wife faxed to the Bank a list of golf carts purchased by the debtor on January 19, 1998. The Bank then filed a completed UCC-1 form with the Marengo County Probate Court on March 27, 1998. The form contained the serial numbers of three golf carts from the list faxed to the Bank. The form bears Cook's signature and the signature of someone from the Bank.

The parties disagree about the facts surrounding the Bank's receipt of the golf cart serial numbers and the Bank's possession and use of a UCC-1 with Cook's signature and the serial numbers of the carts. Cook states that his former wife's family sent the bill of sale with serial numbers to the Bank without his knowledge and consent. Cook also states that he does not remember signing a second UCC statement or loan agreement at that time. The Bank officer asserts that Cook had to tell the Bank which of the six carts on the bill of sale were to be the collateral of the Bank. Also, the loan officer states that Cook did come to the Bank and reexecute the loan with serial numbers in it and sign a second UCC-1 with serial numbers.

Cook sold the golf carts in the course of his business and never remitted the proceeds to the Bank. He asserts that he thought the loan was a one-year signature loan. He took the money received from the carts and used it in his business. He was having difficulties due to a group of carts that he ordered which arrived late and with defects. He was also in the midst of a divorce. Cook stated that he did not mean to violate the loan agreement. He is not a business man or sophisticated in his understanding of finance. He also has no money to repay the loan.

LAW

Sweet Water State Bank seeks to have Cook's debt to it declared nondischargeable pursuant to 11 U.S.C. § 523(a)(6). It states that a debt is nondischargeable if it results from "willful and malicious injury by the debtor to another entity or to the property of another entity." The plaintiff bears the burden of proving each element of the case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d. 755 (1991).

The Bank must show that Cook acted willfully and maliciously when he used the proceeds of the sale of the Bank's security for purposes other than paying off the loan. The Bank must show that it was damaged by the actions.

The easier prong of the test to determine in this case is the damage to the Bank. The only evidence offered as to the value of the proceeds used by Cook was the amount for which the carts were purchased. That amount was $3,400. The Court cannot value the conversion at the amount of the loan unless it was shown that the sales prices for the golf carts were at a price high enough to pay the full loan. Thus, the damages are set at the price at which the carts were purchased.[1]

[1]It is interesting that the purchase price of the carts was over $2,000 less than the loan amount. It is unclear what use was made of the rest of the borrowed funds. When the Bank's

The more difficult issue is whether Cook's actions were willful and malicious as defined by the Bankruptcy Code and case law. The 1997 Supreme Court case of *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) is the starting point for this inquiry. Since the *Geiger* case, there have been numerous decisions as to how the case applies to a conversion of collateral or loan proceeds by a debtor. The case of *Mitsubishi Motors Credit of America, Inc. v. Longley (In re Longley)*, 235 B.R. 651 (10th Cir. BAP 1999) catalogues some of them at footnote 5. The case of *McAlister v. Slosberg (In re Slosberg)*, 225 B.R. 9 (Bankr. D. Me. 1998) lists others. The Court concludes that the *Longley* case reaches the correct conclusion about how to interpret Section 523(a)(6) in a conversion context and adopts its reasoning and explanation. Since the *Longley* decision only addresses the "willfulness" issue, the Court further adopts the reasoning of *America First Credit Union v. Gagle (In re Gagle)*, 230 B.R. 174 (Bankr. D. Utah. 1999) as to the issue of "malice."

Therefore, to be a "willful" act, the debtor must intend that the conversion of the collateral injure the creditor or the creditor's lien interest. *Longley*, *supra* at 657. To be "malicious," an act must be without justification or excuse. *Gagle*, *supra* at 180. In this case Cook argues that he did not understand that the loan was a secured loan. He thought it was a one-year signature loan. However, the loan documents are very clear. On its face, the loan says it is secured by the golf carts and will be paid off when the carts are sold. Cook says he did not come back to the Bank to execute a new UCC-1 or loan agreement. He states that the UCC-1 is a copy of the one he signed on January 16, 1998 to which the serial numbers were added.

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own records show that the purchase price was less than the loan, the use of $2,218.54 for other business purposes cannot be malicious. The Bank had to know that Cook would use the money for some purpose for which there would be no collateral.

However, in looking at the two UCC-1s, it does not appear that the second one is a copy of the first. The positioning of the type in the boxes is different; the Bank official signing the forms is different; the signature of Cook is further above the signature line on one form. These differences between the UCC-1s, coupled with the testimony of the Bank officer, are sufficient to make the Court believe the Bank's version of the facts. Cook knew that the loan was secured by the golf carts, but he sold them and failed to remit the proceeds anyway. He knew the Bank was without collateral after the use. Therefore, his actions were "willful." The issue of malice is a determination of whether Cook had any excuse or justification for his actions. The proper grounds for such a defense are found at RESTATEMENT (SECOND) OF TORTS §§ 887-895 (1997) which lists the defenses available. Cook tried to prove that he was an unsophisticated borrower and did not understand what the loan documents said. He also testified that his business was in trouble and he used the money to keep it afloat. The lack of ability to understand the loan is a capacity defense. Cook's lack of sophistication did not make him unable to understand and perform under the loan. In fact he had secured loans from Sweet Water Bank before. The fact that he only used the money for business purposes is also not a sufficient justification or excuse. He knew the money was to be paid to the Bank and he used it for other purposes. Therefore Cook's actions were malicious.

CONCLUSION

Jonathan Cook obtained a loan from Sweet Water State Bank secured by three golf carts. When he sold the carts, he kept the proceeds and used them in his business instead of paying the Bank debt. The actions of Cook were willful and malicious. Cook knew of the lien on the proceeds and violated the agreement. The Bank was damaged in the amount of $3,400.

THEREFORE IT IS ORDERED AND ADJUDGED that the debt of $3,400 together with interest and costs owed on that amount by Jonathan Dwight Cook to the Sweet Water State Bank is declared to be a nondischargeable debt in this bankruptcy case.

Dated: September 15, 1999

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE