


Dated: February 19, 2014
The following is ORDERED:




Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DIVISION OF TENNESSEE
WESTERN DIVISION

In re
JEFFREY T. CHANDLER,
Debtor.

Case No. 11-23842-L
Chapter 7

Synovus Bank, successor by merger
with Trust One Bank,
Plaintiff,
v.
Jeffrey T. Chandler,
Defendant.

Adv. Proc. No. 11-00396
(Count II only)

ORDER DENYING SECOND MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the second motion for summary judgment filed by the Plaintiff, Synovus Bank, successor by merger to Trust One Bank ("Trust One Bank"). Adv. Dkt. No. 33. The pending motion seeks summary judgment as to Count II of its Complaint, which alleges that the Defendant, Jeffrey T. Chandler, is indebted to it and that the debt results from a willful and malicious injury to Trust One Bank or to its property. See 11 U.S.C. § 523(a)(6). The Defendant

has filed a timely objection to the motion and has asked that the Complaint be dismissed with prejudice. Adv. Dkt. No. 36.

The Plaintiff's prior motion for summary judgment with respect to Count I of the Complaint, based upon 11 U.S.C. § 523(a)(4), was denied and summary judgment was granted in favor of the Defendant because I found that the agreements between Trust One Bank and Eclipse SCS, Inc. ("Eclipse"), and between Eclipse, FTRANS Corp. ("FTRANS"), and Trust One Bank did not create an express trust. See Order Granting Partial Summary Judgment to Defendant, Jeffery T. Chandler, Adv. Dkt. No. 27.

Count II of the Complaint alleges that the same facts give rise to a debt owed by the Defendant that resulted from willful and malicious injury to Trust One Bank or its property. In its motion for summary judgment, Trust One Bank asserts that the actions of the Defendant amount to conversion of its collateral. Chandler has filed an objection to the motion which is supported by his affidavit. Trust One Bank has not filed a response or counter-affidavit.

Examination of the pleadings, exhibits, affidavits, and briefs filed by the parties in light of controlling law supports the conclusion that the Complaint fails to state a claim under section 523(a)(6). Summary judgment will be granted in favor of the Defendant and the Complaint will be dismissed with prejudice.

JURISDICTION

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or

related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of the dischargeability of a particular debt is a core proceeding arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(I). Accordingly, the bankruptcy court has authority to hear and determine this adversary proceeding subject to appellate review under section 158 of title 11. 28 U.S.C. § 157(b)(1); *see BBC Holding v. Alexander (In re Alexander)*, Ch. 7 Case No.10-32756-L, Adv. No. 11-00062, slip op. at 2 (Bankr. W.D. Tenn. Oct. 13, 2011).

FACTS

The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on April 14, 2011. Among his listed creditors is the Plaintiff, Trust One Bank, shown holding a claim in the amount of \$202,000.00 based upon the guaranty of a business loan.

The Plaintiff filed its Complaint to Determine Dischargeability on September 9, 2011. Count I of the Complaint alleges that on April 24, 2009, Chandler, as president of Eclipse, executed a Revolving Credit Note payable to the order of Trust One Bank secured by a Revolving Loan and Security Agreement and the personal guaranty of Chandler. On that same day, Eclipse and FTRANS entered into a Trade Credit Outsourcing Agreement; and Eclipse, FTRANS, and Trust One Bank entered into an Assignment of Credit Balances and Intercreditor Agreement. The Complaint further alleges that Eclipse is in default of the Revolving Credit Note in the unpaid accelerated balance of \$121,838.19, together with additional interest and reasonable attorney fees. It alleges that Chandler, in violation of the various agreements, directed certain customers of Eclipse to pay its invoices directly to the company rather than to FTRANS. It alleges that the amount of these improperly withheld payments is \$65,755.36. It alleges that this debt is the personal responsibility

of Chandler and should be determined to be nondischargeable in his bankruptcy case pursuant to section 523(a)(4) of the Bankruptcy Code for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

Count II of the Complaint alleges no additional facts, but asserts that under these same facts, Chandler is indebted to Trust One Bank, and that the debt should be excepted from discharge pursuant to section 523(a)(6) of the Bankruptcy Code for willful and malicious injury to another entity or to property of another entity.

Chandler filed his Answer on October 20, 2011. He admits the agreements entered into between the various parties, and the genuineness of documents made exhibits to the Complaint, but denies the remaining allegations of the Complaint.

Trust One Bank filed its first Motion for Summary Judgment on August 7, 2012. The motion was denied and summary judgment granted to the Defendant as to Count I of the Complaint on November 11, 2012.

Trust One Bank filed its second Motion for Summary Judgment on December 31, 2013. Trust One Bank alleges that:

1. Chandler is the president and sole shareholder of Eclipse.
2. On or about April 24, 2009, Eclipse executed a Revolving Credit Note (“Note”) in the amount of \$250,000 and a Revolving Loan and Security Agreement (“Security Agreement”) in favor of Trust One Bank. On the same day, Chandler executed a Guaranty Agreement in which he guaranteed all payments and obligations owed by Eclipse to Trust One Bank.

3. On April 24, 2009, Eclipse entered into certain agreements with Trust One Bank and FTRANS Corp. ("FTRANS") that provided that FTRANS was to collect payments from Eclipse's customers and remit them to Trust One Bank for the account of Eclipse.
4. Funding by Trust One Bank under the Note was to be provided to Eclipse after Eclipse entered invoices into the web-based system with FTRANS. The invoices were forwarded to Eclipse's customers with the specific notation that customers should send payments directly to FTRANS.
5. The agreements expressly required that any payments received by Eclipse directly from its customers were to be held in trust by Eclipse to be remitted to FTRANS. In turn, FTRANS was to remit such payments to Trust One Bank.
6. Eclipse received \$61,964.96 directly from several customers. Eclipse did not remit those funds to FTRANS or Eclipse [sic]. These customer payments were pledged as collateral pursuant to the subject loan documents.
7. Chandler admits that Eclipse failed to properly remit or turn over the funds in the amount of \$61,964.96, which were to be held in trust for the benefit of Trust One Bank.

9. Chandler was acutely aware of Trust One Bank's creditor rights as Chandler was the signatory on the subject loan documents on behalf of Eclipse. Even still, Chandler knowingly interfered with Trust One Bank's creditor rights by collecting the subject

customer payments, failing to account for said payments to FTRANS and/or Trust One Bank, and appropriating said payments for Eclipse and/or Chandler's own use.¹

On the basis of these facts, Trust One Bank asserts that Chandler "converted the customer payments he collected in his corporate capacity in direct contravention of the subject loan documents."² The allegations of the motion are supported by a "Statement of Material Undisputed Facts" prepared by counsel for Trust One Bank. To briefly summarize the germane portions of the statement: (1) Chandler knew that Eclipse collected funds from Proscan Technologies, Data Network Systems, and Nystar Tenn. Mines in the aggregate amount of \$61,964.96; and (2) Chandler admits that these funds were not remitted by Eclipse to FTRANS or Trust One Bank.

In response to the motion, Chandler submitted his affidavit in which he states:

1. During the period relevant to this litigation I worked as a low voltage contractor through Eclipse SCS, Inc., a Tennessee corporation in which I am the sole shareholder. On a day-to-day basis I worked in the field on projects.
2. With regard to the funds received from Proscan Technologies, Data Network Systems, and Nystar Tenn. Mines, I did not direct or instruct these vendors to pay these funds directly to Eclipse. According to my review of the relevant bank records, and to the best of my present recollection, these funds were deposited into the corporate bank account of Eclipse at Trust One Bank. I did not withhold these funds from Trust One and did not instruct anyone to do so.³

¹ Plaintiff's Second Motion for Summary Judgment, December 31, 2013, ¶¶ 1-7, 9.

² Plaintiff's Second Motion for Summary Judgment, December 31, 2013, ¶ 10.

³ Affidavit of Jeffrey T. Chandler, January 30, 2014, Exhibit 1 to Adv. Dkt. No. 36.

ISSUES

The second motion for summary judgment raises three issues: (1) is Eclipse liable to Trust One Bank for conversion of its collateral? (2) if so, is the Defendant personally liable for the debts of Eclipse on any basis other than his guaranty? and (3) if so, is the debt of the Defendant excepted from discharge pursuant to 11 U.S.C. § 523(a)(6)? Because I find based upon undisputed facts that there was no conversion of Trust One Bank's collateral, I do not address issues 2 or 3.

ANALYSIS

Summary Judgment Standards

In order to grant a motion for summary judgment, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). When judgment is appropriate as a matter of law, whether or not a motion for summary judgment is opposed, this requirement is met. Fed. R. Bankr. Proc. 7056(c). On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("The burden on the moving party may be discharged by 'showing' ... that there is an absence of evidence to support the non-moving party's case."). If that initial burden is not met, the opposing party is under no obligation to offer evidence in support of its opposition. See, *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 90 (6th Cir. 1993), *In re Rogstad*, 126 F.3d 1224, 1227 (9th Cir. 1997), *Hibernia Nat. Bank v. Admin. Cent. Sociedad*, 776 F.2d 1277, 1279 (5th Cir. 1985). Indeed, the court may sua sponte grant summary judgment for the non-movant, "so long as the losing party [movant] was on notice that she had to come forward with all her evidence."

Celotex Corp. v. Catrett, 477 U.S. at 326, 106 S. Ct. at 91. Accord, *Jones v. Union Pacif. R.R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002); *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 407 (6th Cir. 1999), *cert. den.*, 529 U.S. 1037, 120 S. Ct. 1531 (2000).

Is Eclipse Liable to Trust One Bank for Conversion of its Collateral?

The Defendant admits that he and Eclipse are liable to Trust One Bank as the result of a loan made to Eclipse and his guaranty of that loan. These are *contract* claims. As a contract claim, Chandler's obligation under the personal guaranty to Trust One Bank is dischargeable in bankruptcy.

The Complaint, however, alleges more. It alleges that Chandler should be held personally liable for the conversion by Eclipse of Trust One Bank's collateral. Conversion is an intentional *tort*. It is defined as, "The appropriation of another's tangible property to a party's own use in exclusion or defiance of the owner's rights." *PNC Multifamily Capital Institutional Fund v. Bluff City Community Dev. Corp.*, 387 S.W.3d 553 (Tenn. Ct. App. 2012), citing *Barger v. Webb*, 216 Tenn. 275, 391 S.W.2d 664, 665 (1965); *Lance Prods., Inc. v. Commerce Union Bank*, 764 S.W.2d 207, 211 (Tenn. Ct. App. 1988). Relying upon 90 C.J.S. *Trover and Conversion* § 88 (2012), the Tennessee Court of Appeals quoted with approval the following:

[T]o establish conversion, one must present proof of a wrongful taking, an illegal assumption of ownership, an illegal use or misuse of another's property, or a wrongful detention or interference with another's property....In order to establish conversion, the plaintiff must allege and prove facts showing a right to immediate possession of the property at the time of conversion. The plaintiff must also prove the commission of such acts by the defendant with respect to the allegedly converted property as to amount to a repudiation of the plaintiff's title or an exercise of dominion over the property.

Id., 387 S.W.3d at 553.

In order for Chandler to be liable to Trust One Bank for the tort of conversion, Trust One Bank must allege and prove either that (1) Chandler appropriated Trust One Bank's property for his

own use; or (2) Eclipse appropriated Trust One Bank's property for its own use, and Chandler is responsible for Eclipse's tort under some theory. The Complaint contains no allegation that Chandler appropriated the property of Trust One Bank for his own use. To the contrary, the Complaint and the Statement of Undisputed Material Facts maintain that funds were received by Eclipse and not paid over to Trust One Bank.

Does that mean that there has been a conversion of Trust One Bank's property by Eclipse? In my prior opinion, I discussed the relationships by and among Eclipse, FTRANS, and Trust One Bank. Pursuant to a Trade Credit Outsourcing Agreement between Eclipse and FTRANS, a trust relationship was created with respect to customer payments received by Eclipse for invoices sold to FTRANS. That agreement provides: "Any checks, cash, notes or other documents or instruments, proceeds or property you receive with respect to the Accounts shall be held by you in trust for us, separate from your own property, and immediately turned over to us with proper endorsements."⁴ The agreement further provides:

Our relationship shall be that of seller and purchaser of Accounts, and neither party is or shall be determined a fiduciary of or to the other except to the extent that you will be deemed to owe us a fiduciary duty and serve as our trustee with respect to all payments you receive directly from customers the handling of which shall be governed by Section 9.1.⁵

In my prior opinion, I found that the Trade Credit Outsourcing Agreement created an express trust for the benefit of FTRANS with Eclipse as trustee. I further found that the trust res consisted of the \$61,964.96 in payments received by Eclipse directly from its customers, Proscan Technologies, Data

⁴ Trade Credit Outsourcing Agreement, § 9.1.

⁵ Trade Outsourcing Agreement, § 18.8.

Network Systems, and Nystar Tenn Mines. I found this to be true because invoices to those customers had been sold to FTRANS.

In addition, I found that Trust One Bank was not a party to the Trade Credit Outsourcing Agreement and was not a third-party beneficiary of that agreement by virtue of express language in section 7 of the Assignment of Credit Balances and Intercreditor Agreement, to which Eclipse, FTRANS, and Trust One Bank were parties. Specifically, I found that:

Nothing in the Assignment of Credit Balances and Intercreditor Agreement gives Trust One Bank rights to or an interest in the accounts purchased by FTRANS or the proceeds of those accounts. Rather, Trust One Bank is granted a security interest in amounts that Eclipse would be entitled to be paid under the Trade Credit Outsourcing Agreement.⁶

This finding was based upon the express provisions of section 3 of the Credit Balances and Intercreditor Agreement, which provides:

The Lender [i.e., Trust One Bank] agrees that notwithstanding any contrary provision contained in the Lender Documents, the Company [i.e., Eclipse] may sell and assign the Purchased Accounts to FTRANS, grant a security interest to FTRANS in FTRANS Collateral, and [the Lender] waive[s] any right to declare a default or event of default by the Company under the Lender Documents or any related agreement or instrument [presumably as the result of the Company selling its accounts to FTRANS].”⁷

The Credit Balances and Intercreditor Agreement further provides: “FTRANS security interest in the FTRANS Collateral shall be a senior priority security interest in the FTRANS Collateral, superior to any security interest of the Lender in the FTRANS Collateral, and the Lender’s security interest in the FTRANS Collateral shall remain subordinate and inferior to the security interest of

⁶ Order Granting Partial Summary Judgment to Defendant, Jeffrey T. Chandler, November 26, 2012, p. 17 (emphasis added).

⁷ Assignment of Credit Balances and Intercreditor Agreement, § 3.

FTRANS therein.”⁸ The FTRANS Collateral is specified at Exhibit A to the Assignment of Credit Balances and Intercreditor Agreement. The FTRANS Collateral includes, among other things, its ownership interest in Purchased Accounts, and the proceeds of such accounts.

The basis of Trust One Bank’s present motion is the alleged conversion of its collateral by Eclipse. The payments that are at issue were, according to the Statement of Material Undisputed Facts and the Chandler Affidavit, received from Proscan Technologies, Data Network Systems, and Nystar Tenn. Mines, not from FTRANS. Moreover, pursuant to the Statement of Material Undisputed Facts, the invoices generated by these customers were sold to FTRANS. The Assignment of Credit Balances and Intercreditor Agreement specifically permitted the sale of accounts to FTRANS notwithstanding the security interest of Trust One Bank. Thus the proceeds in the hands of Eclipse constituted the proceeds of FTRANS’s property. Eclipse retained no interest in the three disputed accounts to which Trust One Bank’s security interest could attach. Therefore, I conclude that Trust One Bank has failed to demonstrate a conversion of its collateral by Eclipse.

This result is bolstered by the Affidavit of Jeffrey T. Chandler which states that the proceeds of the three accounts sold to FTRANS were deposited into the corporate bank account of Eclipse at Trust One Bank. The deposit accounts that Eclipse maintained at Trust One Bank were subject to its security interest pursuant to the Revolving Loan and Security Agreement.⁹ As a result, Eclipse cannot be said to have exercised dominion over the proceeds of the three FTRANS accounts to the exclusion of Trust One Bank. Chandler’s affidavit further states that he did not withhold these funds from Trust One Bank or direct anyone else to do so. This statement has not been rebutted by Trust

⁸ Assignment of Credit Balances and Intercreditor Agreement, § 4.2.

⁹ Revolving Loan and Security Agreement, § 4.1(b).

One Bank and therefore, must be taken as true. Trust One Bank has failed to demonstrate a conversion of its collateral.

Because I find that there was no conversion of Trust One Bank's collateral, it is not necessary to address the remaining issues raised in the motion for summary judgment.

CONCLUSION

For the foregoing reasons, the Second Motion for Summary Judgment filed by the Plaintiff is **DENIED**. Summary judgment is granted to Defendant Jeffrey T. Chandler as to Count II, the only remaining count of the Complaint. As a result, this adversary proceeding will be dismissed with prejudice by separate order.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff
Chapter 7 Trustee