

Not intended for publication

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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IN RE:

JESSE GRAY THOMAS,

CASE NO. 96-31627

Debtor.

Chapter 7

NATIONAL BANK OF COMMERCE,

Plaintiff,

v.

Adv. Pro. No. 96-1378

JESSE GRAY THOMAS,

Defendant.

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MEMORANDUM OPINION AND ORDER RE  
COMPLAINT TO DETERMINE DISCHARGEABILITY  
OF DEBT AND, IN THE ALTERNATIVE,  
TO OBJECT TO DISCHARGE

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At issue in this adversary proceeding are three loans made by the plaintiff to the defendant over the course of two years. All three of these loans were unsecured. The defendant eventually defaulted on all three loans. Prior to the defendant/debtor filing his chapter 7 petition for bankruptcy relief, the plaintiff obtained a state court judgment on the loans in the amount of \$94,158.91. The plaintiff is now seeking to have this Court declare these loans nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and 523(a)(6). The plaintiff is also asking this Court to deny the debtor his general discharge under 11 U.S.C. § 727(a)(2)(A).

This Court conducted a trial on this matter on September 30, 1997, pursuant to FED. R. BANKR. P. 7001. This is a core proceeding. 28 U.S.C. § 152(b)(2). After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

### **I. FINDINGS OF FACT**

In the fall of 1992, the debtor in this case, Jesse Gray Thomas (“Thomas”), was employed at the architectural and engineering firm of Allen & Hoshall, Inc., a closely-held corporation. From 1992 until 1995, Thomas’ duties at such job included office manager, chief financial officer, and board of directors member. Thomas also served as the secretary/treasurer of Allen & Hoshall’s board during his tenure at the corporation. As part of his duties at the company, Thomas had responsibility for preparing and overseeing the corporate budget and all corporate financial statements.

In 1992, the plaintiff in this proceeding, National Bank of Commerce (“NBC”), was Allen & Hoshall’s bank of record. The corporation used NBC for all of their deposit and loaning needs. The corporation also had an operating line of credit and an equipment line of credit with NBC. At trial, Thomas testified that the aggregate business Allen & Hoshall gave NBC was somewhere in the neighborhood of \$4.5 million.

In an effort to expand upon its corporate relationship with Allen & Hoshall, NBC began to actively solicit individual banking business from the executives at the corporation in the fall of 1992. NBC sought out this business through its private banking division.<sup>1</sup> Thomas was one of the executives targeted by NBC in this solicitation. For two days in September 1992, NBC set up a booth at Allen & Hoshall for the sole purpose of opening individual accounts and lines of credit for the targeted executives. Thomas responded to this solicitation by applying for and receiving three separate loans from NBC in 1992 and 1993.

The first loan Thomas received from NBC was a \$25,000 line of credit (“Note I”). Thomas applied for this loan on September 18, 1992. In applying, Thomas submitted an “Instalment [sic] Loan Application,” as well as a financial statement he prepared himself on May 31, 1992. This statement did not reflect a \$70,000 unsecured note Thomas had previously obtained from NBC for the sole purpose of purchasing stock in Allen & Hoshall. The testimony at trial was inconclusive as to whether this was intentional or a mere oversight on Thomas’ part.

In addition to the loan application and the financial statement, NBC ran a credit report on Thomas. This credit report showed Thomas with \$1075.00 in revolving credit balances and \$7126.00 in

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<sup>1</sup> According to the testimony of one of NBC’s vice-presidents, the private banking division of NBC catered to individuals with significant net worth, income, or potential for both, who had larger borrowing and deposit needs.

installment loan balances. NBC also ran a credit report on Thomas' wife, Joanne. This report showed Mrs. Thomas with an \$86,000.00 revolving credit balance and a \$33,747.00 installment loan balance.

Jim Burnett ("Burnett"), a vice-president and private banking officer at NBC, was the loan officer who handled the \$25,000 line of credit for Thomas. According to his testimony at the trial, Burnett reviewed Thomas' credit reports and financial statement and did not see anything out of the ordinary. As a result of his satisfaction with these documents, Burnett submitted the loan application to NBC's approval committee. On September 18, 1992, the committee approved the loan. The basis for such approval was listed as "Personal Financial Statement dated 5/31/92."

In addition to submitting the application for approval, Burnett also prepared a memorandum to Thomas' credit file. In this memo, Burnett wrote:

This line reflects a \$25,000 request to use for taxes and other short term expenses. Mr. Thomas plans to pay this line out annually from bonuses. This loan was approved based on the financial strength of Mr. Thomas.

(Trial Ex. 4). Burnett testified at trial that it was NBC's practice to take a person on their word and rely on representations made by the borrower regarding financial stability and repayment terms. Burnett further testified that it was not a regular practice of the bank to require documentation of financial information, nor did NBC conduct title searches in conjunction with applications for these types of loans. In accordance with these practices and procedures, NBC did not require Thomas to provide any type of documentation regarding his financial status. The promissory note for Note I stated that the loan was payable on demand, but if no demand was made, that the loan was due on September 18, 1993. This loan was unsecured.

In September of 1993, Thomas requested NBC to renew Note I. In accordance with NBC procedures for loan renewals, Thomas submitted an updated financial statement. This statement was dated September 20, 1993. NBC renewed Note I for Thomas until September 1994.

Two months before the renewed Note I was due, Thomas contacted NBC about receiving yet another renewal. Doug Atkinson, another vice-president at NBC, was the loan officer who handled this request. Although the testimony at trial indicated that it was NBC's standard practice to require a borrower to submit an updated financial statement every time a loan was renewed,<sup>2</sup> Thomas did not

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<sup>2</sup> On cross-examination, one of NBC's employees admitted that § 101 of NBC's Loan Policy Manual prohibits the use of a financial statement which is more than fifteen months old

submit another financial statement at the time of requesting the second renewal. Despite this noncompliance with bank policy, NBC renewed Note I on July 13, 1994.

In processing Thomas' renewal request, Atkinson prepared a memorandum for Thomas' credit file. This memo, dated July 13, 1994, read as follows:

J.G. Thomas, the Secretary and Treasurer with Alan [sic] and Hoshall, has asked me to renew his line of credit for \$25,000. Mr. Thomas used the proceeds for home improvements on 3904 Otter Drive and the house is currently for sale. Mr. Thomas feels the home improvements will increase the marketability of the home and when it is sold, our loan for \$25,000 will be paid off.

Mr. Thomas has made all of his interest payments on a timely basis and has handled all accounts as agreed. Based on our corporate relationship with Alan and Hoshall and our personal relationship with Mr. Thomas, I recommend renewal of this line of credit.

(Trial Ex. 8). Thomas' line of credit was subsequently renewed for another twelve months until October 1995.

The second loan Thomas obtained from NBC was a \$5000 unsecured signature loan. Such loan was made on June 4, 1993 ("Note II"). This loan was a ninety-day note with an original maturity date of September 2, 1993. According to the evidence introduced at trial, Note II was renewed every ninety days through March 1, 1995. No principle was ever paid on this note. The testimony of NBC officials indicated that such a history of repeated renewals without any principle reduction was not an unusual banking practice.

The third and final loan Thomas obtained from NBC was made on October 14, 1993, in the amount of \$62,500 ("Note III"). Thomas applied for this loan for the purpose of purchasing a second residence located at Reese Point in Memphis. Earlier in the fall, Thomas and his wife had agreed to separate and, as a result, Thomas moved out of the marital residence on Otter Drive.

\_\_\_\_\_As with the renewal of Note I, Atkinson was the loan officer who handled Thomas' application for Note III. In preparing Thomas' application for this loan, Atkinson drew up a memorandum to the loan approval committee. This memo was written on October 14, 1993, and read as follows:

J.G. Thomas has requested a swing loan for \$62,500 to purchase his new residence.

J.G. Thomas, an executive with Allen and Hoshall, was referred to Executive Banking by

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when renewing a loan. Should a bank customer fail to submit an updated financial statement when requesting a renewal, the bank can refuse to renew the loan and call it in.

Lon Magness. Mr. Thomas has been a customer of NBC since September 1992 and all accounts have been handled as agreed.

Mr. Thomas believes his home will sell before April 12, 1994, and once this occurs the swing loan will be paid off with the proceeds. In the event the home does not sell, a 2<sup>nd</sup> mortgage will be taken on the existing residence.

Based on our corporate relationship with Allen and Hoshall and our personal relationship with J.G. Thomas, I recommend this loan for approval.

(Trial Ex. 6).

Despite the fact that NBC was well aware that Thomas was going to use the proceeds of this loan to purchase a new residence, NBC made the loan without taking a deed of trust on the house. Thomas testified at trial that it was NBC's suggestion, and not his, to obtain Note III as an unsecured one because it would save him some money. Had a traditional mortgage and deed of trust been executed, Thomas would have been required to pay closing costs. Additionally, NBC officials testified that the bank did not require collateral for this loan because of Thomas' good reputation as a long-time customer of the bank.

The loan approval committee at NBC approved Note III on October 14, 1993. The committee listed Thomas' September 20<sup>th</sup> personal financial statement as the basis for their approval. The original maturity date of Note III was April 12, 1994. In approving this loan, NBC did not pull a title report on the Reese Point property to see how many mortgages were on it. Thomas purchased the Reese Point residence on October 14, 1993. A warranty deed was executed at that time and listed the buyer as "Jesse G. Thomas, an unmarried person."

When originally applying for Note III, Thomas had believed that his wife would soon be moving out of the Otter Drive house. When this occurred, Thomas intended to sell the Otter Drive residence and use the proceeds to pay off the \$62,500 swing loan. Despite these intentions, however, Thomas did not sell the Otter Drive house before Note III's original maturity date. As a result, Thomas asked NBC to renew this loan in April 1994. NBC granted Thomas' request and renewed the loan until October 1995.

In the fall of 1995, Thomas' life as he knew it began to fall apart. For quite some time prior to his downfall, Thomas had been living a life of excess. He had begun drinking heavily and engaging in numerous extramarital affairs. At work, Thomas was sued for sexual harassment by one of Allen & Hoshall's secretaries. As a result of these events, not only did Thomas' marriage deteriorate right before his eyes, but his stellar career at Allen & Hoshall came to an abrupt end.

In July 1995, Thomas was voted out of office as Allen & Hoshall's secretary/treasurer by the Board of Directors. Thomas left work at the corporation all together in September 1995. In order to settle the sexual harassment lawsuit pending against him, Thomas entered into a settlement agreement with Allen & Hoshall on November 8, 1995. As part of this agreement, Thomas resigned from the corporation, and transferred his partnership interest in the corporation's building as well as his shares of the corporation to Allen & Hoshall. Allen and Hoshall then used these transfers to set-off Thomas' indebtedness to the corporation.

In addition to the cessation of his professional life, Thomas' personal life also began to crumble around him. On November 2, 1995, Thomas' wife, Joanne, filed for divorce in the Circuit Court for Shelby County. Joanne Thomas listed the grounds as Irreconcilable Differences and Inappropriate Marital Conduct.

In order to facilitate the granting of the final decree, Thomas entered into a Marital Dissolution Agreement with his wife. This document was executed on February 20, 1996. According to the terms of this MDA, Thomas transferred both the Otter Drive and the Reese Point properties to his wife, as well as his \$55,000 in retirement savings. When asked at trial why he was so generous with his ex-wife in the MDA, Thomas responded:

I felt like I owed her and the kids a lot from what I had done over the past years and I also felt like what I was giving her at that point wouldn't touch what I had blown just in a selfish manner and in other interests.

The final decree of divorce was issued on March 6, 1996 by the Circuit Court of Shelby County.

In October of 1995, Thomas met with NBC officials regarding his loans. Although he had already been terminated at Allen & Hoshall, Thomas did not inform NBC of his unemployment at the time of this meeting. In fact, Thomas did not give NBC any indication of his employment or financial status at that time.

Thomas began to default on his three NBC loans in November 1995. NBC slowly became concerned about Thomas' accounts over the next few months. On November 6, 14, and 28 and on December 11 and 19, Atkinson wrote Thomas several letters informing him of the maturity dates and past-due nature of the loans. (Trial Ex. 19). Two of the letters Atkinson wrote to Thomas informed him that NBC was accelerating the \$62,500 and \$25,000 loans. Atkinson stated that Thomas had seven days to pay off the loans. If he did not do so, Atkinson stated that NBC would be pursuing legal remedies.

In addition to the letters he wrote to Thomas, Atkinson also drafted several memos to Thomas' credit file. In these memos, Atkinson expressed concern for Thomas' failure to inform the bank about his termination as well as Thomas' lack of response to NBC's demands for payment. (Trial Ex. 18).

Although Thomas had ceased making payments on both Notes I and III, NBC became more concerned about the \$62,500 swing loan Thomas obtained to buy the Reese Point property. In November 1995 and March 1996, NBC prepared deeds of trust on the Reese Point property for Thomas to sign. NBC sought to have Thomas sign these documents so that they could collateralize the \$62,500 swing loan. Despite NBC's wishes, Thomas did not sign either of the deeds of trust.

At trial, NBC officials testified that Thomas had agreed to execute these deeds of trust when the loan became delinquent. When questioned about these promises, Thomas testified that he had no recollection of ever making such a promise. By the time the second deed of trust was presented to him for his signature, Thomas had quitclaimed his interest in the Reese Point property to his ex-wife.

On February 1, 1996, NBC filed a "Complaint for Monies Due and Owing" in the Chancery Court of Shelby County. NBC did not allege fraud in any respect in this complaint. On March 29, 1996, NBC obtained a default judgment against Thomas regarding this complaint in the amount of \$94,158.91.

Six days after the default judgment was handed down, NBC filed a "Complaint to Set Aside Fraudulent Conveyance" in the Chancery Court of Shelby County. In this complaint, NBC alleged that Thomas' transfer of the Reese Point property to his ex-wife in the MDA was a fraudulent transfer. No court resolution was ever granted in this matter. On September 11, 1996, Thomas filed his chapter 7 petition seeking bankruptcy relief in the Western District of Tennessee.

## **II. CONCLUSIONS OF LAW**

NBC is asking this Court to declare Thomas' three loans nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B), and 523(a)(6). In the alternative, NBC is also seeking to have this Court deny the debtor's general discharge under 11 U.S.C. § 727(a)(2)(A). For organizational purposes, the Court will address each statutory section individually. Because no proof was presented as to the dischargeability of Note II, however, this Court will dispense with discussion of that note and declare it wholly discharged at this time.

A. 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) excepts from discharge any debt:

(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;

11 U.S.C. § 523(a)(2)(A). In order to succeed in having a debt declared nondischargeable under this section, a creditor must prove the following elements:

- (1) The Debtors made a representation.
- (2) At the time of making, the Debtors knew that the representation was false or was made with gross recklessness as to its truth.
- (3) The Debtors made the representations with the intention and purpose of deceiving the Creditor.
- (4) The Creditor relied on the representations.
- (5) The Creditor sustained the alleged injury as a proximate result of the representation having been made.

Brady v. McAllister, 101 F.3d 1165, 1172 (6<sup>th</sup> Cir. 1996). The creditor bears the burden of proof in these causes of action and must prove the necessary elements by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). Exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor. Meyer v. Rigdon, 36 F.3d 1375 (7<sup>th</sup> Cir. 1994). This approach is thought to further the well-espoused bankruptcy policy of granting the honest, but unfortunate debtor a fresh start in bankruptcy. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

The second and third elements of a § 523(a)(2)(A) claim are the more troublesome elements of a dischargeability action, only because it is often difficult to determine a debtor's true intent. No debtor is going to get on the stand and admit to fraudulent intent. As a result, "Plaintiff may present evidence of the surrounding circumstances from which intent may be inferred." Van Wert Nat'l. Bank v. Joseph, 1994 WL 760597 \*2 (Bankr. N.D. Ohio 1994), citing Matter of Van Horn, 823 F.2d 1285, 1287 (8<sup>th</sup> Cir. 1987). This type of proof necessarily includes deciding who is the more credible witness.

The level of reliance which a creditor must prove in a false representation action was established in the Supreme Court case of Field v. Mans, 516 U.S. 59, 116 S.Ct. 437 (1995). This case changed the level of reliance in § 523(a)(2)(A) actions from a reasonable one to a justifiable one. Id. at 446. As a result, the Supreme Court stated that an inquiry of a creditor's reliance is a subjective one which depends on the facts and circumstances of each case. Under this standard, a creditor will be found to have

justifiably relied on a representation even though “he might have ascertained the falsity of the representation had he made an investigation.” *Id.* at 444. [Citing Restatement (Second) of Torts, § 540 (1976)].

In the case at bar, NBC first alleges that in applying for Note I, Thomas represented to the bank that he was going to be using the funds to pay off taxes. What he instead did was use the money for home improvements on the Otter Drive residence. NBC wants this Court to believe that this was fraud on the part of Thomas. There are several reasons why this Court is unable to agree with NBC in their interpretation.

The Court cannot find for NBC under § 523(a)(2)(A) because its own documents do not indicate that Thomas had represented to them he was going to use the proceeds solely for the payment of taxes. In Burnett’s memo to the approval committee, he stated that the loan was going to be used for “taxes and other short term expenses.” The next year, when the loan was renewed, Atkinson’s memo to Thomas’ credit file stated that the loan was used for home improvements at Otter Drive and that he recommended renewal of the loan. If NBC was concerned that Thomas had defrauded them by using the loan proceeds for a purpose other than what he had represented to them upon applying, it is not discernable from this renewal memo. NBC’s evidence proves that Thomas was honest with them about the way in which he was going to use the money.

NBC also argues that Thomas was fraudulent in representing his ability and intention to repay the loans. Despite this argument, this Court did not see or hear any evidence that proved by a preponderance that Thomas engaged in fraudulent behavior with regards to repayment. There was no proof introduced about any promises Thomas made as to satisfying the loan obligations. NBC argued that Thomas had promised to sell his Allen and Hoshall stock; however, Allen and Hoshall is a closely-held corporation and, as such, the stock is not easily transferrable. Often times, there is not even a market for such type of stock. NBC could argue that they were unaware of Allen and Hoshall’s status, but since they were the corporation’s bank of record, surely they were aware of what type of corporate structure the company had.

NBC also argues that Thomas misrepresented his true financial condition to the bank. NBC’s own testimony, however, established that Thomas never missed a payment until late in 1995 after he lost his job. Although these payments never made any reduction in the outstanding principle, NBC officials testified that bank policy dictates that if interest payments are being made, a loan is considered current.

Thomas kept his loans current for at least two years before defaulting. As a result, when he entered into the loans and when the bank renewed them, his financial condition was stable enough to satisfy the bank.

The fourth argument NBC makes under § 523(a)(2)(A) is that Thomas was fraudulent in obtaining the \$62,500 swing loan by lying about how he was going to pay off the debt. NBC asserts that Thomas made three contradictory statements regarding repayment, none of which ever came true. But again, this was an unsecured loan. The bank was fully aware that Thomas was purchasing a house with the loan proceeds. Their own memos even state that Thomas would be using the loan to buy “his new residence.” There was no proof introduced that he did not have the intent to repay this debt at the time of incurring it. This Court finds that it is unreasonable for an unsecured creditor to demand promises from a debtor as to what particular asset is going to be sold in order to pay off a loan. If NBC was truly concerned with how Thomas was going to repay Note III, they should never have made the loan without taking a deed of trust on the Reese Point property or having information regarding equity in the Otter Driver property, which was the property NBC claims Thomas agreed to sell to pay off the loan. For the above stated reasons, NBC’s § 523(a)(2)(A) argument must fail.

B. 11 U.S.C. § 523(a)(2)(B)

Section 523(a)(2)(B) excepts from discharge any debt

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by -

- ...
- (B) use of a statement in writing -
    - (i) that is materially false;
    - (ii) respecting the debtor’s or an insider’s financial condition;
    - (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
    - (iv) that the debtor caused to be made or published with the intent to deceive;

11 U.S.C. § 523(a)(2)(B). Unlike § 523(a)(2)(A), a creditor seeking to have a debt declared nondischargeable under § 523(a)(2)(B) only needs to prove that their reliance on a written financial statement was reasonable and not justifiable. Boston Mortgage Corp. v. Ledford (In re Ledford), 970 F.2d 1556 (6<sup>th</sup> Cir. 1992). The standard of proof under § 523(a)(2)(B) is the preponderance of the evidence one. Grogan v. Garner, 498 U.S. 279 (1991).

In the case at bar, it is true that the debtor submitted a financial statement to NBC which omitted a \$70,000 liability Thomas owed to his employer, Allen and Hoshall. It is also true that Thomas failed to

submit new financial statements when seeking to have the loans renewed. Why this Court is unable to rule in favor of NBC under this statutory section, however, is because the proof presented at trial did not establish that NBC reasonably relied on these financial statements, or the lack thereof.

The first reason NBC's § 523(a)(2)(B) argument fails is because Thomas obtained the \$70,000 loan to purchase the Allen and Hoshall stock from NBC. Surely a reasonable banking institution would review all accounts an applicant has with such bank before lending that customer money. If this Court were to find that a bank which does not make even a minimal investigation of its own accounts when considering whether or not to approve a loan is entitled to a finding of nondischargeability under the authority of § 523(a)(2)(B), the scales of justice would be severely unbalanced.

The second reason this Court is unable to find for NBC under § 523(a)(2)(B) is that in renewing Note I the second time and renewing Note II the first time, NBC did not require Thomas to submit an updated financial statement. Not only did they not reasonably rely on the statements, there were not even any statements in writing on which they could rely. There simply was no reliance.

All of the evidence presented at trial by both the plaintiff and defendant firmly established that it was NBC's standard practice to require submission of a new financial statement every time a loan is renewed. Why NBC should be allowed to ignore their own policies and procedures and then be allowed to succeed under § 523(a)(2)(B) is beyond this Court's comprehension. If NBC had been truly relying on Thomas' financial statements in deciding whether or not to renew the loans, they most definitely would have required him to submit an updated financial statement every time he applied for a renewal of the loans or they would have refused to renew them.

The third reason this Court is unable to allow NBC to succeed under § 523(a)(2)(B) relates to the financial status of the loans themselves when they were renewed. At trial, Atkinson admitted that at the time the loans were renewed, Thomas had not reduced the principle balances of the loans. He had made his interest payments and that was all. This evidence proves to the Court by much more than a preponderance that there was no reliance on the part of NBC on Thomas' financial statements. NBC had a very lucrative business deal with Allen & Hoshall. In response to this, NBC actively sought out and solicited the top executives at the corporation. NBC made the loans at issue to Thomas because of his position at the company. If NBC relied on anything in making these loans, they relied on Thomas' executive tenure at the corporation. Atkinson's memos and letters do not even express any serious concern for Thomas' past-due accounts until after Atkinson learned of Thomas' termination at Allen &

Hoshall. For the above stated reasons, NBC's § 523(a)(2)(B) argument must fail.

C. 11 U.S.C. § 523(a)(6)

Section § 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). In their post-trial brief, NBC alleges that "conversion of another's property, if the conversion is willful and malicious, will give rise to a nondischargeable debt under Section 523(a)(6)." The plaintiff's brief goes on to say that "The Court of Appeals for the Sixth Circuit has held 'that the intentional tort of conversion, then, meets the requirements for Section 523(a)(6) for nondischargeability when it is . . . proven that the Debtor intentionally transferred property to one who is not entitled to it without the authorization or approval of the one entitled to the property.'" This Court wholly agrees that conversion qualified as a violation of § 523(a)(6). But to be guilty of that tort, a person must transfer property in which another entity has an interest. In the case at bar, Thomas obtained the \$62,500 loan as an unsecured note. No deed of trust was ever executed, let alone recorded. By virtue of this lack of collateral, NBC stood as an unsecured creditor with a claim. NBC did not have any specific, identifiable interest in the Reese Point property. As a result, Thomas could not have engaged in the tort of conversion. NBC's § 523(a)(6) argument must necessarily fail.

D. 11 U.S.C. § 727(a)(2)(A)

11 U.S.C. § 727(a)(2)(A) provides that

(a) The Court shall grant the debtor a discharge unless -

...  
(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -

(A) property of the debtor, within one year before the date of filing the petition;

11 U.S.C. § 727(a)(2)(A). In order for a court to deny discharge under this provision, the creditor must prove by a preponderance of the evidence the following elements:

1. That the act complained of was done at a time subsequent to one year before the date of the filing of the petition;
2. With actual intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under the Bankruptcy Code;
3. That the act was that of the debtor or his duly authorized agent;
4. That the act consisted of transferring, removing, destroying or concealing any of the

debtor's property, or permitting any of these acts to be done.

See In re Cook, 126 B.R. 261, 266 (Bankr. E.D. Tex. 1991).

In their post-trial briefs, NBC alleges that Thomas violated § 727(a)(2)(A) when he transferred nearly all of his assets to his ex-wife in their divorce. NBC even asserts that Thomas admitted he knew he was preferring his wife to his other creditors when he made these transfers. Although this admission was made, this Court refuses to find that such a court-approved transfer in settlement of a divorce rises to the level of a § 727(a)(2)(A) violation.

The Thomases entered into their MDA and submitted it to the Chancery Court for approval. The Chancery Court reviewed the property settlement provided for therein and approved the way in which the Thomases had chosen to divide up their assets and liabilities. When the Chancery Court then issued the Final Decree of Divorce, Thomas not only voluntarily transferred his assets to his wife, he did so under court order. This Court simply refuses to now go behind the Chancery Court and overturn its decision that the Thomases' MDA made a fair and equitable distribution of the marital estate. If there was any suspicion that Thomas had been trying to defraud creditors in entering into his MDA, surely the Chancery Court would have discovered it and would have refused to approve such an agreement.

NBC had ample time in this case to get a hold on Thomas' assets. The loans were made in 1992 and 1993 as unsecured notes. The loans were each subsequently renewed two times. NBC asserts that Thomas agreed to execute a deed of trust on the Reese Point property in the fall of 1995, yet when NBC finally had a deed of trust drawn up in November, Thomas refused to sign. Instead of then filing a lawsuit against Thomas and asking the court to issue a lien *lis pendens* at that exact moment, what did NBC do? It drug its feet for another four months, continued to write Thomas letters demanding payment, even after NBC learned Thomas had lost his job with Allen & Hoshall and had no source of income. NBC also presented another deed of trust to Thomas for him to sign in March. If Thomas was unwilling to execute the November deed of trust, it stands to reason that he was not going to agree to execute one four months later.

This passive attitude towards pursuing Thomas is exactly what allowed him to deed away his property to his ex-wife in the divorce. If NBC had filed suit in November instead of waiting until February, Thomas' property would have been encumbered and the Chancery Court would not have approved the MDA until resolution in that case was made. Thomas simply would not have been able to transfer the property without satisfying his outstanding obligations to NBC.

#### E. Conclusion

It is true that in this case, the debtor got a loan to purchase a house, defaulted on the loan, and then deeded away his interest in the property to his ex-wife. If this had been a standard mortgage question, there is no doubt that the debtor would have been guilty of fraudulent behavior. This is not a standard mortgage case, however. Here, Thomas approached NBC about obtaining a loan with which to purchase a house. There was no hidden agenda as to what Thomas was going to be using the proceeds for. Instead of approving Thomas for a mortgage, though, NBC decided to make an unsecured loan in the amount of \$62,500. NBC then renewed the loan as an unsecured note the next year.

From the time of the loan disbursement until the initial default, Thomas never made any reduction in the principle balance of the loan. When Thomas defaulted on the loan in November 1995, NBC began to think that maybe making the loan without taking a deed of trust on the subject house was not such a wise idea. What did NBC do then, however? They asked and pleaded and begged Thomas to execute a deed of trust on the house, knowing him to be unemployed. And what did Thomas do in response to these requests? He refused--and refused--and refused. But did these subsequent refusals spurn NBC into action? No, they waited another four months to take any action. And when they did finally do this, they filed a complaint alleging that the loans were due and in default. They did not take that opportunity to allege any fraudulent behavior.

Now that the debtor has filed bankruptcy and is hopelessly insolvent, NBC wants this Court to find the wholly unsecured debts nondischargeable. For the numerous reasons set forth herein, this Court refuses to grant NBC's requests. What has occurred between this debtor and NBC is regrettable. But if the debtor can be fairly said to be blame-worthy, so must NBC. If ever there was a case of poor banking practices, this is it.

#### **ORDER**

It is therefore **ORDERED** that the defendant's debt to the plaintiff in the amount of \$95,162,41 is discharged.

**IT IS SO ORDERED.**

**By the Court,**  
**G. Harvey Boswell**  
**United States Bankruptcy Judge**

**Date: December 18, 1997**