UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In re	:	**Case No. 99-3605-CH**
TAWNA L. BRODERICK,	:	
	:	**Chapter 7**
Debtor.	:	
- -	:	
DEERE HARVESTOR CREDIT UNION,	:	**Adv. No. 99-99253**
	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
TAWNA L. BRODERICK,	:	
	:	
Defendant.	:	
	:	

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ORDER—COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On November 9, 2000, trial was held on the Plaintiff's Complaint to Determine Dischargeability of Debt. Attorney Steven L. Nelson appeared for Plaintiff Deere Harvestor Credit Union; Defendant Tawna L. Broderick appeared pro se. At the conclusion of the trial, the court took the matter under advisement upon a briefing schedule. Plaintiff filed a post-trial brief; Defendant did not. The court now considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. Plaintiff/Creditor is Deere Harvester Credit Union (hereinafter Deere). Plaintiff brings this action for money loaned to Defendant/Debtor and secured by a motor vehicle.

2. Defendant/Debtor is Tawna L. Broderick (hereinafter Debtor). On September 22, 1999, she filed a petition for relief under chapter 7 of the Bankruptcy Code.

3. On Schedule B – Personal Property, Debtor scheduled an interest in a "1993 Ford Explorer (no transmission)" valued at $9,000.00. Debtor did not state where the property was located.

4. On Schedule D – Creditors holding secured claims, Debtor scheduled Deere holding a security interest in the 1993 Ford Explorer. Debtor indicated the amount of the claim to be $12,252.00, of which $3,252.00 was unsecured.

5. On her statement of intention, Debtor indicated that she would surrender the Ford Explorer. Debtor failed to surrender the vehicle within 45 days of filing her statement of intention.

6. Debtor purchased the Ford Explorer on March 9, 1998. At the time of the purchase, Debtor indicated that her address was 2014 41st St., Rock Island, Illinois. Debtor acquired an Illinois certificate of title for the vehicle. The title shows WFS Financial, Inc. of Silvis, Illinois, as the first lienholder.

7. In June of 1998, Debtor moved from 2014 41st St. Rock Island, Illinois.

8. Debtor moved to Long Grove, Iowa in March of 1999.

9. A notation on the Illinois title indicates that WFS Financial Inc. released its lien on the vehicle on April 30,1999.

10. On June 22, 1999, Debtor entered into a "Note and Disclosure Statement" with Deere. The agreement provided that Deere would loan Debtor $12,812.61 at an annual rate of 14.15%. In turn, Debtor agreed to pay Deere thirty-five (35) payments of $464.39 per month starting August 6, 1999. Debtor also granted Deere a security interest in the Ford Explorer.

11. As part of the security agreement, Debtor promised that she would transfer the title to Iowa and register the vehicle in Iowa. She knew that she was required to show Deere as a secured party on the Iowa certificate of title.

12. Deere paid off WFS Financial and received the Illinois certificate of title.

13. Debtor refused to transfer the certificate of title to Iowa. At the hearing, Debtor stated that she that she could not afford to transfer the title.

14. Deere attempted to contact Debtor on a regular basis in order to get her to transfer the vehicle title to Iowa, so that it could record its security interest on the title. Debtor admits that she knew of the attempts to contact her. Debtor ignored all the requests. Debtor was employed at this time.

15. Debtor failed to make the initial August 6, 1999 loan payment, and did not make any of the subsequent payments.

16. In August of 1999, debtor received notice from the Department of Motor Vehicles that her driver license was suspended by the state of Illinois.

17. Sometime in late August or early September, the transmission in the Ford

Explorer failed. At that time, the vehicle was parked in front a friend's house at East Pleasant off of Bell Ave. in Davenport, Iowa. Debtor did not inform Deere that the transmission was "out" of the vehicle.

18. Debtor became unemployed in early September of 1999.

19. On September 21, 1999, Fred's Towing removed the vehicle from the street. Debtor's friend called and informed her that Fred's Towing was in the process of towing the vehicle. She did not contact either the towing company or Deere. The vehicle had Illinois plates at the time that it was towed.

20. On September 24, 1999, the city of Davenport gave notice to Debtor that the vehicle would be sold at auction on November 18, 1999. The notice was sent to 2014 41st St., Rock Island, IL. Notice was also sent to WFS Financial Inc.

21. Debtor testified that she never received the notice. Debtor did not offer any evidence that she filed a notice of change of address.

22. On September 29, 1999, the City of Davenport gave a second notice of the auction to Debtor and WFS Financial Inc.

23 On November 18, 1999, the City of Davenport sold the Ford Explorer at auction. The vehicle sold for $2,500.00.

24. The first meeting of creditors in Debtor's case was scheduled for October 26, 1999. Debtor failed to attend the meeting.

25. On November 23, 1999, Debtor appeared at the rescheduled meeting of creditors accompanied by counsel. At the meeting, Deere first learned that the vehicle had been towed by Fred's Towing. Prior to the meeting, Debtor did not advise Deere that

the vehicle was no longer in her possession.

26. At the time of the meeting of creditors, Debtor's address was 717 W. 58th St. Davenport, Iowa.

27. On November 27, 1999, Deere discovered that the vehicle had been sold at auction.

DISCUSSION

Deere brings this adversary proceeding pursuant to 11 U.S.C.§ 523(a)(6), and asks the court to except its claim of $12,363.82 plus interest from December 9,1999, from discharge. It also requests an award of court costs. Deere argues that Debtor did not perform her stated intention to surrender the Ford Explorer as required by 11 U.S.C. § 521(2)(B). Deere maintains that it relied on the statement to its detriment. Debtor never informed that the vehicle had been towed by the city of Davenport and was scheduled for auction. When Deere finally learned that Debtor was no longer in possession of the vehicle, it had already been sold. Deere contends that such actions and omissions by Debtor were willful and malicious and resulted in its injury.

The court agrees that Debtor has not acted in good faith in dealing with Deere. Based on the particular facts of this case, the court will except Deere's claim from discharge.

Section 521 sets forth certain tasks that a debtor must perform in accordance with his or her bankruptcy case. If an individual debtor has consumer debts which are secured by property of the bankruptcy estate, the debtor in a chapter 7 case must file a statement of his or her intention with respect to the property. 11 U.S.C.§ 521(2)(A). The statement

shall be filed within thirty (30) days of the date the bankruptcy petition was filed. Id. Within forty-five (45) days after filing the notice, the debtor shall perform his or her stated intention with respect to the property. 11 U.S.C. § 521(2)(B). Both of the provisions use the term "shall" indicating that compliance is not optional. As one court stated:

> [T]he bankruptcy laws impose a strict obligation on debtors to file complete and accurate schedules and, also, complete and accurate statements of intention. Accordingly, debtors who, through neglect or indifference, fail to recognize the requirements of § 521(2) as a significant and integral part of filing a bankruptcy petition under Chapter 7 do so at their own peril. They further increase their peril with regard to these requirements if they fail to respond to a trustee's or a secured creditor's legitimate inquiries concerning these matters.

In re Bayless, 78 B.R. 506, 509 (Bankr. S.D. Ohio 1987).

While most courts agree that the duties required under § 521 are mandatory, there is a split in the Circuits as to whether § 521 provides an exclusive list of options. As of yet, the Eighth Circuit has not considered the issue. However, the First, Fifth, Seventh, and Eleventh Circuits have held that the list of options is exclusive, and if a debtor wants to retain property that is subject to a security interest, he or she must either reaffirm the debt or redeem the property. See Bank of Boston v. Burr (In re Burr), 160 F.3d 843 (1st Cir. 1998); Johnson v. Sun Fin. Co. (In re Johnson), 89 F.3d 249 (5th Cir. 1996); In re Edwards, 901 F.2d 1383 (7th Cir. 1990); Taylor v. AGE Fed. Credit Union (In re Taylor), 3 F.3d 1512 (11th Cir. 1993). The Second, Fourth, Ninth, and Tenth Circuits hold it permissible for a debtor to state an intention to retain the property and remain current on the contract payments. See Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow), 126 F.3d 43 (2d Cir. 1997), cert. denied, 522 U.S. 1117(1998); Home

Owners Funding Corp. of Am. v. Belanger (In re Belanger), 962 F.2d 345 (4th Cir. 1992); McClellan Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668 (9th Cir. 1998), cert. denied, 525 U.S. 1041 (1998); Lowry Fed. Credit Union v. West (In re West), 882 F.2d 1543 (10th Cir. 1989). However, the debtor must be current on the obligation at the time of filing the petition in order to retain the property and continue making payments at the contract rate. See In re Boodrow, 126 F.3d at 53 (the Code does not prevent a debtor who is current on his obligation from retaining the property and continuing to make payments); In re Belanger, 962 F.2d at 347 (options other than reaffirmation, redemption, or surrender are available to nondefaulting debtors); Am. Nat. Bank & Trust Co. v. DeJournette (In re DeJournette), 222 B.R. 86, 94 (W.D. Va.1998) (in order to retain property encumbered by security interest a defaulting debtor must either reaffirm the debt or redeem the property).

The Bankruptcy Code does not specifically provide a penalty when a debtor fails to perform the duties described in § 521. Rather, § 704(3) provides that the trustee shall ensure that the debtor performs his or her stated intention. Absent intervention by the trustee, courts have formulated the following remedies or sanctions:

1. Compel the debtor to perform pursuant to 11 U.S.C. § 105;
2. Dismiss the case pursuant to 11 U.S.C.§ 707(a);
3. Modify the stay pursuant to 11 U.S.C. § 362;
4. Render the debt nondischargeable pursuant to 11 U.S.C. § 523(a); and/or
5. Award costs and/or attorney fees to the pursuing creditor.

Beneficial New York, Inc. v Bushey (In re Bushey), 204 B.R. 661, 664 (Bankr. N.D.N.Y. 1997); In re Donnell, 234 B.R. 567, 572 (D.N.H. 1999). The remedy used by a court turns on the particular facts of the case. DeJournette, 222 B.R. at 97. In most instances,

relief from stay is the preferred remedy. Id.; In re Donnell, 234 B.R. at 575. However, when relief from stay will not offer a creditor an adequate remedy, then equity requires the court to turn to a more severe sanction. In re Bushey, 204 B.R. 663-64.

In the case now before it, the court determines that relief from stay will not provide the creditor adequate remedy. The vehicle has already been sold at auction. Further, Debtor has been granted a discharge and the stay has lifted as a matter of law. 11 U.S.C. § 362(c)(2)(C). Therefore, a more severe remedy may be appropriate.

Deere urges the court to except the debt from discharge pursuant to 11 U.S.C. § 523(a)(6). The section provides that a discharge under section 727 does not discharge an individual from any debt:

> (6) 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).

The creditor must prove its case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-287 (1991). The standard "is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate." Smith v. United States, 557 F.Supp. 42, 51 (W.D. Ark. 1982) aff'd, 726 F.2d 428 (8th Cir.1984). The party with the burden of proof must provide evidence to prove his or her position is reasonably probable, not merely possible. Sherman v. Lawless, 298 F.2d 899, 902 (8th Cir. 1962). If the proven facts equally support each party's position, "the judgment must go against the party upon whom rests the burden of proof." Id.

Under § 523(a)(6), the court must separately analyze the elements of willfulness and malice. Barclays American/Business Credit v. Long (In re Long), 774 F.2d 875, 880 (8th

Cir. 1985). "Willful" means intentional or deliberate. Id. "Malice" must apply to a heightened level of culpability that goes beyond recklessness if it is to have a meaning independent of willful. Johnson v. Miera (In re Miera), 926 F.2d 741, 743 (8th Cir. 1991). The Eighth Circuit has defined willful as "headstrong and knowing" conduct and "malicious" as conduct "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause …harm." Id. at 743-44. The act must be done with the actual intent to cause injury to the creditor. Kawaauhau v. Geiger, 523 U.S. 57, 61-64 (1998).

In this case, the court finds that Deere has carried its burden. It is undisputed that Debtor agreed to make 35 loan payments beginning August 8, 1999 in the amount of $464.39 per month. She granted Deere a security interest in the Ford Explorer and agreed to transfer the certificate of title to Iowa. After she received the loan, she refused to transfer the title to Iowa. Deere attempted contacted her on numerous occasions. She ignored these calls and refused to honor her part of the bargain. When the first payment came due in August of 1999, she failed to make the payment. In fact, Debtor never paid Deere anything on the loan.

When the transmission went out of the vehicle, Debtor did not notify Deere, nor did she attempt to have the vehicle repaired. Rather, she left the vehicle parked on the street until it was eventually towed by the city of Davenport. Debtor admitted that she was aware that the vehicle had been towed. A friend called and notified her at the time that Fred's Towing removed the vehicle. Debtor did not inform Deere that the vehicle was towed and not in her possession.

Debtor filed her chapter 7 petition on September 22, 1999. On her schedules she indicated that she was in possession of the vehicle, and the transmission was out of it. She stated that she would surrender the vehicle.

Debtor did not appear at the first meeting of the creditors on October 26, 1999. She appeared at the meeting on November 23, 1999. By this time the vehicle had already been sold at the auction on November 18, 1999. At the meeting of the creditors, Deere first received information that the vehicle had been towed. Its own investigation revealed that it had been sold.

Debtor made no effort to honor her obligations to Deere. Further, she stated her intention to surrender the vehicle to Deere and did not perform her intention within the time provided by statute.

The court has no difficulty in finding that Debtor acted in a willful and headstrong manner when she refused to transfer the title of the vehicle to Iowa. In so doing she prevented Deere from identifying its lien on the title and perfecting its security interest. Debtor also acted willfully when she indicated that she would surrender the vehicle and then did not contact or direct her attorney to contact Deere. This is particularly egregious after the vehicle was towed.

The court finds that Debtor knew that her actions and inactions would result in financial harm to Deere. Debtor knew that she was acquiring funds that she did not intend to repay. She also knew that she was preventing Deere from acquiring the collateral.

Further, the court determines that Debtor acted with malice toward Deere. Debtor intended to financially harm Deere. Accordingly, Deere's claim will be excepted from discharge.

ORDER

IT IS THEREFORE ORDERED that the debt owed by the defendant Tawna L. Broderick to the plaintiff Deere Harvestor Credit Union is excepted from discharge.

FURTHER, Plaintiff shall have judgment for $12,363.82 plus interest at the contract rate from December 9, 1999, to the date of the entry of this order. Interest will thereafter accrue at the judgment rate.

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RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT