IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

MARK RANDALL STEELE **Debtor**	**CASE NO. 01-56535** **CHAPTER 7**
AUTOMOTIVE FINANCE CORPORATION **Plaintiff**	
V.	**ADV. PROC. NO. 02-05036**
MARK RANDALL STEELE **Defendant**	

OPINION

The matter before the court is the Motion for Summary Judgment filed by the plaintiff, Automotive Finance Corporation. Having considered the matter, the court concludes that summary judgment is not appropriate at this time and the motion should be denied.

I. FACTUAL BACKGROUND

1. Mark Randall Steele and George P. Steele filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code on December 12, 2001.

2. Automotive Finance Corporation filed its complaint to determine dischargeability of debt against Mark Randall Steele in March of 2002, claiming that indebtedness owed by the debtor is not dischargeable pursuant to 11 U.S.C. § 523(a)(6). The plaintiff made loans to the defendant's business, U-Park Auto Sales, secured by personal property under a floor plan arrangement. The complaint alleges that the debtor sold property out of trust and wrongfully converted proceeds, and that the action constituted a willful and malicious injury to the plaintiff

and the indebtedness is not dischargeable.

3. Automotive Finance Corporation ("AFC") filed its motion for summary judgment submitting that "summary judgment is appropriate because under 11 U.S.C. § 523(a)(6), the subject debt is not dischargeable because the collateral was sold "out of trust," thus constituting "conversion" and thus a "willful and malicious" injury to AFC." In the motion, AFC contends that Steele does not dispute AFC's interest or his obligations to protect its interest. AFC further contends that Steele was the president and sole stockholder of U-Park, that he signed all checks over a few thousand dollars, that he undertook purchasing of vehicles at auction, that he assumed day-to-day operations. AFC further states that U-Park acquired five vehicles that were subject to AFC's lien, that Steele knew when a car was sold, and states that the lien has not been satisfied. AFC further submits some information to indicate that the cars were sold or are missing.

4. The debtor submits that summary judgment is not appropriate in this case as genuine issues of fact exists precluding the granting of judgment as a matter of law. Steele submits that he developed cancer and turned management over to a third party and that actions were taken without his knowledge or consent. He submits that his illness and inability to participate significantly in the operation of the business prevented him from being guilty of willful and malicious behavior resulting in injury to AFC.

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. § 157. The court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. § 157 and § 1334.

The plaintiff requests summary judgment on its complaint pursuant to 11 U.S.C. §

523(a)(6). The creditor has the burden to prove the debt is not dischargeable:

> A bankruptcy court's grant of summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* (citing Fed.R.Civ.P. 56(c); Bankr.R. 7056). In an adversary proceeding challenging the discharge of a debt, the creditor has the burden to prove by a preponderance of the evidence that the debt is not dischargeable. *Grothues v. IRS (In re Grothues),* 226 F.3d 334, 337 (5th Cir.2000) (citing *Grogan v. Garner,* 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). "If the moving party meets its burden, the non-movant must designate specific facts showing there is a genuine issue for trial." *Zer-Ilan v. Frankford (In re CPDC, Inc.),* 337 F.3d 436, 441 (5th Cir.2003) (citing *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (en banc)).

Rogers v. Morin 189 Fed.Appx. 299, 301, 2006 WL 1765428, (5th Cir. 2006). Evidence is to be viewed in the light most favorable to the non-moving party:

> The district court's grant of summary judgment is appropriate if the record shows " 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Id.* at 285. (quoting Fed.R.Civ.P. 56(c)); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court "views the evidence in the light most favorable to the non-movant." *Abarca v. Metro. Transit Auth.,* 404 F.3d 938, 940 (5th Cir.2005).

Jessup v. Ketchings 2007 WL 779170, 4 (5th Cir. 2007). *See also, Thomas v. Atmos Energy Corp*., 2007 WL 866709, (5th Cir. 2007)(when deciding whether there is a genuine issue of material fact this court must view all evidence in the light most favorable to the non-moving party).

In discussing requisites necessary to establish an exception to discharge under § 523(a)(6), the Fifth Circuit provided the following in *In re Keaty* 397 F.3d 264 (5th Cir. 2005):

> Section 523(a)(6) of the Bankruptcy Code excepts from discharge any debt incurred for willful and malicious injury by the debtor to another entity. 11 U.S.C. § 523(a)(6) (2004). Section 523(a)(6) of the Bankruptcy Code specifically provides:

> § 523. Exceptions to discharge
>
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt...
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity....
>
> *Id.* The Supreme Court, in *Kawaauhau v. Geiger,* 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), stated that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury." The Fifth Circuit extended *Kawaauhau*'s reasoning in *Miller v. J.D. Abrams Inc. (In re Miller),* 156 F.3d 598, 603 (5th Cir.1998), and stated that "either objective substantial certainty [of injury] or subjective motive [to injure] meets the Supreme Court's definition of 'willful ... injury' in § 523(a)(6)." (third alteration in original). The court in *Miller* went on to define the word "malicious" and specifically rejected that it meant an act without just cause or excuse. *Id.* at 605. Instead, the court defined "malicious" as an act done with the actual intent to cause injury. *Id.* at 606. The court noted that this definition is synonymous with the definition of "willful" and thus aggregated "willful and malicious" into a unitary concept. Thus, the court held that "an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm." *Id.* at 606; *see also Williams v. IBEW Local 520 (In re Williams),* 337 F.3d 504, 509 (5th Cir.2003).
>
> To prevail under § 523(a)(6), a creditor must prove by a preponderance of the evidence that the debt is not dischargeable. *Grogan v. Garner,* 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

In re Keaty, 397 F.3d 264, 269 -270 (5th Cir. 2005).

Based on the materials presented, the court finds that there is insufficient documentation to prove either an objective substantial certainty of harm or a subjective motive to cause harm by the debtor. The materials and documentation submitted do not clearly indicate that the debtor was aware of actions that may have been taken to the detriment of AFC's interests, what those actions were, or the extent of any damages that may have been incurred by AFC. The debtor's

partial deposition submitted by AFC indicates that the debtor became ill and was being treated for cancer and that others were involved in running his business. The court is to view the materials submitted in the light most favorable to the debtor. The court concludes that there are genuine issues of material fact and that the moving party is not entitled to judgment as a matter of law. The court concludes that the plaintiff has not met its burden of proof under § 523(a)(6) and summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 is not appropriate.[1]

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 28th day of March, 2007.

/s/ *Edward R. Gaines*
EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

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[1]See previous court decisions under § 523(a)(6) in *Frigidaire Financial Corporation v. Posey (In re Posey),* Adv. No. 03-05412 (Bankr. S.D.Miss. 2005)(debt excepted from discharge where inventory was sold out of trust), and *People's Bank v. Walls (In re Walls),* Adv. No. 03-05330 (Bankr. S.D. Miss. 2004)(insufficient evidence to establish willful and malicious injury under § 523(a)(6)).

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