

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

**IN RE:
JACQUELINE S. HOLMES**

**CHAPTER 7
CASE NO. 0400532JEE**

**MANHEIM AUTOMOTIVE FINANCIAL
SERVICES, INC.**

VS.

ADVERSARY NO. 040123

JACQUELINE S. HOLMES

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Edward Ellington, Judge

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
*MANHEIM AUTOMOTIVE FINANCIAL SERVICES, INC.'S MOTION FOR
SUMMARY JUDGMENT TO DECLARE DEBT NONDISCHARGEABLE FOR FRAUD***

This matter came before the Court on *Manheim Automotive Financial Services, Inc.'s Motion for Summary Judgment to Declare Debt Nondischargeable for Fraud*. After considering the motion and the memorandum of authorities filed by Manheim Automotive Financial Services, Inc. (Manheim), the Court finds for the following reasons that the motion is well taken and should be granted.

FINDINGS OF FACT

Jacqueline S. Holmes (Debtor) operated a used car lot, Madison Motors. In order to finance the purchase of vehicles, the Debtor entered into a series of financing agreements in which Manheim agreed to provide floor-plan financing to the Debtor. The Debtor executed promissory notes in favor of Manheim for the amounts advanced under the floor-plan agreement. As security for the indebtedness, the Debtor executed security agreements giving Manheim a security interest in all of Madison Motors' existing and after-acquired inventory, equipment, accounts, fixtures and general intangibles, and the proceeds thereof.

As stated above, Manheim provided the financing which enabled the Debtor to purchase vehicles to sell at her car lot. Under the terms of the promissory notes and security agreements (collectively, the Agreements), the Debtor was required to deliver payment to Manheim for each vehicle she sold at the earliest of: (1) 48 hours of selling a vehicle; (2) 24 hours of receiving payment on the sale of a vehicle; or (3) when determined by Manheim.

On January 30, 2004, Jacqueline S. Holmes filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On June 30, 2004, Manheim filed its *Complaint to Except from Discharge Indebtedness Owed to Manheim Automotive Financial Services, Inc.* In its complaint, Manheim alleges that the Debtor sold at least ten (10) vehicles (Vehicles) financed by Manheim for which the Debtor failed to remit the sales proceeds to Manheim as she was required under the Agreements, and therefore, the Debtor was *out-of-trust* with respect to those Vehicles in the principal amount of approximately \$137,899.35. Manheim contends that the actions of the Debtor entitle it to a judgment declaring its debt to be nondischargeable pursuant to 11 U. S. C. §

523(a)(2)(A)¹, (a)(2)(B) and (a)(6).

On July 26, 2004, the Debtor filed her *Answer to Complaint to Except from Discharge Indebtedness Owed to Manheim Automotive Financial Services, Inc.* in which the Debtor generally denies all counts of Manheim's complaint.

Manheim Automotive Financial Services, Inc.'s Motion for Summary Judgment to Declare Debt Nondischargeable for Fraud and the *Memorandum of Authorities (sic) in Support of Manheim Automotive Financial Services, Inc.'s Motion for Summary Judgment to Declare Debt Nondischargeable for Fraud* were filed on February 24, 2005. In its motion and brief, Manheim argues that summary judgment should be granted in its favor as there is no genuine issue of material fact and therefore, Manheim is entitled to a judgment declaring the Debtor's debt to Manheim to be nondischargeable as a matter of law.

Pursuant to Rule 18(III)(2) of the *Uniform Local Bankruptcy Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi* (Local Rules), the Debtor had twenty days from February 24, 2005, to file a response to the motion for summary judgment and a brief. The Debtor has failed to file a responsive pleading to the motion for summary judgment.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).

¹Hereinafter all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

II.

Rule 56 of the Federal Rules of Civil Procedure² provides that in order to grant a motion for summary judgment, the court must find that “[t]he pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In addition, when considering a motion for summary judgment, the court must view the pleadings and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party, and the motion should be granted only where there is no genuine issue of material fact. *Thatcher v. Brennan*, 657 F. Supp. 6, 7 (S.D. Miss. 1986), *aff’d*, 816 F.2d 675 (5th Cir. 1987)(citing *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070-71 (5th Cir. 1984)); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986). Moreover,

an adverse party may not rest upon the mere allegations of denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Bankr. P. 7056(e).

One of the grounds Manheim asserts as a basis for having its claim against the Debtor declared nondischargeable is that the Debtor committed a willful and malicious injury against Manheim within the meaning of § 523(a)(6). Section 523(a)(6) provides in relevant part:

²Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

11 U. S. C. § 523. Exceptions to discharge

(a) A discharge under section 727, . . . 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;

“An individual is not entitled to a discharge from any debt ‘for willful and malicious injury by the debtor to another entity or to the property of another entity.’” *Chrysler Credit Corp. v. Perry Chrysler Plymouth*, 783 F.2d 480, 486 (5th Cir. 1986)(citations omitted). *See also Bank of Western Oklahoma v. Cantrell, (In re Cantrell)*, 208 B.R. 499 (10th Cir. BAP 1997); and *First of America Bank v. Afonica (In re Afonica)*, 174 B.R. 242 (Bankr. N.D. Ohio 1994). Willful and malicious means there is an objective substantial certainty of harm. *Miller v. J.D. Abrams, Inc.*, 156 F.3d 598, 604 (5th Cir. 1998); *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998).

Based on the evidence presented to the Court by Manheim in its motion for summary judgment and brief and considering the Debtor's lack of a response to the motion for summary judgment, the Court finds that no genuine issue of material fact exists and that the Debtor converted Manheim's collateral, causing an objective substantial certainty of harm to Manheim, and that Manheim is therefore entitled to a nondischargeable judgment against the Debtor as a matter of law.

In addition, pursuant to the terms and conditions of the promissory notes and security agreements between Manheim and the Debtor, Manheim is entitled to an award of reasonable attorneys' fees and expenses in the amount of \$46,657.90.

Having found that the debt to Manheim is nondischargeable pursuant to § 523(a)(6), the Court will not address the other code sections pled in the complaint, namely § 523(a)(2)(A)

or § 523(a)(2)(B).

CONCLUSION

Based on the foregoing, the Court finds that no genuine issue of material fact exists and that Manheim is entitled to a judgment, including pre-judgment and post-judgment interest and reasonable attorney fees and expenses, declaring the Debtor's debt to Manheim to be nondischargeable as a matter of law.

A separate judgment will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

So ordered this the 8th day of December, 2005.

/S/ EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE