



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: April 13, 2018**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

JENNIFER L. JONES,

CASE NO. 17-04325-NPO

DEBTOR.

CHAPTER 7

PLATINUM HOMES, LLC

PLAINTIFF

VS.

ADV. PROC. 17-00075-NPO

JENNIFER JONES

DEFENDANT

DEFAULT JUDGMENT

This matter came before the Court for hearing on April 11, 2018 (the "Hearing"), on the Motion for Default Judgment (the "Motion") (Adv. Dkt. 14)¹ filed by Platinum Homes, LLC ("Platinum Homes") in the Adversary. The debtor, Jennifer L. Jones (the "Debtor"), did not file a response to the Motion, and no attorney appeared at the Hearing on her behalf. Todd G. Crawford appeared at the Hearing as counsel for Platinum Homes. Neither the Debtor nor a representative of Platinum Homes testified at the Hearing. Platinum Homes introduced into evidence one composite exhibit, marked as "Exhibit A." The Court, having heard and considered the argument

¹ Citations to docket entries in the above-referenced adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. ___)", and citations to docket entries in the above-referenced bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ___)".

of counsel for Platinum Homes and the evidence presented at the Hearing, together with the pleadings filed in the Adversary, finds that the Motion should be granted in part and denied in part for the reasons set forth below.

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (I). Notice of the Motion was proper under the circumstances.

Facts

On December 18, 2017, Platinum Homes filed the Plaintiff's Original Complaint to Deny Dischargeability of Debt Pursuant to 11 U.S.C. § 523 (the "Complaint") (Adv. Dkt. 1), alleging breach of contract, unjust enrichment, and common-law fraud and seeking a declaration that the debt is nondischargeable under 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6). In the affidavit attached to the Motion, counsel for Platinum Homes asserts that a copy of the Complaint was served on the Debtor by a process server on January 9, 2018. (Adv. Dkt. 6 & 14-1). Counsel also contends that a copy of the Complaint was served on counsel for the Debtor in the Bankruptcy Case by regular, first class United States mail, postage pre-paid, and by certified mail, return receipt requested on December 20, 2017. (Adv. Dkt. 8 & 14-1); *see* FED. R. BANKR. P. 7004(g). As reflected in the docket, the Debtor failed to answer the Complaint or otherwise defend the Adversary, and Platinum Homes filed the Application to Clerk for Entry of Default (Adv. Dkt. 10) on January 25, 2018. The Clerk of the Bankruptcy Court issued the Entry of Default (the "Entry of Default") (Adv. Dkt. 12) on February 2, 2018, and Platinum Homes filed the Motion seeking a default judgment on February 13, 2018.

Platinum Homes alleges in the Complaint that the Debtor was the managing member and president of Dream Homes of Mississippi, LLC (“Dream Homes”), which was engaged in the business of purchasing manufactured homes from various vendors, including Platinum Homes, for resale to its customers. (Compl. ¶ 6). On October 14, 2015, Dream Homes and Common Sense Lending, LLC (“CSL Financial”) entered into a Revolving Loan and Purchase Money Security Agreement (the “Loan Agreement”) (Adv. Dkt. 1-1 at 1-19), in which CSL Financial agreed to finance Dream Homes’ purchase of inventory. (Compl. ¶ 6). The Debtor signed the Loan Agreement as president of Dream Homes and also signed a personal guaranty (Adv. Dkt. 1-1 at 20-22) in favor of CSL Financial (Compl. ¶ 7). Platinum Homes signed a separate Guaranty Agreement (the “Platinum Homes Guaranty”) (Adv. Dkt. 1-2) also in favor of CSL Financial to the extent Dream Homes borrowed funds to purchase manufactured homes from Platinum Homes or its affiliates. (Compl. ¶ 8).

Platinum Homes contends in the Complaint that the Debtor willfully and intentionally sold one or more manufactured homes “out of trust” and converted the funds to the Debtor’s personal use rather than allocating the funds to each unit as required by the Loan Agreement. (Compl. ¶ 9; Adv. Dkt. 1-1 §§ 3.2, 3.3, 3.4 & 5.1). By converting the funds from the improper sale and eliminating the security interest in the manufactured homes (the “Out-of-Trust Units”), the Debtor committed fraud, according to Platinum Homes. (*Id.*).

After the Debtor and Dream Homes sold the Out-of-Trust Units in breach of the Loan Agreement, Platinum Homes, pursuant to the Platinum Homes Guaranty, repurchased one or more loans from CSL Financial in the amount of \$57,760.20, which was secured by the Out-of-Trust Units described as: “Platinum Homes Model X-7003, Serial No. PHAL03720AB, Invoice Nos. 03720, Invoice Date 6/8/2015.” (Compl. ¶¶ 10-11). Thereafter, CSL Financial assigned to

Platinum Homes all rights or claims it has against the Debtor and Dream Homes arising out of the Loan Agreement pursuant to the Assignment of Out of Trust Claim (Adv. Dkt. 1-3) dated December 2, 2016. (Compl. ¶ 12).

In the First Cause of Action in the Complaint, Platinum Homes alleges that the Debtor breached the Loan Agreement by selling the Out-of-Trust Units outside the ordinary course of business, for cash, without immediately repaying CSL Financial. (Compl. ¶ 18). As a result of the alleged breach, Platinum Homes asserts that the Debtor owes: (1) \$57,760.20, the principal amount of the loan for the Out-of-Trust Units; (2) accrued interest on the principal amount of the loan; and (3) attorney's fees. (Compl. ¶¶ 11, 18). In the Second Cause of Action, Platinum Homes contends that the Debtor and Dream Homes were unjustly enriched by their possession of the proceeds of the sale of the Out-of-Trust Units without repayment of the loan. (Compl. ¶ 20). Platinum Homes alleges that the Debtor owes: "[A]ll proceeds of the sale of the Out-of-Trust Unit, together with all reimbursements, improvements, costs, money or use value of the collateral and damages related to same." (Compl. ¶ 23). In the Third Cause of Action, Platinum Homes alleges that the Debtor committed "actual fraud" within the meaning of the U.S. Supreme Court's decision in *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016). (Compl. ¶ 25). Finally, Platinum Homes seeks a declaration that the debt owed by the Debtor is nondischargeable as either: (1) a debt for money or property obtained by fraud pursuant to 11 U.S.C. § 523(a)(2); (2) a debt for fraud or defalcation while acting in a fiduciary capacity or for embezzlement pursuant to 11 U.S.C. § 523(a)(4); or (3) a debt for a willful and malicious breach of the Loan Agreement pursuant to 11 U.S.C. § 523(a)(6). (Compl. ¶ 26).

In the prayer for relief in the Complaint, Platinum Homes seeks a judgment against the Debtor for:

- (i) Actual damages;
- (ii) Avoidance of all fraudulent transfers to the extent necessary to satisfy [Platinum Homes'] claims;
- (iii) Exemplary damages;
- (iv) Pre-judgment and post-judgment interest at the maximum lawful rate;
- (v) Attorney's fees; and
- (vi) Court Costs; and
- (vii) All other relief to which [Platinum Homes] shall show itself to be justly entitled.

(Compl. at 6-7). The Complaint mentions "fraudulent transfers" only in the prayer for relief. In the Motion, Platinum Homes did not ask the Court to avoid any alleged fraudulent transfers, and at the Hearing, counsel for Platinum Homes did not request such relief. The Court, therefore, finds that Platinum Homes has abandoned this claim, to the extent it was properly pled in the Complaint.

Discussion

Federal Rule of Civil Procedure 55 ("Rule 55") applies in adversary proceedings by virtue of Rule 7055 of the Federal Rules of Bankruptcy Procedure. The effect of the Entry of Default, the first step for entry of a default judgment, is that all of the factual allegations in the Complaint are taken as true, except for the amount of any unspecified damages. *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). A court may enter a default judgment only if the factual allegations of the complaint provide a sufficient legal basis for entry of a default judgment. *Id.* If the amount of damages sought are unspecified in the complaint, the plaintiff must prove the unliquidated sum in a hearing on damages. FED. R. CIV. P. 55(b)(2). The Fifth Circuit Court of Appeals has cautioned that even when a defendant is technically in default, the plaintiff

is not entitled to a default judgment as a matter of right. *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996).

The Complaint alleged that the Debtor breached the Loan Agreement and, taking these allegations as true, the Court finds that the Debtor's liability to Platinum Homes, as the assignee of CSL Financial's claim against the Debtor, has been admitted due to the Entry of Default. As for monetary damages, the Complaint stated a specific amount for actual damages and nonspecific amounts for exemplary damages, prejudgment and post-judgment interest, attorney's fees, and court costs. As to actual damages, Platinum Homes sought \$57,760.20 in the Complaint but a lesser amount in the Motion. The Court finds that Platinum Homes is entitled to a judgment against the Debtor in the lesser amount of \$56,476.64, the damages specified in the Motion.² The determination of the amounts unspecified in the Complaint was the basis for the Hearing pursuant to Rule 55(b)(2).

A. Exemplary Damages

At the Hearing, Platinum Homes requested exemplary damages in an amount equal to its actual damages. The Court finds that the allegations of the Complaint do not support exemplary damages. That the Debtor "willfully and intentionally sold one or more manufactured homes in breach of the Loan [Agreement] . . . and converted the funds to her personal use" constitute wrongdoings to be sure. (Compl. ¶ 9). Absent from the Complaint, however, is any allegation that the Debtor actively concealed her conversion or misrepresented the status of the inventory to CSL Financial. *Cf. Meridian Prod. Credit Ass'n v. Hendry (In re Hendry)*, 77 B.R. 85, 90 (Bankr.

² Because the amount sought in the Motion is less than the amount pled in the Complaint, this award of damages does not implicate Rule 54(c) of the Federal Rules of Civil Procedure, which provides: "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." *See* FED. R. BANKR. P. 7054 (making Rule 54(a)-(c) of the Federal Rules of Civil Procedure applicable in adversary proceedings).

S.D. Miss. 1987) (during creditor’s inventory of cattle, farmer misrepresented 1,000 herd of cattle as the creditor’s collateral). Without the testimony of the Debtor or a representative of CSL Financial at the Hearing that would show the presence of such aggravating factors, the Court denies the request for exemplary damages.

B. Prejudgment & Post-Judgment Interest

At the Hearing, counsel for Platinum Homes requested prejudgment interest at the rate of eight percent (8%) per annum. Section 5.4 of the Loan Agreement required Dream Homes to pay interest at the annual rate of eight and one-half percent (8.5%). Counsel for Platinum Homes agreed to reduce that rate by one-half percent (0.5%). When questioned by the Court about his interest calculation, counsel for Platinum Homes explained that prejudgment interest began to accrue on March 27, 2017, when Platinum Homes filed a complaint against the Debtor in state court. From March 27, 2017, until the date of this Default Judgment is approximately twelve (12) months. The Court, therefore, finds from its own calculation³ that Platinum Homes is entitled to prejudgment interest of \$4,518.13.

C. Attorney’s Fees

In the Motion, Platinum Homes requests attorney’s fees of \$14,119.16, representing twenty-five percent (25%) of the amount of its actual damages.⁴ Pursuant to § 15.6 of the Loan Agreement, “upon the occurrence of an Event of Default hereunder, Lender shall be entitled to recover . . . its costs incurred in connection with the collection of the Indebtedness or the enforcement of this Agreement or any Loan Document, including, without limitation, its reasonable attorneys’ fees, expenses and court costs.” (Adv. Dkt. 1-1 ¶ 15.6). In support of the

³ $\$4,518.13 = \$56,476.64 \times 8\% \times 1 \text{ year.}$

⁴ $\$14,119.16 = 25\% \times \$56,476.64.$

amount of its attorney's fees, counsel for Platinum Homes at the Hearing cited the rebuttable presumption established by the Mississippi Supreme Court that attorney's fees in open account cases "of one-third [of] the amount of the indebtedness in collection matters is reasonable." *Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 54 (Miss. 1998) (quoting *Dynasteel Corp. v. Aztec Indus., Inc.*, 611 So. 2d 977, 987 (Miss. 1992)). By comparison, Platinum Homes requests attorneys' fees and expenses in an amount that is less than the presumptively reasonable amount.

Counsel for Platinum Homes introduced into evidence at the Hearing itemized statements of his fees and expenses billed to Platinum Homes for legal services rendered from November 21, 2016, through March 23, 2018, in the total amount of \$6,348.10. (Ex. A). He estimated additional unbilled fees and expenses of \$1,500.00 to \$2,000.00 through the date of the Hearing. When \$8,348.10 in billed attorney's fees and expenses is compared to the amount sought by Platinum Homes in the Motion, the Court finds that twenty-five percent (25%) of the debt or \$14,119.16 is reasonable since the billed amount does not include the attorney's fees and expenses that will be incurred in attempting to collect the Default Judgment. Accordingly, the Court finds that Platinum Homes is entitled to a default judgment in that amount.

D. Dischargeability

Platinum Homes seeks a declaration that the debt owed by the Debtor is nondischargeable in the Bankruptcy Case under 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6). Because the Court finds that the debt owed by the Debtor in the total amount of \$75,113.93 is nondischargeable under 11 U.S.C. § 523(a)(6), it is unnecessary to address the other discharge exceptions alleged in the Complaint.

Under 11 U.S.C. § 523(a)(6), debts arising from a willful and malicious injury inflicted by the debtor are not dischargeable. An injury is willful when the debtor had specific intent to inflict

the injury or the injury was substantially certain to result. *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). To be a willful and malicious injury, there must be “either an objective substantial certainty of harm or a subjective motive to cause harm.” *Miller v. J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598, 606 (5th Cir. 1998). “An injury to an entity or property may be a malicious injury . . . if it was wrongful and without just cause or excuse, even in the absence [of] personal hatred, spite or ill-will.” *Fed. Deposit Ins. Corp. v. Lefevre (In re Lefevre)*, 131 B.R. 588, 602 (Bankr. S.D. Miss. 1991) (quoting 3 COLLIER ON BANKRUPTCY ¶ 523.16 (15th ed. 1988)).

Here, the allegations of the Complaint are that the Debtor willfully and intentionally sold one or more manufactured homes “out of trust” and converted the funds to her personal use. The Loan Agreement required that the proceeds be held in trust for CSL Financial to apply to the outstanding debt. (Adv. Dkt. 1-1 §§ 3.2, 3.3, 3.4, 4.9 & 5.1). No good faith reason is apparent from the Complaint or the loan documents attached to the Complaint for the Debtor’s disposition of the proceeds from the sale of the Out-of-Trust Units in direct contravention of the Loan Agreement. *See In re Hendry*, 77 B.R. at 90 (holding that conversion of proceeds from the sale of cattle was malicious and fell within the exception to discharge under 11 U.S.C. § 523(a)(6)). The Court finds that the allegations of the Complaint, which must be accepted as true, show a willful, malicious infliction of injury entitling Platinum Homes to a finding that the debt owed by the Debtor is nondischargeable under 11 U.S.C. § 523(a)(6).

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion is granted in part and denied in part. The Motion is granted to the extent that Platinum Homes is awarded a default judgment against the Debtor in the total amount of \$75,113.93 (\$56,476.64 in actual damages + \$4,518.13 in prejudgment interest + \$14,119.16 in attorney’s fees and expenses) and that this

judgment amount is nondischargeable in the Bankruptcy Case pursuant to 11 U.S.C. § 523(a)(6).
The Motion is denied to the extent that Platinum Homes is not awarded exemplary damages.

IT IS FURTHER ORDERED AND ADJUDGED that interest on the judgment amount of \$75,113.93 shall accrue at the federal judgment rate pursuant to 28 U.S.C. § 1961 from the date of entry until the judgment amount has been paid in full.

IT IS FURTHER ORDERED AND ADJUDGED that the costs of the Adversary are taxed against the Debtor under 28 U.S.C. § 1920.

##END OF DEFAULT JUDGMENT##