SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: August 27, 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:

STEPHEN F. ADCOCK,	**CASE NO. 16-03626-NPO**
DEBTOR.	**CHAPTER 7**
FIRST FINANCIAL BANK	**PLAINTIFF**
VS.	**ADV. PROC. NO. 17-00081-NPO**
STEPHEN F. ADCOCK	**DEFENDANT**

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ISSUES OF LIABILITY

There came on for consideration the Plaintiff's Motion for Summary Judgment (the "Motion") (Adv. Dkt. 11)[1] filed by First Financial Bank ("FFB") and the Plaintiff's Brief in Support of Motion for Summary Judgment (Adv. Dkt. 12) filed by FFB in the Adversary. No response was filed by the debtor, Stephen F. Adcock (the "Debtor"). FFB attached eleven (11)

[1] Citations to the record are as follows: (1) citations to docket entries in the above-referenced adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. ____)"; and (2) citations to docket entries in the above-referenced bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ____)".

exhibits to the Motion, which are marked as Exhibits 1-11 (Adv. Dkt. 11-1 to 11-11) and will be referred to as "(FFB Ex. __)".

Jurisdiction

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

Facts[2]

Under Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), as made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, the Court generally views the evidence and inferences in the light most favorable to the non-moving party. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010). Before a non-movant can benefit from a favorable view of the evidence, however, he must actually place evidence before the court. *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 389 (7th Cir. 2010). Here, the Debtor has failed to respond to the Motion. The Court, therefore, deems all facts presented by FFB as undisputed for purposes of the Motion.

A. Loans

Brad Ogletree ("Ogletree"), FFB's president in its Carthage, Mississippi, branch, testified by affidavit regarding the history of five (5) loans that FFB granted the Debtor from October 2007 until January 2014. (FFB Ex. 2). The Debtor's wholly-owned entity, Adcock Properties, LLC (the "Adcock Properties"), was an additional borrower on all loans, and the Debtor's spouse,

[2] The following findings of fact and conclusions of law are made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Angela Adcock, was an additional borrower on all but one of the five loans. A summary of these loans, based on Ogletree's undisputed testimony, follows below.

1. October 2007 Note

On October 17, 2007, the Debtor, along with Adcock Properties and Angela Adcock, executed a promissory note (the "October 2007 Note") (FFB Ex. 1 at 2-4; FFB Ex. 2 at 3) in favor of FFB in the original principal amount of $168,208.00. The purpose of this loan was to acquire commercial property located at 206 North Van Buren Street in Carthage, Mississippi (the "Carthage Property") (FFB Ex. 1 at 3; FFB Ex. 2 at 3). The October 2007 Note was secured by a deed of trust executed by the Debtor, individually and in his capacity as a managing member of Adcock Properties, and by Angela Adcock ("Deed of Trust 1") (FFB Ex. 1 at 5-15; FFB Ex. 2 at 2). Deed of Trust 1 granted FFB a lien on the Carthage Property. (FFB Ex. 1 at 3; FFB Ex. 2 at 3). As of November 4, 2016, the date of the original filing by the Debtor of a chapter 13 petition for relief (the "Petition") (Bankr. Dkt. 1), the net payoff on the October 2007 Note was $116,633.38. (FFB Ex. 2 at 3).

2. February 2010 Note

On February 9, 2010, the Debtor, along with Adcock Properties and Angela Adcock, executed a promissory note (the "February 2010 Note") (FFB Ex. 2 at 5; FFB Ex. 5 at 2-4) in favor of FFB in the original principal amount of $64,000.00. The purpose of this loan was to renew the loan on commercial property located at the corner of North Hills Road and Bounds Road in Meridian, Lauderdale County, Mississippi (the "Meridian Property") (FFB Ex. 2 at 5; FFB Ex. 5 at 3). The February 2010 Note is secured by a deed of trust executed by the Debtor, individually and in his capacity as a managing member of Adcock Properties, and by Angela Adcock ("Deed of Trust 2") (FFB Ex. 2 at 5; FFB Ex. 5 at 5-22). Deed of Trust 2 granted FFB a lien on the

Meridian Property (FFB Ex. 2 at 5; FFB Ex. 5 at 3). As of November 4, 2016, the Petition date, the net payoff on the February 2010 Note was $65,049.26. (FFB Ex. 2 at 6).

3. August 2010 Note

On August 17, 2010, the Debtor, along with Adcock Properties and Angela Adcock, executed a promissory note (the "August 2010 Note") (FFB Ex. 2 at 6; FFB Ex. 6 at 2-6) in favor of FFB in the original principal amount of $196,000.00. The purpose of this loan was to acquire and/or refinance real estate located at: (1) 1058 North Street in Sebastopol, Scott County, Mississippi (the "Sebastopol Property"); (2) 10431 Road 101 in Union, Neshoba County, Mississippi (the "Union Property"); and (3) twenty acres of real estate located off McCool Road in Kosciusko, Attala County, Mississippi (the "Kosciusko Property") (FFB Ex. 2 at 6; FFB Ex. 6 at 3). The August 2010 Note is secured by three deeds of trust, two of which were executed by the Debtor, individually and in his capacity as a managing member of Adcock Properties, and by Angela Adcock and one of which was executed by the Debtor and Angela Adcock. (FFB Ex. 2 at 6-7; FFB Ex. 6 at 7-45). The deeds of trust granted FFB liens on the Sebastopol Property (FFB Ex. 2 at 6; FFB Ex. 6 at 32-45), the Union Property (FFB Ex. 2 at 6; FFB Ex. 6 at 7-18), and the Kosciusko Property (FFB Ex. 2 at 7; FFB Ex. 6 at 19-31). As of the Petition date, the net payoff on the August 2010 Note was $170,656.26. (FFB Ex. 2 at 7).

4. October 2013 Note

On October 16, 2013, the Debtor, along with Adcock Properties, executed a promissory note (the "October 2013 Note") (FFB Ex. 2 at 3-4; FFB Ex. 3 at 2-4) in favor of FFB in the original principal amount of $50,965.00. The purpose of the loan was to provide working capital for a business. (FFB Ex. 3 at 3). The October 2013 Note was secured by a deed of trust executed by the Debtor, individually and in his capacity as a managing member of Adcock Properties ("Deed

of Trust 6") (FFB Ex. 2 at 4; FFB Ex. 3 at 5-20). Deed of Trust 6 granted FFB a second lien on the Carthage Property. (FFB Ex. 2 at 4; FFB Ex. 3 at 7). The October 2013 Note also was secured by "Fifty (50) Head of Mixed Breed Cattle together with all their increase." (FFB Ex. 2 at 4; Adv. Dkt. 1-2). FFB perfected its lien on the cattle by filing a UCC-1 financing statement with the Mississippi Secretary of State on October 30, 2013. (*Id.*). Paragraph 4 of the UCC-1 financing statement provides, "[i]nclusion of the proceeds does not constitute permission to sell or otherwise dispose of the collateral." (Adv. Dkt. 1-2). As of November 4, 2016, the Petition date, the net payoff on the October 2013 Note was $55,364.43. (FFB Ex. 2 at 4).

5. January 2014 Note

On January 7, 2014, the Debtor, along with Adcock Properties and Angela Adcock, executed a promissory note (the "January 2014 Note") (FFB Ex. 2 at 4; FFB Ex. 4 at 2-4) in favor of FFB in the original principal amount of $36,365.00. The purpose of this loan was to provide working capital for Infinity Hospice Business. (FFB Ex. 4 at 3). The January 2014 Note was secured by a deed of trust executed by the Debtor, individually and in his capacity as a managing member of Adcock Properties[3] ("Deed of Trust 7") (FFB Ex. 2 at 4; FFB Ex. 4 at 5-46). Deed of Trust 7 granted FFB a third lien on the Carthage Property. (FFB Ex. 2 at 4-5; FFB Ex. 4 at 7). As of the Petition date, the net payoff on the January 2014 Note was $37,797.71. (FFB Ex. 2 at 5).

B. Summary of Loans & Deeds of Trust Provisions

A summary of the original principal loan balance, collateral, and net payoff amount as of the date of the Petition for each loan appears below:

[3] The January 2014 Note also was secured by deeds of trust signed by the Debtor's daughter, Ashton Leah Adcock, granting FFB liens on real property located in Newton County and Attala County, Mississippi. (FFB Ex. 4 at 3, 21-46).

Note	Original Principal Amount of Loan	Collateral	Net Pay Off as of Petition Date
Oct. 2007	$168,208.00	Carthage Property (First Lien)	$116,633.38
Feb. 2010	$64,000.00	Meridian Property	$65,049.26
Aug. 2010	$196,000.00	Sebastopol Property, Union Property & Kosciusko Property	$170,656.26
Oct. 2013	$50,965.00	Carthage Property (Second Lien) & 50 Cattle	$55,364.43
Jan. 2014	$36,365.00	Carthage Property (Third Lien)	$37,797.71

(FFB Ex. 2 at 3-7). In total, the cumulative principal and interest owed by the Debtor to FFB as of the date of the Petition, was $445,501.04. (*Id.* at 7).

The deeds of trust for all five loans contained nearly identical provisions. Of relevance to the Adversary, each deed of trust contained the following cross-collateralization clause: "[T]his Security Instrument will secure . . . [a]ll present and future debts." (FFB Ex. 1 at 6; FFB Ex. 5 at 6; FFB Ex. 6 at 9, 21-22, 34-35; FFB Ex. 3 at 7-8; FFB Ex. 4 at 7-8). In addition, each deed of trust described FFB's collateral as including "all existing future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate." (FFB Ex. 1 at 6; FFB Ex. 5 at 6; FFB Ex. 6 at 9, 21, 34; FFB Ex. 3 at 7; FFB Ex. 4 at 7). Finally, each deed of trust provided that the Debtor agreed to pay "all expenses of collection, enforcement or protection of [FFB's] rights and remedies" under the deed of trust on or after a default. (FFB Ex. 1 at 9; FFB Ex. 5 at 9; FFB Ex. 6 at 13, 26, 39; FFB Ex. 3 at 20; FFB Ex. 4 at 13). Expenses were described as including "attorneys' fees, court costs and other legal expenses." (*Id.*). "In addition, to the extent permitted by the United States Bankruptcy Code, [the Debtor] agrees to pay the

reasonable attorneys' fees incurred by [FFB] to protect [its] rights and interest in connection with any bankruptcy proceedings initiated by or against [the Debtor]." (*Id.*).

C. Foreclosures

Before the Debtor's commencement of the Bankruptcy Case on November 4, 2016, FFB foreclosed on the Kosciusko Property at 12:00 noon on September 25, 2015. (FFB Ex. 2 at 7; Adv. Dkt. 1 at 6). That foreclosure sale was conducted approximately two hours after Adcock Properties filed a chapter 11 bankruptcy case (the "Adcock Properties Case") (Case No. 15-02980-NPO). Pursuant to the Agreed Order Resolving First Financial Bank's Motion to Lift, Terminate, and Annul Automatic Stay and for Abandonment of Property from the Estate [Dkt. #49] (Adcock Properties Case, Dkt. 88), the stay was annulled retroactively and the sale validated. The Kosciusko Property was sold to FFB for $34,100.00.

After the commencement of the Bankruptcy Case, FFB liquidated additional collateral securing the debts owed by the Debtor. In separate foreclosure sales, FFB purchased the Carthage Property for $160,000.00, and the Town of Sebastopol purchased the Sebastopol Property for $140,001.00. (FFB Ex. 2 at 7). FFB liquidated other collateral as well. (*Id.*). According to FFB, the net pay off amount of each loan, after applying the sales proceeds, is as shown below.

Note	Original Principal Amount of Loan	Collateral Sold	Net Pay Off as of Petition Date	Foreclosure Sale Proceeds	Net Pay Off after Application of Foreclosure Sale Proceeds
Oct. 2007	$168,208.00	Carthage Property (First Lien)	$116,633.38	$160,000.00	$0.00
Feb. 2010	$64,000.00	None	$65,049.26	$0.00	$54,058.54
Aug. 2010	$196,000.00	Sebastopol Property	$170,656.26	$140,001.00	$29,518.13
		Kosciusko Property		$34,100.00	
Oct. 2013	$50,965.00	Carthage Property (Second Lien)	$55,364.43	$160,000.00	$4,680.14
Jan. 2014	$36,365.00	Carthage Property (Third Lien)	$37,797.71	$160,000.00	$32,325.00
TOTAL					$120,581.81

(FFB Ex. 2 at 3-7; Adv. Dkt. 1 at 10).

D. Debtor's Sale of Collateral Out of Trust & Other Destruction/Loss of Collateral

1. Cattle

The October 2013 Note matured on January 14, 2014. (FFB Ex. 2 at 8; FFB Ex. 3 at 2). After the Debtor defaulted, FFB initiated a replevin action (the "Replevin Action") in the Circuit Court of Neshoba County, Mississippi (the "Circuit Court"), in Cause No. 14-cv-0044-NS-G, to obtain possession of the fifty (50) heads of cattle. (FFB Ex. 2 at 8). In March 2014, the Circuit Court issued an order granting FFB possession of the cattle pursuant to a bond posted in the Replevin Action. (*Id.*). FFB took possession of the cattle and brought them to market for auction. (*Id.*).

Meanwhile, the Debtor contacted senior management of FFB and pleaded with them not to proceed with the sale of the cattle (*Id.*). Based on the Debtor's promises and assurances regarding his intentions and ability to pay down the October 2013 Note, FFB halted the sale of the cattle and released them to the Debtor on March 12, 2014. (*Id.*; FFB Ex. 8 at 10).

In a deposition taken on August 15, 2014, in the Replevin Action, the Debtor testified that he sold some of the cattle during the previous month. (FFB Ex. 8 at 12).

> Q. Have you sold any of those cattle since the time you took possession of them?
>
> A. Yes.
>
> Q. Tell me about that.
>
> A. I've sold ten steers.

(*Id.*). The Debtor further testified that he received approximately $8,900.00 for the sale of the ten steers. (*Id.* at 15). The Debtor paid nothing to FFB toward the October 2013 Note. (FFB Ex. 2 at 8-9). Instead, he used the proceeds from the cattle sales "to pay everyday bills, lights, [and] water" and certain expenses of his healthcare business. (FFB Ex. 8 at 19). To date, Adcock has refused to provide any information as to the location or disposition of the remaining cattle subject to FFB's lien, and FFB has been unable to obtain any such information on its own. (FFB Ex. 2 at 8).

2. Sebastopol Property

The August 2010 Note was secured in part by a lien on the Sebastopol Property, referred to as "the Co-Op Building" in some documents. (FFB Ex. 2 at 8-9). After the conversion of the Bankruptcy Case to a chapter 7 case, FFB filed a Motion for Abandonment and Relief from Automatic Stay (Bankr. Dkt. 108) on April 27, 2017, with respect to all real property securing the loans. On May 25, 2017, the Court entered the Order Granting Motion for Abandonment and

Relief from Automatic Stay [Dkt. #108] (Bankr. Dkt. 125), terminating the stay on all real property, including the Sebastopol Property. FFB conducted a foreclosure sale on the Sebastopol Property on August 3, 2017. (FFB Ex. 2 at 9). The Town of Sebastopol purchased the Sebastopol Property at the foreclosure sale for $140,001.00. (*Id.*).

Ogletree testified in his affidavit that before the foreclosure sale on August 3, 2017, a person known to him, whom he did not identify by name, expressed an interest in bidding on the Sebastopol Property for an amount higher than the amount owed FFB. (FFB Ex. 2 at 9). Ogletree further testified that either the Debtor or someone acting on his behalf, removed certain fixtures and/or accessions from the Sebastopol Property, including a storage shed. According to Ogletree, the removal of these items caused the unnamed potential bidder to lose interest in buying the Sebastopol Property and diminished the value of the Sebastopol Property. (FFB Ex. 2 at 9-10).

Michael Barnes, FFB's vice president in its Carthage, Mississippi branch, testified by affidavit that during this time, he drove by the Sebastopol Property on his daily commute to work. (FFB Ex. 11). He was aware that FFB intended to foreclose on the Sebastopol Property and at Ogletree's request, made it a point to keep watch. In or around late July, 2017, he noticed that work was going on at the site. On one occasion, he stopped to look around and observed that interior fixtures and an exterior storage shed had been removed from the Sebastopol Property. He never personally witnessed the Debtor or anyone else removing fixtures from the building or tearing down the shed.

E. Bankruptcy Filings

The Court is familiar with the Debtor and his pattern of misusing the bankruptcy process. The Bankruptcy Case is the second individual bankruptcy filing by the Debtor. Previously, the Debtor filed a chapter 13 petition for relief in Case No. 15-00072-NPO on January 9, 2015. That

case was dismissed on May 11, 2015, because the Debtor failed to file a confirmable chapter 13 plan despite being granted multiple extensions of time to do so. (Case No. 15-00072-NPO, Dkt. 118). In the order dismissing the Debtor's prior individual case, the Court concluded that the Debtor "has proceeded in the Bankruptcy Case in bad faith." (*Id.* at 5).

The Adcock Properties Case was dismissed on August 5, 2016 (the "Dismissal Order") (Adcock Properties Case, Dkt. 126) for similar reasons. In the Dismissal Order, the Court found that Adcock Properties had failed to make certain payments to FFB pursuant to the terms of the Court's Order: (I) Denying, Without Prejudice, Confirmation of Amended Plan of Reorganization *[Dkt. #73]*; and (II) Establishing Deadlines and Conditions (Adcock Properties Case, Dkt. 117). The Dismissal Order imposed a one-year bar against any new bankruptcy filing. The Debtor, acting *pro se* on behalf of Adcock Properties, appealed the Dismissal Order (Adcock Properties Case, Dkt. 130) on August 12, 2016. On May 30, 2017, the U.S. District Court for the Southern District of Mississippi dismissed the appeal, noting that the appeal "was filed pro se against the advice of counsel" and "there are no filings . . . that indicate the appeal has been perfected or briefed." (3:16-cv-00632-HTW-LRA, Dkt. 3).

On November 4, 2016, the Debtor filed the Bankruptcy Case under chapter 13 of the Bankruptcy Code. (Bankr. Dkt. 1). In his bankruptcy schedules, the Debtor indicated he did not own any interest in farm-related property. (Bankr. Dkt. 4 at 9). The Court converted the Debtor's chapter 13 case to a chapter 7 case on February 7, 2017 (the "Conversion Order") (Bankr. Dkt. 45). In the Conversion Order, the Court noted that the Debtor is "a serial bankruptcy filer who utilizes the bankruptcy process to delay creditors." (*Id.* at 13). The Court characterized the Debtor as an "atypical litigant" who "intentionally misled the Court, the Trustee, and the creditors." The Court also noted the Debtor's failures to abide by the basics of the bankruptcy process in the

chapter 13 case, including his failure to attend the initial creditors' meeting and his failure to produce certain required documents to the chapter 13 trustee.

F. Initiation of Adversary

On December 28, 2017, FFB filed the Adversary Complaint Objecting to Discharge Pursuant to 11 U.S.C. § 727 and to Dischargeability of Debt Owed to First Financial Bank Pursuant to 11 U.S.C. § 523 (the "Complaint") (Adv. Dkt. 1), alleging five (5) counts for relief against the Debtor. In Counts I, II, and III, FFB asked the Court to deny the Debtor's discharge pursuant to: §727(a)(2)(A),[4] based on the Debtor's failure to keep or preserve recorded information from which his financial condition or business transactions might be ascertained (Compl. ¶¶ 35-38); § 727(a)(4) and § 727(a)(7), based on the Debtor's false oaths or accounts in his Bankruptcy Case and his false or misleading testimony in various hearings held over the course of his multiple bankruptcies (Compl. ¶¶ 39-44); and § 727(a)(5), based on the Debtor's failure to explain his loss of assets, including the loss of the cattle that secured the October 2013 Note (Compl. ¶¶ 45-47).

In Counts IV and V, FFB asked the Court to enter a non-dischargeable judgment against the Debtor in the amount of $318,852.53 pursuant to: § 523(a)(2)(A), based on the Debtor's unauthorized sale of the cattle that secured the October 2013 Note (Compl. ¶¶ 48-60) and § 523(a)(6), based both on the Debtor's unauthorized sale of the cattle and his removal, whether directly or indirectly, of certain fixtures and/or accessions from the Sebastopol Property (Compl. ¶¶ 61-65). In both Counts IV and V, the total amount of the non-dischargeable judgment sought by FFB includes all amounts owed by the Debtor pursuant to the various loans and guaranties

[4] All statutory citations are to the U.S. Bankruptcy Code located at title 11 unless otherwise noted.

executed by him in the amount of $120,581.81, plus all attorneys' fees incurred by FFB since early 2014 for state court litigation, bankruptcy court litigation, foreclosures, and other actions taken to collect the loans and enforce its liens in the amount of $198,270.72. (Compl. ¶¶ 58-60, 65).

On February 2, 2018, the Debtor filed the Answer to Adversary Complaint (the "Answer") (Adv. Dkt. 7). In the Answer, the Debtor denied that the October 2013 Note was secured by fifty (50) head of cattle and all other allegations by FFB regarding the Replevin Action, the release of the cattle to the Debtor, and the sale/loss of the cattle. (Answer ¶¶ 3, 6). The Debtor also denied FFB's allegations about the removal of the fixtures and/or accessions from the Sebastopol Property. (Answer ¶ 10). Finally, he denied FFB's calculations of the amounts owed on the loans after the foreclosures and as well as all of FFB's dischargeability allegations. (Answer ¶¶ 10, 12). He admitted all other allegations regarding the loans, the collateral for the loans, and the amounts owed as of the date of the Petition. (Answer ¶¶ 1-2, 4-5, 7, 9, 11).

G. Motion

On July 6, 2018, FFB filed the Motion seeking summary judgment on Count III, IV, and V, consisting of its dischargeability claims under § 727(a)(5), § 523(a)(2)(A), and § 523(a)(6). FFB does not seek summary judgment as to any other claims asserted in its Complaint under § 727(a). (Mot. at 15 n.4). On July 26, 2018, the Debtor, acting *pro se*, filed the Motion for Additional Time to Respond to Motion for Summary Judgement (the "Motion for Time") (Adv. Dkt. 15). FFB opposed the Motion for Time. (Adv. Dkt. 16). On July 27, 2018, the Court entered an order extending the deadline for the Debtor to file a response to the Motion until August 13, 2018. (Adv. Dkt. 17). On August 10, 2018, the Debtor, acting *pro se*, filed a second Motion for Additional Time (the "Second Motion for Time") (Adv. Dkt. 19), alleging that he had retained Craig Geno ("Geno") to represent him in the Adversary but that Geno was unavailable to meet

with him until August 18, 2018. The Debtor requested additional time until August 20, 2018, to allow Geno to prepare and file a response to the Motion. FFB opposed the Second Motion for Time. (Adv. Dkt. 20). At a telephonic hearing on August 16, 2018, Geno informed the Court that he did not represent the Debtor in this matter, that the Debtor had contacted him just last week, and that he had agreed only to meet with him on August 18, 2018. The Debtor was unable to explain the contradiction between Geno's statements and the allegations in the Second Motion for Time. Because the factual basis for the Second Motion for Time was untrue and because the Debtor was provided ample opportunity to retain legal counsel, the Court denied the Second Motion for Time. In the Order Denying Second Motion for Additional Time to Respond to Motion for Summary Judgment (Adv. Dkt. 23), the Court informed the parties that it would consider the Motion without any response having been filed by the Debtor.

Discussion

A. Summary Judgment Standard

In resolving a motion for summary judgment, a court may consider a fact undisputed "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c)." FED. R. CIV. P. 56(e). The Debtor failed to file any response to the Motion. The Debtor's failure to contest any of the facts asserted by FFB results in those facts, as supported by the evidence, to be undisputed. "Rule 56 does not impose a duty on [a court] to sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996). Still, FFB has the initial burden of demonstrating the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If FFB fails to meet its initial burden, the Motion must be denied even though the Debtor failed to

file a response. Ultimately, the role of this Court is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *see Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000).

Finally, the Court notes that even if the standards of Rule 56 have been met, the Court "has the discretion to deny motions for summary judgment and allow parties to proceed to trial so that the record might be more fully developed for the trier of fact." *Hall v. Desper (In re Desper)*, No. 09-05051-NPO, 2010 WL 653864, at *6 (Bankr. S.D. Miss. Feb. 9, 2010); *see also Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 (5th Cir. 2012) (quoting *Anderson*, 477 U.S. at 255); *River Region Med. Corp. v. Wright*, No. 3:13-cv-00793-DPJ-FKB, slip op. at 4-6 (S.D. Miss. Aug. 5, 2014) (affirming interlocutory order denying summary judgment); *Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Expl. Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989). Indeed, this Court previously has denied summary judgment to allow the parties to develop the facts at trial. *Good Hope Constr., Inc. v. RJB Fin., LLC (In re Grand Soleil-Natchez, LLC)*, No. 12-00013-NPO, slip op. at 33 (Bankr. S.D. Miss. Aug. 13, 2013).

B. Dischargeability

FFB seeks summary judgment on the dischargeability claims asserted in the Complaint under § 523(a)(2), § 523(a)(6), and § 727(a)(5). As a preliminary matter, the Court notes that the scope of § 523 is narrower than § 727. Section 523 excepts only specific debts from discharge, whereas § 727 prevents a debtor from discharging all of his debts in the Bankruptcy Case. *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1589 (2016) (describing § 523(a)(2)(A) as providing "a tailored remedy for behavior connected to specific debts" and § 727(a)(2) as providing "a blunt

remedy for actions that hinder the entire bankruptcy process"). The Court considers first FFB's dischargeability claims under the narrower scope of § 523.

1. § 523(a)

A bankruptcy court cannot declare a debt nondischargeable until the creditor establishes the existence and amount of that debt. It does not appear that any judgment has been entered against the Debtor for the amounts due FFB under the five loans. The Motion thus involves a two-step process: (1) the establishment of the debt owed FFB under Mississippi law and (2) a determination of the dischargeability of that debt under bankruptcy law. *See Morrison v. W. Builders of Amarillo, Inc. (In re Morrison)*, 555 F.3d 473, 478-79 (5th Cir. 2009) (holding that bankruptcy courts have both subject matter jurisdiction and the constitutional authority to liquidate state-law claims as part of the adjudication of any dischargeability issue); *see also Saenz v. Gomez (In re Saenz)*, No. 17-41004, 2018 WL 3746810 (5th Cir. Aug. 7, 2018); *Countrywide Home Loans, Inc. v. Cowin (In re Cowin)*, 492 B.R. 858, 887 (Bankr. S.D. Tex. 2013) (finding that *Stern v. Marshall*, 564 U.S. 462, 479-80 (2011), left intact a bankruptcy court's authority to fully adjudge state-law claims in dischargeability actions).

Ogletree's testimony is undisputed that the loans were in default as of the Petition date and that the Debtor owed FFB $445,501.04, in cumulative principal and interest, as of the date of the Petition, less the pre-petition liquidation of the Kosciusko Property. Following the post-petition liquidation by FFB of the Carthage Property and the Sebastopol Property, the Debtor currently owes FFB the cumulative sum of $120,581.81. For each loan, the amount the Debtor owes FFB is as follows:

Note	Amount Owed
Oct. 2007	$0.00
Feb. 2010[5]	$54,058.54
Aug. 2010	$29,518.13
Oct. 2013	$4,680.14
Jan. 2014	$32,325.00
TOTAL	$120,581.81

FFB opposes the discharge of any portion of the total debt owed by the Debtor, a matter addressed later in this Opinion with respect to FFB's claims under § 523(a)(2)(A) and § 523(a)(6).

FFB also requests an award of attorneys' fees of no less than $198,270.72, which it incurred both pre-petition and post-petition in attempting to collect the debt. In support of its claim for attorneys' fees, FFB points to the provisions in the deeds of trust in which the Debtor agreed to pay "all expenses of collection, enforcement or protection of [FFB's] rights and remedies" on or after a default as well as its reasonable attorneys' fees incurred by [FFB] to protect [its] rights and interest in connection with any bankruptcy proceedings." (FFB Ex. 1 at 9; FFB 5 at 9; FFB 6 at 13, 26, 39; FFB 3 at 20; FFB Ex. 4 at 13).

FFB's attorneys' fees are includable in any judgment to be collected from the Debtor personally, as opposed from the bankruptcy estate, as to any debt deemed nondischargeable. *See Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998) (holding that nondischargeable debt encompasses not only the debt created by fraud but also any award of attorneys' fees). Whether FFB is entitled to its reasonable attorneys' fees from the bankruptcy estate depends on its status as an oversecured

[5] This amount will change if and when FFB forecloses on the Meridian Property. *See Competition Marine of MS, Inc. v. Whitney Bank*, 220 So. 3d 1019, 1023 (Miss. Ct. App. 2017) (holding that in Mississippi, a lender may sue upon a note before foreclosing on its collateral).

creditor. *See* 11 U.S.C. § 506(b); *Wells Fargo Bank, N.A. v. 804 Congress, L.L.C. (In re 804 Congress, L.L.C.)*, 756 F.3d 368 (5th Cir. 2014).

FFB has not provided any evidence for the Court to rule on summary judgment regarding its status as an oversecured or undersecured creditor. Moreover, FFB did not provide an itemization indicating the amount of fees it incurred prepetition in enforcing its rights under the deeds of trust, as opposed to its rights under any security agreement granting it a lien on the cattle, for which there does not appear to be a contractual provision entitling it to its reasonable attorneys' fees. It is thus premature to examine the reasonableness of the amount of the attorneys' fees requested or to determine the amount to which FFB is contractually entitled to recover under the deeds of trust or any security agreement. The Court, therefore, will require FFB to submit a fee itemization and other documents clarifying its entitlement to the full amount it seeks.

a. § 523(a)(2)(A)

Under § 523(a)(2)(A), a debtor is not discharged from any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . 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). There are three independent grounds for nondischargeability listed in § 523(a)(2)(A). To establish a claim for false representation under § 523(a)(2)(A), a creditor must prove by a preponderance of the evidence: "(1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the representation was made with the intent to deceive the creditor; (4) that the creditor actually and justifiably relied on the representation; and (5) that the creditor sustained a loss as a proximate result of its reliance." *Gen. Elec. Capital Corp. v. Acosta (In re Acosta)*, 406 F.3d 367, 372 (5th Cir. 2005), *overruled on other grounds by Ritz*, 136 S. Ct. at 1586. A claim of false pretenses

similarly involves conduct intended to create or foster a false impression but differs from a claim of false representation in that it may be premised on misleading conduct without an explicit statement by the debtor. *Wright v. Minardi (In re Minardi)*, 536 B.R. 171, 187 (Bankr. E.D. Tex. 2015). The third ground for nondischargeability, actual fraud, covers forms of fraud, like fraudulent conveyance schemes, that do not involve a false representation. *Ritz*, 136 S. Ct. at 1586.

FFB seeks summary judgment on its § 523(a)(2)(A) claim under the first ground for nondischargeability based on the Debtor's representations in March 2014 regarding his intention to pay the October 2013 Note. The Debtor made the representations in question well after execution of the October 2013 Note. FFB does not allege that the loan was obtained as a result of the Debtor's fraud but, rather, that the October 2013 Note was extended as a result of his wrongful conduct. Indeed, § 523(a)(2)(A) covers more than the situation where a debtor obtains money or property by a false representation. It also covers situations where a debtor obtains "an extension, renewal, or refinancing of credit" by fraud. 11 U.S.C. § 523(a)(2)(A). The Court thus agrees with FFB that under these facts, where FFB alleges that it halted the cattle sale and returned the cattle to the Debtor based on his representations that he intended to pay the October 2013 Note, the loan was "extended" within the meaning of § 523(a)(2)(A). *Selenberg v. Bates (In re Selenberg)*, 856 F.3d 393, 397 (5th Cir. 2017) (recognizing that the Bankruptcy Code "protects the creditor who is deceived into forbearing collection efforts") (citation & quotation omitted). The next question is whether there is any genuine dispute that FFB was deceived by the Debtor into extending the October 2013 Note.

(1.) Did the Debtor make the representations knowing they were false and intending to deceive FFB?

In July, 2014, less than four months after assuring FFB of his intention to pay the October 2013 Note, the Debtor sold ten steers without FFB's consent and used the cattle proceeds to pay personal and business expenses. (FFB Ex. 8 at 12). He testified at his deposition that he could not recall whether FFB held a lien on any of the cattle but admitted that the documents indicated that he had granted FFB a lien on the cattle. Indeed, in an email dated March 12, 2014, Debtor's counsel advised FFB's counsel, "I have spoken to [the Debtor] who has authorized me to agree to the terms of the agreement in your previous email. I look forward to receiving drafts of the forbearance and related documents from you in a few days." (FFB Ex. 8 at 20). The Debtor was advised at his deposition of FFB's security interest in the cattle and was warned not to sell any additional cattle without its consent.

Q. Now if you go to sell them, I think you saw in the loan documents—

A. Yes, sir.

Q. —earlier that you need to consult with the bank on that. Right?

A. Yes, sir.

(FFB Ex. 8 at 16).

"A misrepresentation is fraudulent if the maker . . . knows or believes . . . the matter is not as represented, or does not have the confidence in the accuracy of his representation as stated or implied, or knows . . . he does not have the basis for his representation as stated or implied." *Higgins v. Nunnelee (In re Nunnelee)*, 560 B.R. 277, 285 (Bankr. N.D. Miss. 2016) (citing *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 407 (5th Cir. 2001)). The Fifth Circuit Court of Appeals has held that a debtor's promise to perform acts in the future is not a

misrepresentation within the meaning of § 523(a)(2)(A) merely because the debtor subsequently breaches his promise. *Bank of La. v. Bercier* (*In re Bercier)*, 934 F.2d 689 (5th Cir. 1991), *overruled on other grounds by Ritz*, 136 S. Ct. at 1586. The Fifth Circuit, however, also has held that a debtor's misrepresentation of his future intentions constitutes a false representation within the meaning of the dischargeability provision if he had no intention of performing as promised when he made the representation. *Allison v. Roberts (In re Allison)*, 960 F.2d 481, 484 (5th Cir. 1992). Under these circumstances where the Debtor admitted that he sold ten steers without FFB's knowledge and without tendering the proceeds to FFB and thus acted completely contrary to his previous representations to FFB (made less than four months earlier), the Court finds that the Debtor knew that his assurances to FFB that he intended to pay the October 2013 Note were false when he made them in March 2014 and that he intended to deceive FFB.

(2.) Did FFB justifiably rely on the representations and sustain a loss as a proximate result of its reliance?

There is no dispute that FFB actually and justifiably relied on the Debtor's misrepresentations. *Field v. Mans*, 516 U.S. 59, 70 (1995). Before releasing the cattle to the Debtor, FFB had no reason to believe that the Debtor did not intend to pay the October 2013 Note or that the Debtor intended to sell some of the steers less than four months later. *See Guion v. Sims (In re Sims)*, 479 B.R. 415, 425 (Bankr. S.D. Tex. 2012) (holding that a creditor has no duty to investigate a debtor's representation, unless the "falsity of the representation is readily apparent") (citing *Field*, 516 U.S. at 70-71). Based on the Debtor's assurances, FFB halted the cattle sale and released the cattle to the Debtor. FFB had a valuable collection remedy at the time of the misrepresentations but did not exercise that remedy because of the Debtor's fraud. FFB's remedy lost value, now that the Debtor has sold or otherwise disposed of the cattle.

(3.) Analysis

FFB has satisfied all of the elements of its nondischargeability claim for false representations under § 523(a)(2)(A). As set forth above, the Debtor's representations to FFB that he intended to pay the October 2013 Note, which he knew were false when he made them, induced FFB to halt the sale of the cattle and proximately caused FFB's injury after FFB justifiably relied on the Debtor's assurances that he would pay the October 2013 Note.

As to FFB's damages, FFB requests a nondischargeable judgment of $120,581.81, the total amount owed on all of the loans under § 523(a)(2)(A). "[A]ny liability arising from money, property, etc., that is fraudulently obtained, including treble damages, attorneys' fees, and other relief that may exceed the value obtained by the debtor" is excepted from discharge. *Cohen*, 523 U.S. at 223. The Debtor testified at his deposition that he sold ten steers for $8,900.00, which is $890.00 per steer. With a value of $890.00 per steer, FFB's loss at the time of the misrepresentation with respect to the fifty head of cattle was $44,500.00.[6] FFB has shown that the cattle secured payment of the October 2013 Note. Because the net pay off amount of the October 2013 Note is currently $4,680.14, FFB also has shown that it is entitled to a nondischargeable judgment in at least that amount. In the Motion, however, FFB requests a nondischargeable judgment in the amount of $120,581.81 without explanation as to why the amount of its damages under § 523(a)(2)(A) equals the total debt owed.[7] Each of the deeds of trust contains a cross-collateralization clause, but FFB has not pointed to any document containing a similar provision

[6] $44,500.00 = 50 × $890.00.

[7] Given that the Court concludes later in this Opinion that the Debtor is not entitled to a discharge of any of his debts under § 727(a)(5), the amount of FFB's nondischargeable judgment under § 523(a)(2)(A) is significant only in the event of a successful appeal of that decision.

regarding the cattle. Were the loans consolidated? Did the cattle secure the entire debt? The Court, therefore, will set an evidentiary hearing to determine the amount of the nondischargeable judgment under § 523(a)(2)(A).

b. § 523(a)(6)

Section 523(a)(6) provides that a debtor is not discharged from 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). The Supreme Court in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), held that debts arising from injuries recklessly or negligently inflicted do not fall within this exception to the discharge. In light of the *Geiger* ruling, the Fifth Circuit adopted a test for "willful and malicious injury" that distinguishes between acts intended to cause injury as opposed to those acts merely leading to an injury. *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998). A "willful . . . injury" meets the Supreme Court's definition where the debtor acted either with an objective substantial certainty of harm (an objective test) or a subjective motive to cause harm (a subjective test). *Miller*, 156 F.3d at 606; *see Williams v. Int'l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504 (5th Cir. 2003) (condensing test into a single inquiry). A "malicious injury" is an act done with the actual intent to cause injury. A court may infer malice under § 523(a)(6) if the debtor acts "in a manner which one knows will place a lender at risk, such as converting property in which the lender holds a security interest." *Theroux v. HSA Mortg. Co. (In re Theroux)*, No. 94-50530, 1995 WL 103342, at *3 (5th Cir. Feb. 27, 1995). FFB seeks summary judgment on its § 523(a)(6) claim based on: (1) the Debtor's sale of the ten steers out of trust and the loss of the other forty head of cattle and (2) the removal of fixtures and a shed from the Sebastopol Property.

(1.) Sale/Loss of Cattle

In his deposition, the Debtor acknowledged that FFB held a security interest in the cattle. He also acknowledged that he previously negotiated a forbearance agreement as a condition for FFB's release of the cattle in March 2014. He admitted selling ten steers after that negotiation and stated that he understood he could sell cattle only after consulting with FFB. (FFB Ex. 8 at 16). Yet he sold or otherwise disposed of the forty head of cattle without FFB's knowledge or consent and without turning over the proceeds of any sale of the cattle to FFB. This undisputed evidence supports a finding that the Debtor's actions in converting the collateral were objectively and substantially certain to harm FFB.

This finding is supported by *Meridian Prod. Credit Ass'n v. Hendry* (*In re Hendry)*, 77 B.R. 85 (Bankr. S.D. Miss. 1987). There, Milus Wesley Hendry ("Hendry") was a cattle farmer who, beginning in 1981, obtained a series of loans from the Meridian Production Credit Association ("PCA") to purchase cattle. *Id.* at 86. For each loan, Hendry and PCA entered into a security agreement listing the cattle as collateral. The most recent agreement contained an after-acquired property clause securing any additional cattle as well as proceeds. All transactions between Hendry and PCA were handled rather loosely. *Id.* at 90. For example, although the security agreements required PCA's written permission before the sale of any cattle subject to its lien, PCA waived this requirement with the understanding that Hendry would remit all sales proceeds to PCA. *Id.* at 87.

PCA was not Hendry's only lender. Hendry obtained loans from lenders other than PCA to purchase cattle and for each loan entered into a similar security agreement. Hendry testified that when he sold cattle, including PCA's collateral, he ignored the security agreements and paid

the lender that was pressing him the most for payment, with some of the sale proceeds paying for his farming operations.

In February, 1983, a representative of PCA visited Hendry to take an inventory of the cattle and to discuss the possibility of another loan. Hendry took the PCA representative to different locations on his farm and showed him approximately 1,000 head of cattle. As Hendry later admitted, he already had sold the last of PCA's cattle in 1982 so that none of the cattle that PCA inventoried for its records were subject to its security interest. In fact, Hendry admitted that he did not even own all of the cattle counted by PCA.

In the action brought by PCA challenging the dischargeability of Hendry's debt under § 523(a)(6), the bankruptcy court concluded that Hendry intentionally and deliberately, and thus willfully, converted PCA's collateral. *Id.* at 90. Additionally, the bankruptcy court found that Hendry's conduct was malicious in fact, in that his conversion of PCA's collateral resulted in harm to PCA. *Id.* at 91. The bankruptcy court thus concluded that the debt owed PCA fell under the "willful and malicious" exception to discharge in § 523(a)(6). Similarly, the Court finds that the Debtor converted FFB's collateral either with the subjective intent to cause injury to FFB or with the knowledge that an injury to FFB was substantially certain to result.

(2.) Removal of Fixtures and Shed

FFB asks the Court to assume that the Debtor or someone acting on his behalf removed the fixtures and the storage shed from the Sebastopol Property because of the timing of the damage, the Debtor's conversion of its cattle, and his "well-known pattern of behavior." (Adv. Dkt. 12 at 4 n.1). The standard of proof in all § 523(a) dischargeability actions is preponderance of the evidence standard. *Grogan v. Garner*, 498 U.S. 279, 286-88 (1991). In the absence of any evidence disputing FFB's allegations, the Court finds that it is more likely true than not that the

Debtor damaged the Sebastopol Property with the subjective intent to cause injury to FFB or with the knowledge that an injury to FFB was substantially certain to result.

(3.) Analysis

FFB has satisfied all of the elements of its nondischargeable claim for a willful and malicious injury by the Debtor under § 523(a)(6). In the Motion, FFB requests a nondischargeable judgment of $120,581.81, the total amount of the debt owed on all of the loans under § 523(a)(6).

The Fifth Circuit in *Friendly Finance Service Mid-City, Inc. v. Modicue (In re Modicue)*, 926 F.2d 452 (5th Cir. 1991), held that willful and malicious injury claims are recoverable to the extent of the fair market value of the collateral at the time of the unlawful disposition. In *Modicue*, the creditor loaned the debtors money and in exchange, the debtors gave the creditor a security interest in certain personal property valued at $1,300.00. The debtors later sold the collateral at a rummage sale for approximately $120.00 without informing the creditor or tendering the proceeds from the sales to the creditor. When the debtors filed for bankruptcy, the balance on the note was $3,590.55. In an adversary proceeding instituted by the creditor, the bankruptcy court found that the debtors had willfully and maliciously injured the creditor and awarded the creditor a nondischargeable judgment in the amount of $865.00, the fair market value of the collateral at the time of the rummage sale. The creditor appealed, arguing that it was entitled to a nondischargeable judgment in the entire amount of the debt. The Fifth Circuit determined that the appropriate measure of damages for non-dischargeability claims under § 523(a)(6) was "an amount equal to the injury caused by the debtor rather than any other sum owed by the debtor on a contractual basis." *Id.* at 453. The Fifth Circuit reasoned that any other construction of the statute would allow the creditor to improve its position in the bankruptcy case because of the debtor's wrongful conduct.

Applying *Modicue* with respect to the cattle, the Court finds that the value of the missing or sold cattle at the time of the unlawful disposition was $44,500.00. With respect to the Sebastopol Property, Ogletree testified that the Sebastopol Property lost value because of the removal of the fixtures and the storage shed, but he did not state a specific amount of damages. Instead, he testified that before the Debtor removed these items, a potential bidder was interested in buying the Sebastopol Property for an amount higher than what the Debtor owed FFB on the August 2010 Note. As with FFB's § 523(a)(2)(A) claim, the Court finds it necessary to hold an evidentiary hearing to determine the amount of FFB's nondischargeable judgment under § 523(a)(6).[8]

2. § 727(a)(5)

Consistent with the "fresh start" policy of the Bankruptcy Code, a debtor generally is entitled to a discharge of all debts that arose prior to the filing of the bankruptcy petition unless a specific condition is met. Section § 727(a)(5) provides that the court shall grant the debtor a discharge unless "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities." 11 U.S.C. § 727(a)(5). FFB seeks summary judgment denying the Debtor a discharge under § 727(a)(5) on the ground that he failed to explain satisfactorily the loss of assets of the estate.[9]

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[8] *See supra* note 7.

[9] In the Complaint, FFB also asked the Court to deny the Debtor a discharge under § 727(a)(2), § 727(a)(4), and § 727(a)(7), but it does not seek summary judgment on those alleged claims in the Motion. (Adv. Dkt. 11 at 15 n.4).

A party objecting to a discharge under § 727(a)(5) has the initial burden of establishing a *prima facie* case by proving that the debtor previously possessed substantial assets that are now no longer available for distribution to creditors. *Chu v. Texas (In re Chu)*, 679 F. App'x 316, 319 (5th Cir. 2017); *First Tex. Sav. Ass'n, Inc. v. Reed (In re Reed)*, 700 F.2d 986, 992 (5th Cir. 1983). Once the creditor establishes a *prima facie* case, the burden shifts to the debtor to provide a satisfactory explanation for the loss of assets. *Id.*

A satisfactory explanation in the context of § 727(a)(5) "need not be meritorious to be satisfactory." *Cadlerock Joint Venture II, L.P. v. Robbins (In re Robbins)*, 386 B.R. 636, 643 (Bankr. W.D. Ky. 2008) (citing *Great Am. Ins. Co. v. Nye (In re Nye)*, 64 B.R. 759, 762-63 (Bankr. E.D.N.C. 1986)). The explanation need only satisfactorily account for the disposition. *First Nat'l Bank of Amarillo v. Holmes (In re Holmes)*, 121 B.R. 505, 508 (Bankr. N.D. Tex. 1990). "[T]he test under 11 U.S.C. § 727(a)(5) relates to the credibility of the proffered explanations, not the propriety of dispositions." *First Am. Bank of N.Y. v. Bodenstein (In re Bodenstein)*, 168 B.R. 23, 34 (Bankr. E.D.N.Y. 1994).

> [T]he word "satisfactorily" . . . may mean reasonable, or it may mean that the court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [debtors] say with reference to the disappearance or shortage. He is satisfied. He no longer wonders. He is contented.

Cadle Co. v. Orsini (In re Orsini), 2008 WL 3342017, at *5-6 (5th Cir. Aug. 11, 2008) (citing *Reed*, 700 F.2d at 993). A debtor's failure to justify a substantial loss of assets need not be the product of fraudulent intent.

A "[l]ack of wisdom in the debtor's expenditures, by itself, is not grounds for denial of a discharge." *Cadlerock Joint Venture, L.P. v. Sauntry (In re Sauntry)*, 390 B.R. 848, 857 (Bankr. E.D. Tex. 2008). Thus, the proper question the Court must ask under § 727(a)(5) is what happened

to the assets, not why it happened. *Wood v. Bush (In re Bush)*, Adv. Proc. 17-06019-EWM, slip op. at 25 (Bankr. S.D. Miss. May 16, 2018) ("The Bankruptcy Code does not have a morality clause."); *Bodenstein*, 168 B.R. at 34. In providing an explanation for any missing assets, a debtor must satisfy the court that the creditors have no cause to wonder where the assets went. The debtor may meet this burden by providing his "good faith and businesslike conduct" in connection with the missing assets. *Weatherall Radiation Oncology v. Caletri (In re Caletri)*, 517 B.R. 655, 671 (Bankr. E.D. La. 2014). "Vague and indefinite explanations of losses that are based upon estimates uncorroborated by documentation are unsatisfactory." *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984).

FFB has established that the Debtor possessed fifty head of cattle and sold ten steers at auction to an unidentified buyer, but that the whereabouts of the remaining forty head of cattle are unknown. At his deposition, the Debtor testified that he kept some cattle at his farm and some at his home. (FFB Ex. 8 at 12). In his bankruptcy schedules, he denied owning any farm animals. The Debtor's failure to respond to the Motion means that he has failed to offer any explanation whatsoever for the missing forty cattle. His explanation as to the loss of the ten steers is less than satisfactory in that he failed to identify the buyer or provide any documentation of the sale. But cattle are not small possessions that may be easily moved and sold without the Debtor's knowledge. This disappearance of substantial assets in both number and volume, in the absence of any evidence from the Debtor as to the current whereabouts or disposition of the forty head of cattle, establishes FFB's § 727(a)(5) claim as a matter of law. The Court, therefore, finds that the Debtor should be denied a discharge of all of his debts in the Bankruptcy Case. This decision makes it unnecessary for the Court to consider whether the Debtor's discharge should be denied under FFB's remaining claims under § 727(a)(2), (a)(4), and (a)(7).

Conclusion

For the reasons stated above, the Court finds that there is no genuine issue of material fact and that FFB is entitled to summary judgment as a matter of law on its nondischargeability claims as to the issue of liability under § 523(a)(2)(A) and § 523(a)(6). The Court will set an evidentiary hearing to determine the amount of the nondischargeable judgment under § 523(a)(2)(A) and § 523(a)(6). Additionally, the Court finds that there is no genuine issue of material fact and that FFB is entitled to summary judgment as a matter of law on its nondischargeability claim under § 727(a)(5). As to the issue of attorneys' fees, the Court will require FFB to submit a fee itemization and, if needed, will consider the matter at the evidentiary hearing set to determine the amount of the nondischargeable judgment under § 523(a)(2)(A) and § 523(a)(6).

IT IS, THEREFORE, ORDERED that FFB is entitled to a nondischargeable judgment against the Debtor under § 523(a)(2)(A) and § 523(a)(6). The Court will set, by separate order, an evidentiary hearing as to the amount of the nondischargeable judgment under each of these sections.

IT IS FURTHER ORDERED that the Debtor is denied a discharge of all of his debts in the Bankruptcy Case under § 727(a)(5).

IT IS FURTHER ORDERED that FFB shall file within fourteen (14) days an itemization of its attorneys' fees. *See* MISS. BANKR. L.R. 7054-1. The Court will determine from the itemization the amount of attorneys' fees to include in the amount of the nondischargeable judgment under § 523(a)(2)(A) and § 523(a)(6) and also the total amount of the nondischargeable debt owed FFB under § 727(a)(5). If necessary, however, the Court also will consider the amount of attorneys' fees at the evidentiary hearing set to determine the amount of the nondischargeable judgment under § 523(a)(2)(A) and § 523(a)(6).

The Court will not enter a separate final judgment until after the evidentiary hearing and after final resolution of the amount of: (1) each nondischargeable judgment under § 523(a)(2)(A) and § 523(a)(6), and (2) FFB's reasonable attorneys' fees under § 523(a)(2)(A), § 523(a)(6), and § 727(a)(5).

##END OF OPINION##