UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

KEVIN P. KIBLER 93-11025 B

Debtor

MOOG EMPLOYEES FEDERAL CREDIT UNION,

Plaintiff

v. AP 93-1186 B

KEVIN P. KIBLER,

Defendant

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Bucki, U.S.B.J.

In all aspects of life, humankind strives to achieve a state of being in which the whole equals more than the sum of its parts. At times, however, we are left with disjointed parts having only a resemblance to the original whole. Such a condition is common to bankruptcy, but seldom so graphically as in the present case.

Moog Employees Federal Credit Union initiated this adversary proceeding to determine the dischargeability of an obligation that was to have been secured by a 1970 Chevrolet Camero Z-28. The debtor, Kevin P. Kibler, acquired this vehicle in March of 1987 for $6,500. To finance this purchase, Mr. Kibler borrowed $6,000 from Moog Employees Federal Credit Union, and granted to the Credit Union a security interest in the vehicle. As a classic automobile and collectible,

this particular car was thought to enjoy the prospect of appreciating value. After adding improvements to upgrade the vehicle, Mr. Kibler supplied the Credit Union with appraisals which respectively showed the car to have a value of $12,500 and $16,500. Based upon these appraisals, the Credit Union advanced additional monies, and later agreed to an extension of the repayment terms. Having properly perfected its lien, the Credit Union had reason to believe that its loan position was fully protected.

When Kevin P. Kibler filed a petition for relief under Chapter 7 on April 2, 1993, he owed Moog Employees Federal Credit Union an outstanding balance of $7,162.96. The Credit Union soon discovered, however, that its collateral was substantially dissipated. Kibler testified that at a point in time, the car had begun to experience engine difficulties. In an attempt to identify the source of that problem, the debtor dismantled the vehicle. Apparently, he then either lost interest or was unable successfully to reassemble the various parts. For whatever reason, the car was never put together again. Instead, Mr. Kibler sold certain of the components as spare parts. By the time that the Credit Union was prepared to repossess its collateral, little was left but a shell. In his schedules, the debtor admits that the residual parts collectively had a value of zero. Facing a total loss of its security, the Credit Union contends that the debt is nondischargeable under the provisions of 11 U.S.C. §523(a)(2), (4), and (6).

This court rejects the notion that the debt is non-dischargeable under either subdivision 2 or 4 of section 523(a). Subdivision 2 of this section precludes a discharge of loans obtained through means of fraud or through use of false pretenses, or false representations, or use of a statement that is materially false. The Credit Union contends that it extended the term of the loan in reliance upon an excessively high appraisal. Section 523(a)(2) relates only to the creation of the current credit relationship. For relief under this section, a plaintiff must establish a causal connection between the misrepresentation and the loss suffered. *In re Arterburn*, 15 B.R. 189, 192 (Bkrtcy. W.D. Okla. 1981). In the present case, the Credit Union fails to demonstrate that the appraised value was false at the time

of the loan or its extension.[1] Surely, the subsequent value of its residual parts can hardly serve as evidence of the falsity of an appraisal submitted to show value as an operating vehicle. The Credit Union also fails to demonstrate that any such misrepresentation was a proximate source of financial loss. It extended no new money on the occasion of its final loan modification. Inasmuch as the debtor was already unemployed at the time of the modification, the creditor's forbearance arguably served only to forestall a probable loss, rather than to enlarge the risk of loss. This is not to say that the mere forbearance of an existing obligation can never entail financial loss. In the present circumstance, however, the Credit Union has made no showing that the misleading appraisal caused it to suffer losses greater than those which it would have otherwise incurred.

With respect to subdivision 4 of section 523(a), the Credit Union urges that its claim is nondischargeable because it arises from an embezzlement by the debtor. As this Court explained recently in its decision in *In re Contella*, 166 B.R. 26 (Bkrtcy. W.D.N.Y. 1994), embezzlement involves the appropriation of property belonging to another person or entity. Title to the property here at issue rested with the debtor. As owner, he simply could not embezzle from himself.

Ownership may have its privileges, but those privileges can never justify a deliberate and malicious injury to the property interests of a secured creditor. For this reason, the Credit Union correctly invokes the protection of 11 U.S.C. § 523(a)(6), which exempts from discharge any debt "for willful and malicious injury by the debtor to the property of another entity." In this instance, Moog Credit Union extended credit based upon the existence of a functional automobile as collateral. By itself, the dismantling of the vehicle did not constitute a malicious injury. Surely, a lienor would anticipate that any machine might be disassembled for repair purposes. Moreover, this particular car was a "show vehicle." Inherent to that character is an expectation that the vehicle would be subject to constant tinkering and refinement. The very purpose for ownership is not transportation, but the

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[1] *See Goldberg Securities, Inc. V. Scarlata (In re Scarlata)*, 127 B.R. 1004, 1010 (N.D. Ill. 1991).

creative opportunity for artistic display of a mechanical masterpiece. The Credit Union knew, or at least should have known, that the car would be disassembled.

Had the debtor merely dismantled the car without the disposition of any parts, this Court would be unable to find any willful and malicious injury. Nothing in the present record indicates that the debtor initiated the disassembly with a malicious intent never to reassemble the parts. The testimony indicates that he decided not to attempt reassembly only after discovering that he could not readily repair the engine. Rather, the willful and malicious injury occurred when the debtor chose to sell the parts rather than to make them available for reassembly as a vehicle in need of repair. Once the vital parts were removed, no mechanic could restore its value. Accordingly, the debtor's disposition of the parts constituted a willful and malicious injury, thereby creating a claim that is nondischargeable.

The Credit Union argues that the debtor's willful and malicious conduct caused it to lose the entire value of its collateral, that that value exceeded the outstanding loan balance, and that as a consequence, its entire claim should be deemed nondischargeable. On the other hand, the debtor would contend that the willful and malicious conduct was wrongful only with regard to the disposition of used parts. Having already paid the proceeds of the parts sales to the Credit Union, the debtor now asserts that it has already reimbursed the value of any unjust enrichment that the debtor may have realized , and that accordingly, the Court should not attribute any portion of the outstanding loan balance to any wrongful and malicious conduct.

Section 523(a)(6) extends nondischargeable status only to the debt for willful and malicious injury. Having rejected the claim for nondischargeability under section 523(a)(4), this Court is not prepared to hold that the Credit Union's entire claim must thereby become nondischargeable. Rather, a nondischargeable status attaches only to that portion of the total claim which may be attributed to the debtor's willful and malicious conduct. Nor can the debtor confine nondischargeability to the limits of his unjust enrichment. The defining factor is the extent to which the debtor's wrongful activity causes a reduction in the Credit Union's recovery from its collateral.

A lien can provide security only for the value of the underlying collateral. For this reason, the value of collateral at the moment of the debtor's willful and malicious conduct will establish the limits of the nondischargeability of what would otherwise have constituted a secured claim.[2] In the present case, the debtor's wrongful and malicious conduct occurred when he sold parts necessary for reassembly of the vehicle. As noted earlier, this Court finds no wrongfulness in the disassembly of those parts, that being an act that the parties should have contemplated at the time that the Credit Union granted the loan. While it is most unfortunate that the debtor chose not to accomplish that reassembly himself, this Court cannot find malice in his refusal to do so.

The Credit Union's nondischargeable claim, therefore, is limited to the value of all components collected and available for reassembly, as they existed immediately prior to their piecemeal liquidation. As to the calculation of this value, the evidence is inadequate at best. In an environment in which components are scarce, additional value attaches from the availability of all or most of the compatible parts needed to complete the unit. For this reason, the price that the debtor received from his sale of parts is not a fair indication of value even without assembly. On the other hand, the value as a tested and functioning whole cannot compare to the value of all of the parts. For this reason, the Court cannot attach reliability to the earlier appraisals obtained when the unit was assembled and had a functional engine.

Both parties agree that the remaining collateral has no value. Neither party, however, offers any convincing proof of liquidation value prior to the piecemeal dissipation of the parts. During discussions in chambers, both counsel agreed that they did not wish to submit further proof and urged the court to ascertain a value from the limited evidence that was available.

Based upon all of the evidence presented, the Court finds that if the debtor had not sold the various components, the Credit Union would have realized a net recovery after costs of

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[2]In the present instance, the debtor's willful and malicious conduct relates to use of collateral, rather than to the underlying claim. When a debtor acts in willful and malicious ways having no relation to the collateral, the Court's review will necessarily focus upon different considerations.

liquidation of no more than $3,300. The debtor testified that from the proceeds of his sale of parts, he paid the sum of $900 to the Credit Union. This sum should be applied as a credit against what would otherwise have been the Credit Union's recovery. Accordingly, the damages resulting from the debtor's willful and malicious conduct total $2,400. This sum shall be deemed nondischargeable.

So ordered.

Dated: Buffalo, New York
September 30, 1994

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U.S.B.J.