IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE FRANK C. PEASE, Debtor. JEFFERSON FINANCIAL SERVICES, INC., Plaintiff/Counterdefendant, v. FRANK C. PEASE, Defendant/Counterplaintiff.	U.S. Bankr. Ct. District of Connecticut Case No. 93-53692 Chapter 7 Adv. Pro. No. 94-2126

M E M O R A N D U M

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

(5)

This adversary proceeding is before the court on a motion for summary judgment filed by the plaintiff, Jefferson Financial Services, Inc. ("JFS"), on January 13, 1995, wherein JFS asserts that the debtor's guilty pleas in state criminal court proceedings and his resulting convictions of the felonies "Hindering Secured Creditors" and "Attempt to Commit Aggravated Perjury" are sufficient as a matter of law to deny the debtor a discharge pursuant to 11 U.S.C. § 727(a)(2), or at the least, to deny the discharge of the debts owed to JFS by the debtor pursuant to 11 U.S.C. § 523(a)(6). For the reasons set forth below, the court will deny the motion to the extent JFS seeks a denial of discharge, but will grant the motion with respect to the debts alleged in *Counts 2* and *4* of the complaint, the convictions having established all the necessary elements to deny dischargeability of these debts.

I.

As set forth in the complaint, between October, 1991, and May, 1993, JFS made a series of loans and renewals of loans to the debtor in various amounts, with some of the loans being secured by the grant of a security interest in certain personal property of the debtor, including a 24-inch Enterprise Power Planer. Thereafter, on November 17, 1993, the debtor initiated this case by filing a chapter 7 petition in the United States Bankruptcy Court for the District of Connecticut. Subsequent to his bankruptcy

filing, the debtor was indicted by the Hamblen County, Tennessee grand jury on February 14, 1994, on two felony charges. The first indictment alleged that the debtor violated TENN. CODE ANN. § 39-14-116 by committing the offense of "Hindering Secured Creditors" in that he, on September 18, 1992, "did unlawfully, with intent to hinder enforcement of a security interest, security agreement or lien on a 24-inch Enterprise Power Planer (serial no. 70233) held by Jefferson Financial Services, remove, conceal and transfer the property of which the defendant claimed ownership ...." The second indictment charged the debtor with "Aggravated Perjury", asserting that on or about July 19, 1993, the debtor "did unlawfully, with intent to deceive, make a false material statement, under oath, during an official proceeding in the General Sessions Court for Hamblen County[1] by testifying that he had not sold any collateral given to Jefferson Financial Services as security for a loan when in fact the defendant had sold collateral to Conasauga River Lumber Co. on September 18, 1992 in violation of TENN. CODE ANN. § 39-16-703 ...."

On December 12, 1994, the debtor pled guilty to the charge of Hindering Secured Creditors and was sentenced to one year in the

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[1]Neither the complaint nor the motion for summary judgment provide any information about this proceeding, such as what type of proceeding it was, how it came about or what parties were involved. In fact, the complaint, the motion, and the answer give few details regarding the events which transpired between the debtor and JFS, although copies of the promissory notes and security agreements evidencing the loans were attached to the complaint and certified copies of the indictments and criminal judgments were attached to the motion for summary judgment. Despite this scarcity of detail, sufficient evidence is before the court to enable it to rule on JFS's pending motion as set forth in this memorandum.

Hamblen County jail. He was also ordered to pay restitution in the amount of $16,460.29.[2] With respect to the charge of Aggravated Perjury, the debtor pled guilty to an amended charge of "Attempt To Commit Aggravated Perjury"[3] and again was sentenced to a one-year imprisonment, with the sentence to run concurrently with his sentence on the other conviction.

The complaint initiating this adversary proceeding objecting to discharge and seeking a determination of dischargeability of debts was filed by JFS on April 25, 1994. The complaint details the various transactions with the debtor in fifteen counts and asserts, *inter alia*, that the debtor furnished materially false financial statements to JFS to induce it to make the loans to the debtor; that the debtor sold the power planer in which JFS had a security interest with the intent to defraud JFS; that with respect to two of the loans, the debtor gave JFS a security interest in the

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[2]In its motion for summary judgment, JFS makes the statement that the debt for restitution is nondischargeable. Despite this assertion, the issue of the dischargeability of the restitution debt is not before this court because the complaint filed by JFS does not request a determination of nondischargeability with respect to this debt. This absence, however, is understandable because the restitution obligation is a post-petition debt, having arisen on December 12, 1994, the day restitution was ordered by the court, more than a year after the debtor's chapter 7 case was filed on November 17, 1993. Thus, being a post-petition debt, it will not be discharged by any discharge order entered in this case. *See* 11 U.S.C. § 727(b). Additionally, JFS is correct that restitution obligations imposed as part of a criminal sentence are nondischargeable. *See Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

[3]The court assumes that the guilty plea to the lesser charge of Attempt To Commit Aggravated Perjury was the result of a plea bargain, although again the record does not provide this information.

power planer when it had already been sold; and that the debtor concealed the transfer of the power planer by falsely testifying that it had not been sold. JFS alleges in the complaint that because of these acts the debtor should be denied a discharge pursuant to 11 U.S.C. §§ 727(a)(2), (3), (4), and (5), and that the debts arising out of these transactions are nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B) and (a)(6). The debtor filed an answer to the complaint denying all of the allegations of the complaint and raising numerous special defenses and a counterclaim against JFS. Thereafter, by motion of JFS to transfer venue of this adversary proceeding to this district and division, the Bankruptcy Court for the District of Connecticut transferred this proceeding to this court by order entered October 17, 1994.

In its motion for summary judgment, JFS asserts that *Counts 2, 4, 8, 10, 13, 14* and *15* of the complaint pertain to acts of fraud and false dealings by the debtor involving the power planer and that the debtor is estopped from denying these allegations because of his guilty pleas and criminal convictions of Hindering Secured Creditors and Attempt to Commit Aggravated Perjury. JFS further alleges that based on the doctrine of collateral estoppel, the debtor's convictions establish as a matter of law that the debtor should be denied a discharge under 11 U.S.C. § 727(a)(2) and that the debtor's debts to JFS are nondischargeable pursuant to 11 U.S.C. § 523(a)(6). The debtor, who is representing himself in this

proceeding, filed a response[4] to the motion for summary judgment asserting, *inter alia*, that because he "is subsequently filing an appeal to such conviction,"[5] collateral estoppel is not applicable and, as a result, summary judgment is inappropriate.

II.

Federal Rule of Civil Procedure 56, which is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056, provides that a "party seeking to recover upon a claim, ... may, at any time after the expiration of 20 days from the commencement of the action ... , move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court must review the pleadings, and affidavits, if any, to determine if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509, 91 L. Ed. 2d 202 (1986). The inquiry that the court must make is whether the

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[4]The debtor's statements in the response are not in the form of an affidavit as required by Fed. R. Civ. P. 56(e), which is incorporated by Fed. R. Bankr. P. 7056. Despite this inadequacy, the court will consider the debtor's representations in his response as properly before the court in light of the fact that he is proceeding *pro se*.

[5]It is not clear from his response whether the debtor has actually appealed his convictions or whether an appeal is simply contemplated in the future. Regardless of the present status of an appeal, the court will assume for the purposes of considering JFS's motion that an appeal is pending.

evidence presents a sufficient disagreement to require trial or whether one party must prevail as a matter of law. *Id.* at 251-252. The moving party has the burden of showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. V. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 599, 106 S. Ct. 1348, 1363, 89 L. Ed. 2d 538 (1986). The nonmoving party may oppose a summary judgment motion by making a showing that there is a genuine issue as to a material fact in support of a verdict for that party. *Anderson,* 477 U.S. at 249, 106 S. Ct. at 2511.

III.

The Sixth Circuit Court of Appeals has made it clear that collateral estoppel may preclude relitigation by one side or the other in a dischargeability action where the state court has determined factual issues using standards identical to those in dischargeability proceedings. *See Spilman v. Harley*, 656 F.2d 224 (6th Cir. 1981).[6] In *Spilman*, the court identified three

[6]The application of collateral estoppel in a dischargeability action to bar relitigation of issues previously decided by a state court is not inconsistent with the exclusive jurisdiction of bankruptcy courts over dischargeability actions. *See Spilman*, 656 F.2d at 227 ("that Congress intended the bankruptcy court to determine the final result - dischargeability or not - does not require the bankruptcy court to redetermine all the underlying facts").

requirements which must be met to preclude relitigation of an issue: (1) the precise issue sought to be precluded must have been raised in the prior proceeding; (2) the determination in the prior action must actually have been litigated; and (3) the determination in the prior action must have been necessary and essential to the judgment. *Id.* at 228. Numerous courts have recognized that a plea to a criminal charge resulting in a criminal conviction may meet all of these criteria, including the "actual litigated" requirement, provided the charge to which the plea is entered contains the requisite elements of the discharge or dischargeability exception. *See BT Commercial Corp. v. Kochekian (In re Kochekian)*, 175 B.R. 883, 889 (Bankr. M.D.N.C. 1995); *American National Bank v. Cooper (In re Cooper)*, 125 B.R. 777, 780 (Bankr. N.D. Ill. 1991); *U.S. v. Boll (In re Boll)*, 82 B.R. 107, 108-109 (Bankr. D.N.D. 1987); *Gualtieri v. Goux (In re Goux)*, 72 B.R. 355, 359-360 (Bankr. N.D.N.Y. 1987); *U.S. v. Vandrovec (In re Vandrovec)*, 61 B.R. 191, 196-97 (Bankr. D.N.D. 1986); *Matter of Esposito*, 44 B.R. 817 (Bankr. S.D.N.Y. 1984). This is so because the guilty plea serves as an admission of all elements of the formal criminal charge. *In re Boll*, 82 B.R. at 109; *In re Goux*, 72 B.R. at 359; *In re Vandrovec*, 61 B.R. at 197.

Before the court reviews the elements of the debtor's convictions to determine if they establish the facts necessary to deny discharge and/or dischargeability as alleged by JFS, the court must first determine whether the fact that the debtor's convictions are on appeal preclude them from having collateral estoppel effect.

Fortunately, this issue has been addressed by other bankruptcy courts in the dischargeability context. In *State Farm Fire and Casualty Co. v. Dunn (In re Dunn)* 95 B.R. 414 (Bankr. M.D. Miss. 1988), the court held that the debtor's arson conviction barred relitigation of the issue of whether the debtor's destruction of certain collateral by fire constituted "willful and malicious" injury to property under 11 U.S.C. § 523(a)(6). The court rejected the debtor's argument that because the conviction was on appeal, it was inequitable and unfair to afford collateral estoppel effect to the arson conviction, noting that in the event the appeal resulted in the reversal of the conviction, the debtor would have the option of seeking relief from the order declaring the debt nondischargeable, pursuant to Fed. R. Civ. P. 60 (b)(5) as incorporated by Fed. R. Bankr. P. 9024. *Id.* at 418.

Similarly, in the case of *State of New York v. Kelley (In re Kelley)* 155 B.R. 75 (Bankr. S.D.N.Y. 1993), the court concluded that a criminal conviction on appeal could be used for collateral estoppel purposes in a dischargeability action because the fact that the conviction was on appeal did not prevent it from constituting a final judgment.[7] *Id.* at 78. *See also State of New York v. Sokol (In re Sokol)* 170 B.R. 556 (Bankr. S.D.N.Y. 1994)("the fact that Sokol's criminal conviction may be on appeal

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[7]The "finality" of the judgment has been included by many courts as a fourth requirement (in addition to the three set out in *Spilman*, 656 F.2d at 228) which must be met if collateral estoppel is to apply. *See, e.g., Matter of McMillan*, 579 F.2d 289, 291-92 (3rd Cir. 1978); *In re Goux*, 72 B.R. at 358; *In re Vandrovec*, 61 B.R. at 196.

does not affect its finality for collateral estoppel purposes"); *May v. Oldfield*, 698 F. Supp. 124, 127-28, (E.D. Ky. 1988) ("established rule in the federal courts is that a final judgment retains all of its *res judicata* consequences pending decision of the appeal"). This court agrees that a conviction which is on appeal may nonetheless collaterally estop the relitigation of matters previously litigated and established in the criminal proceeding. As the court in *Dunn* noted, if the debtor's convictions are subsequently reversed, he may seek relief pursuant to Fed. R. Civ. P. 60 from any order by this court denying discharge or dischargeability.

The court must now examine the elements which must be proven to deny discharge and dischargeability and determine if these precise issues were raised and necessarily decided by the debtor's guilty pleas and convictions. Turning first to the denial of discharge question, JFS asserts that the debtor's convictions conclusively establish the allegations set forth in *Counts 13, 14* and *15* of the complaint which seek a denial of discharge. *Count 13* of the complaint alleges that in order to induce JFS to make various loans to the debtor, the debtor granted JFS a security interest in the 24-inch Enterprise power planer and that the debtor, "with intent to hinder, delay, or defraud a creditor, concealed property of the debtor within one year before the date of his petition, by falsely testifying that he had not sold the power planer," when in fact he had. JFS asserts that debtor's guilty plea and conviction of the crime, Attempt To Commit Aggravated Perjury,

establish these allegations as a matter of law and, that therefore, the debtor should summarily be denied a discharge pursuant to 11 U.S.C. § 727(a)(2).

Section 727(a)(2)(A) of the Bankruptcy Code provides the following:

> (a) The court shall grant the debtor a discharge, unless-
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> ...
>
> (2) the debtor with intent to hinder, delay, or defraud a creditor ... has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -
>
> (A) property of the debtor, within one year before the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A).

As noted previously, the indictment charged the debtor with Aggravated Perjury, which is a violation of TENN. CODE ANN. § 39-16-703. Specifically the indictment stated that the debtor, on or about July 19, 1993, "did unlawfully, with intent to deceive, make a false material statement, under oath, during an official proceeding in the General Sessions Court for Hamblen County by testifying that he had not sold any collateral given to Jefferson Financial Services as security for a loan when in fact he had sold collateral to Conasauga River Lumber Co. on September 18, 1992 ...." TENN. CODE ANN. § 39-16-703 sets forth the elements of Aggravated Perjury:

> (a) A person commits an offense who, with intent to deceive:

(1) commits perjury as defined in § 39-16-702;[8]

(2) the false statement is made during or in connection with an official proceeding; and

(3) the false statement is material.

Rather than pleading guilty to Aggravated Perjury, the debtor pled guilty to and was convicted of the lesser offense of "Attempt To Commit Aggravated Perjury" which incorporates the provisions of TENN. CODE ANN. § 39-12-101. TENN. CODE ANN. § 39-12-101(a) defines "criminal attempt" as:

> A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
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> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
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> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further

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[8]TENN. CODE ANN. § 39-16-702 defines perjury as:

> (a)A person commits an offense [of perjury] who, with intent to deceive:
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> (1)Makes a false statement, under oath;
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> (2)Makes a statement, under oath, that confirms the truth of a false statement previously made and the statement is required or authorized by law to be made under oath; or
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> (3)Makes a false statement, not under oath, but on an official document required or authorized by law to be made under oath and stating on its face that a false statement is subject to the penalties of perjury.

> conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

The publisher's historical notes to this section observe that "criminal attempt is an offense directed at the individual whose intent is to commit an offense, but whose actions while strongly corroborative of criminal intent, failed to achieve the criminal objective intended." *Id.* Thus, even in the lesser charge of Attempt To Commit Aggravated Perjury, the intent to deceive is a necessary component and is comparable to the "intent to hinder, delay, or defraud" requirement of § 727(a)(2). In pleading guilty to this offense, the debtor thereby admitted all of the elements of the offense. *See In re Boll*, 82 B.R. at 109; *In re Goux*, 72 B.R. at 359. Accordingly, the intent required by § 727(a)(2) has been established by the debtor's guilty plea and conviction.

The court questions, however, whether the remaining elements of § 727(a)(2) are established by the conviction. As quoted above, § 727(a)(2) denies a discharge to a debtor who ***has concealed property of the debtor*** within one year of the filing. When the debtor falsely testified in the state court proceeding that he had not transferred the power planer when in fact he had, he was not ***concealing property of the debtor***, but was instead ***concealing a previous transfer of property of the debtor***. While § 727(a)(2) also denies a discharge if there has been a ***transfer of property of***

the debtor within one year with intent to deceive, the actual transfer did not occur within one year of the bankruptcy filing, just the concealment of the transfer. Accordingly, because the debtor was not concealing his property when he lied on the witness stand, but was instead concealing a transfer of his property, this court is unable to say as a matter of law that the debtor's guilty plea to falsely testifying about the transfer conclusively establishes the elements of 11 U.S.C. § 727(a)(2), *i.e.*, that the debtor ***concealed property of the debtor*** within one year of the filing.

In *Count 14* of the complaint, JFS alleges that the debtor should be denied a discharge under § 727(a)(2) of the Code because the debtor transferred the power planer within one year before the date of the bankruptcy filing with the intent to hinder, delay or defraud JFS as proven by his guilty plea and conviction of TENN. CODE ANN. § 39-14-116, Hindering Secured Creditors. Under this section, a

> person who claims ownership of or interest in any property which is the subject of a security interest, security agreement, deed of trust, mortgage, attachment, judgment or other statutory or equitable lien commits an offense who, with intent to hinder enforcement of that interest or lien, destroys, removes, conceals, encumbers, transfers, or otherwise harms or reduces the value of the property.

TENN. CODE ANN. § 39-14-116(a).

Comparing the elements of this offense, with the requirements of § 727(a)(2) that the debtor "with intent to hinder, delay, or defraud a creditor ... has transferred ... property of the debtor

within one year before the date of the filing of the petition ...," it is obvious that the debtor's conviction establishes that the debtor transferred his property with the intent to hinder a creditor and, that therefore, these elements of § 727(a)(2) have been met. The necessary time component, however, is missing. The indictment recites that the debtor transferred the power planer on or about September 18, 1992, clearly outside the one-year period prior to the debtor's bankruptcy filing on November 17, 1993. Because the transfer does not meet the one-year requirement,[9] JFS is not entitled to summary judgment with respect to *Count 14* of the complaint.

Count 15 asserts that the debtor should be denied a discharge pursuant to § 727(a)(4)(A) of the Bankruptcy Code because he made a false oath or account in connection with his bankruptcy case by failing to disclose the transfer of the power planer. JFS's motion for summary judgment does not mention § 727(a)(4)(A) of the Code; instead, JFS cites only § 727(a)(2) as its basis for denial of

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[9]The court does note that there have been cases where a court has denied a discharge under 11 U.S.C. § 727(a)(2) even though the transfer occurred earlier than one year before the petition was filed. Courts have allowed an exception to the one-year requirement based on the "continuing concealment" doctrine, where the debtor, even though he transferred the property outside the one-year period, retained a significant interest in or control over the asset. *See Bank of Chester County v. Cohen (In re Cohen)*, 142 B.R. 720 (Bankr. E.D. Pa. 1992); *Newton v. Essres (In re Essres)*, 122 B.R. 422 (Bankr. D. Colo. 1990), *aff'd in part and rev'd in part*, 139 B.R. 958 (D. Colo. 1992); DAVID G. EPSTEIN, STEVE H. NICKELS & JAMES J. WHITE, BANKRUPTCY § 7-19 (1992) and cases cited therein. JFS has not alleged that the debtor retained any interest in the power planer or that the "continuing concealment" doctrine is applicable. However, even if it had, such an allegation would raise an issue of material fact, thereby precluding summary judgment.

discharge on summary judgment. Regardless of this absence, the court will consider whether summary judgment is appropriate to deny discharge pursuant to § 727(a)(4)(A) because the motion does claim that JFS is entitled to summary judgment with respect to *Count 15* of the complaint and *Count 15* raises § 727(a)(4)(A).

Section 727(a)(4)(A) of the Bankruptcy Code denies a discharge to a debtor who "knowingly and fraudulently, in or in connection with the case made a false oath or account ...." As stated above, JFS claims in *Count 15* of the complaint that the debtor made a false oath in connection with this bankruptcy case by failing to disclose the transfer of the power planer. However, the court has no evidence before it as to what was or was not disclosed by the debtor in connection with this bankruptcy case, or whether the statements made by him in his schedules and statement of affairs are inconsistent with his guilty pleas and convictions. The debtor's bankruptcy case file is not before the court (the case remains pending in the District of Connecticut) and no certified copies of the schedules and statements or any other evidence establishing a false oath in connection with this case have been tendered to the court. Accordingly, the court will deny summary judgment on this count as well.

The court will now turn to the claim by JFS that the debtor's guilty pleas preclude the discharge of the debts owed by the debtor to JFS. *Counts 2* and *4* of the complaint allege that on or about June 17, 1992, and July 21, 1992, the debtor borrowed the sums of $5,135.56 and $4,681.12, respectively, and granted JFS a security

interest in the power planer as security for these loans. JFS alleges that the debtor's guilty plea and conviction of Hindering Secured Creditors establish that these debts should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(6) which excepts the discharge of any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."

It is well recognized that the unauthorized sale of collateral may form the basis of a valid claim of nondischargeability under § 523(a)(6) of the Bankruptcy Code provided the sale was done willfully and maliciously. *See, e.g., American Family Financial Services, Inc. v. Johnson (In re Johnson)*, 166 B.R. 365 (Bankr. D. Minn. 1994); *Thomas v. Deere Credit Services, Inc. (In re Thomas)*, 116 B.R. 287, 289 (Bankr. M.D. Fla. 1990); *Finance America Corp. v. Ricker (In re Ricker)*, 26 B.R. 862 (Bankr. E.D. Tenn. 1983); *U.S. v. Langer (In re Langer)*, 12 B.R. 957 (D.N.D. 1981). In *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir. 1987), *cert. denied,* 484 U.S. 853, 108 S. Ct. 156 (1987), the Sixth Circuit Court of Appeals defined "willful" and "malicious" as used in 11 U.S.C. § 523(a)(6):

> An injury to an entity may be malicious injury within this provision if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite, or ill will. The word "willful" means "deliberate or intentional," a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse may constitute a willful and malicious injury.

Id. at 394. In the present case it is clear that the debtor's pleading guilty to the charge of Hindering Secured Creditors,

pursuant to TENN. CODE ANN. § 39-14-116, establishes all of the elements of § 523(a)(6). As quoted above, in order to be guilty of Hindering Secured Creditors, TENN. CODE ANN. § 39-14-116 requires the removal, transfer or concealment of property which is the subject of a security interest "with intent to hinder enforcement of that interest." The indictment alleged that the debtor "unlawfully, with the intent to hinder enforcement of a security interest" transferred the power planer. The language of the statute and indictment is analogous to the *Perkins* definition of "a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse." *Perkins,* 817 F.2d at 394. Since the debtor's guilty plea and resulting conviction of Hindering Secured Creditors constitutes an admission of all the elements of the crime, which are the same elements required to deny dischargeability under 11 U.S.C. § 523(a)(6), the court finds that those issues were raised and necessary to the determination of the conviction and were actually litigated. Accordingly, the debtor is collaterally estopped from denying[4] the allegations of *Counts 2* and *4* of the complaint, and JFS is entitled to summary judgment on the issue of nondischargeability.

In *Counts 8* and *10* of the complaint, JFS alleges that on or about February 23, 1993, and May 12, 1993, the debtor borrowed the

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[10]Although the debtor in his "special defenses" to these counts contends that the power planer was "improperly described" in the loan agreements, and that the security agreements were "vague, ambiguous and incomplete," there is no dispute regarding any of the other facts surrounding the loan transactions which would prevent summary judgment.

respective sums of $6,876.26 and $1,678.61 from JFS and that in order to induce JFS to make these loans, the debtor purported to grant JFS a security interest in the power planer. JFS alleges, however, that the debtor had already sold the power planer at that time and that he therefore obtained the loans by misrepresentations or under false pretenses. JFS asserts that these debts should be excepted from discharge under § 523(a)(2)(A) of the Code which excepts debts obtained by false pretenses, a false representation, or actual fraud. Although it would appear from the conviction of the debtor on the felony charge of Hindering Secured Creditors (which included a allegation that the power planer had been sold on September 18, 1992, prior to the execution of these loans) that the necessary elements for establishing nondischargeablity under Section 523(a)(2)(A) are present, the debtor asserts in his "special defenses" to these counts that the security agreements for these loans are forgeries. The debtor also previously filed an affidavit in this proceeding which avers that the exhibits marked as *Exhibits I* and *J* to the complaint (the loan documents for the loans described in *Counts 8* and *10*) are forgeries. Because the record is devoid of any affirmative evidence from JFS which establishes the authenticity of the security agreements for the power planer as security for the loans referenced in *Counts 8* and *10*, a genuine issue exists concerning these material facts which prevents the court from awarding summary judgment to JFS on *Counts 8* and *10*.

IV.

For the foregoing reasons, the court will enter an order awarding summary judgment to JFS on *Counts 2* and *4* of the complaint and denying the motion with respect to all other counts, including *Counts 3* and *5* which are alternative theories of relief regarding the same loans referenced in *Counts 2* and *4*, respectively, these counts now being moot.

ENTER: March 22, 1995

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

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