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

In re JEFFREY FOSTER BROBECK and JANET LAVON BROBECK, Debtors.	No. 03-21784 Chapter 7
PAUL LEWIS, Plaintiff, vs. JEFFREY FOSTER BROBECK and JANET LAVON BROBECK, Defendants.	Adv. Pro. No. 03-2045

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the plaintiff Paul Lewis seeks a judgment against the debtors Jeffrey and Janet Brobeck and a determination of nondischargeability based on fraud and willful and malicious injury pursuant to 11 U.S.C. § 523 (a)(2) and (a)(6), respectively. Presently before the court is the debtors' motion for summary judgment and/or for dismissal for failure to state a claim, particularly as to Mrs. Brobeck. For the reasons discussed hereafter, the court concludes that the debtors' motion should be granted as to the dischargeability of their debt under 11 U.S.C. § 523 (a)(6) but not under 11 U.S.C. § 523 (a)(2). In addition, Mrs. Brobeck will not be dismissed from this adversary proceeding. This is a core proceeding. *See* 28 U.S.C. § 157 (b)(2)(I).

I.

The debtors filed for bankruptcy relief under chapter 7 on May 15, 2003, and plaintiff commenced the instant adversary proceeding on August 15, 2003. In the complaint as amended, the plaintiff alleges that between July 9, 1998, and August 11, 2000, he loaned the debtors sums totaling $274,845 for the purpose of financing the debtors' inventory of used cars, which sums were to be repaid as the inventory was sold. The plaintiff alleges that the debtors obtained these sums "by representing ... that automobiles that had been sold were still in the inventory and failing to repay the Plaintiff for automobiles sold from inventory; [and] by representing to the Plaintiff that automobiles for which the Defendant requested funds were purchased for more than the amount actually paid by the Defendant." The plaintiff further alleges that the debtors "repaid the plaintiff for titles or automobiles with worthless checks, representing to the Plaintiff that the sale was not consummated when in fact the sale had been consummated, and failed, neglected or refused to return the title(s) to the Plaintiff" and "that the Defendants induced the Plaintiff to exchange titles

on certain automobiles, the Defendants knowing that the title(s) offered in exchange were to automobiles worth less than the value of the automobiles for which they were exchanged." According to the plaintiff, the debtors knew their fraudulent conduct was misleading, they acted "with the intention and purpose of deceiving the Plaintiff," and plaintiff reasonably relied on the debtors' representations, suffering total damages of $671,170, including fees and interest, as a result. Lastly, the plaintiff alleges that "at the time the Defendants committed the [described] intentional acts," the "Defendants intended harmful consequences on the Plaintiff or believed that harmful consequences were substantially certain to result."

In their answer, the debtors admit that Mr. Brobeck received money from the plaintiff but deny that Mrs. Brobeck was a contractual party to any agreement with the plaintiff. The debtors also deny all allegations of fraud. As affirmative defenses, the debtors contend that any agreement with the plaintiff was invalid and unenforceable under the statute of frauds, TENN. CODE ANN. § 29-2-101, because it was not in writing and capable of being performed within one year from the date of making; that plaintiff assumed the risk of his relationship with the debtor Jeffery Brobeck in that he actively participated in the Mr. Brobeck's business; and that the plaintiff illegally operated as a financial institution, extending credit to the debtors and others at usurious interest rates, without proper licenses and required governmental supervision.

On April 6, 2004, the debtors filed the motion to dismiss and for summary judgment pursuant to Fed. R. Civ. P. 12(b)(6) and 56 which is presently before the court. The debtors assert that the complaint fails to state a claim for relief under either section 523(a)(2) or (6) of the Bankruptcy Code. They further contend that there are no material facts in dispute and that they are entitled to judgment as a matter of law. Finally, as to Mrs. Brobeck, the debtors contend that she "never attempted, made or formed any

agreement with Plaintiff either individually or jointly with her husband" and that therefore, she should be dismissed from this proceeding, regardless of any other action taken on their motion. The debtors support their motion by affidavits signed by each of them.

In his response to the debtors' motion, the plaintiff states that "the material facts of the case are very much in dispute." As evidence of this assertion, he has filed his affidavit and that of his wife, Linda Lewis. The plaintiff also references the debtors' responses to the plaintiff's interrogatories and requests for admission and the debtors' bankruptcy schedules and statement of financial affairs. Both parties have filed memoranda of law in support of their respective positions. The court will address each of the issues raised by the parties in turn.

II.

"[T]he determination of whether a complaint states a claim for relief is a question of law." *Andrews v. Ohio*, 104 F.3d 803, 806 (6th Cir. 1997). In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 12(b):

> This Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. A complaint need only give "fair notice of what plaintiff's claim is and the grounds upon which it rests." A judge may not grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss based on a disbelief of a complaint's factual allegations. While this standard is decidedly liberal, it requires more than a bare assertion of legal conclusions. "In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory."

Id. (quoting *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir.1993)).

Rule 12(b) itself provides that if matters outside the pleadings are presented for consideration in

the context of a motion to dismiss for failure to state a claim, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. *See, e.g., Nat'l Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997). Because the parties' affidavits offer evidence on each of the issues raised in the debtors' motion to dismiss and for summary judgment, the court will treat the entire motion as one for summary judgment.

III.

The first issue raised by the debtors in their motion concerns plaintiff's claim of nondischargeability under11 U.S.C. § 523(a)(2)(A). In order to except a debt from discharge under this provision, a plaintiff must prove the following elements by a preponderance of the evidence: "(1) the debtor obtained money [or services, or an extension, renewal, or refinancing of credit] through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness to the truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss." *Rembert v. AT&T Universal Card Servs. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998).

The debtors contend, supported by their affidavits, that none of these elements is present in this

case. As to the initial requirement that money be obtained by a material misrepresentation, knowingly made, the debtors assert that no material misrepresentations were made at the time they received funds from the plaintiff. Mr. Brobeck states in his affidavit that "I never misrepresented, nor intended to misrepresent, any fact to Mr. Lewis regarding the autos that I bought, sold or had on my lot." Mrs. Brobeck states in her affidavit that she "never discussed anything, business or otherwise, with Mr. Lewis other than to exchange brief social greetings" and that she "never made any statement, representation, promise, warrantee, guarantee, agreement, deal or any like assurance in any form whatsoever to or with Mr. Lewis in connection with my husband's sale of used cars on his lot or regarding any other matter." Both indicate that there were no written agreements between the parties.

In his memorandum in opposition to debtors' motion, the plaintiff asserts that:

> [T]he material misrepresentation occurred when Defendants presented titles to the Plaintiff in exchange for the loan of money. The presenting of the titles, according to the agreement, was a token of the intent to repay the loan at the time the automobile represented by the title was sold. In fact the parties dealt with each other in this manner for an extended period of time.... At some point the Defendants began selling automobiles and failed to pay Plaintiff what was owed.... Defendants admit that [there] are some eight (8) automobiles disposed of in this manner. There are a further eight (8) automobiles which the Defendants asserts that there is "No Record of Sale" and yet were not found in the Defendants['] possession. There are a further eight (8) automobiles that Defendants assert were "paid off" for which the Plaintiff retains titles.... The automobiles that Defendants assert were "paid off" were indeed paid off and then the titles were resubmitted to the Plaintiff for additional funds.

To the extent the plaintiff is asserting that the debtors engaged in fraud as evidenced by their failure to pay, his contention is without merit. "The failure to perform a mere promise is not sufficient to make a debt nondischargeable, even if there is no excuse for the subsequent breach. A debtor's statement of future intention is not necessarily a misrepresentation if intervening events cause the debtor's future actions to

deviate from previously expressed intentions." *MacPhee v. Sullivan (In re Sullivan)*, 282 B.R. 120, 123 (Bankr. D.N.H. 2002)(quoting 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][d]). *See also Parker v. Grant (In re Grant)*, 237 B.R. 97, 112 (Bankr. E.D. Va. 1999)("[A] breach of contract does not, by itself, establish misrepresentation for purposes of § 523(a)(2)(A)."); *Schwalbe v. Gans (In re Gans)*, 75 B.R. 474, 485 (Bankr. S.D.N.Y. 1987)("The mere lack of performance, without more, does not establish fraud.").

Nonetheless, "[a] promise to pay made with a present intention not to perform ... will satisfy the misrepresentation requirement." *Bednarsz v. Brzakala (In re Brzakala)*, 305 B.R. 705, 711 (Bankr. N.D. Ill. 2004). In other words, if a debtor enters into a contract with no intent to fulfill the terms of the contract and later defaults, the contract may provide a basis for a nondischargeability claim based on fraud. *In re Grant*, 237 B.R. at 112-113. Accordingly, the appropriate inquiry is whether the debtors intended to deceive the plaintiff when they agreed to repay any sums he loaned them. In making this inquiry, the Sixth Circuit Court of Appeals has instructed that "[w]hether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard." *In re Rembert*, 141 F.3d at 281. Because debtors will rarely admit an intent not to repay, "a debtor's intention—or lack thereof—must be ascertained by the totality of the circumstances." *Id.* at 282.

In his memorandum, the plaintiff argues that "[f]rom the Defendants['] course of action over a period of time in presenting titles, obtaining money, selling the vehicles and failing to repay the money and re-obtain the titles[,] it can be inferred that the Defendants intended to deceive the Plaintiff by engaging in a plan or scheme to defraud the Plaintiffs, by presenting titles to the Plaintiff, obtaining money for titles and intentionally selling the vehicles and keeping the proceeds, with no intent to repay the loans." The debtor

Jeffrey Brobeck responds to this argument by stating in his affidavit that he "always intended to pay Mr. Lewis any money that [he] owed him"; that bankruptcy was their "very last," rather than first resort; and that he continued paying the plaintiff even after he closed his used car business. The debtors also describe in their affidavits the events that led to the closing of the business and the bankruptcy filing, which include paying for Mr. Brobeck's elderly father's medical and nursing home expenses, the care and expense of Mr. Brobeck's mother who had advanced Alzheimer's disease, and the economic conditions after the terrorist attacks of September 11.

From the court's review of all of the evidence submitted in connection with the summary judgment, there is nothing which suggests that the debtors intended to deceive the plaintiff at the time their business association began. In fact, the plaintiff even states in his affidavit that, "For an extended period of time, Mr. Brobeck appeared to deal faithfully with me...." At some point in the parties' relationship, the debtors began failing to pay the plaintiff upon the sale of vehicles and presumably during this same time period, continued to obtain new loans from the plaintiff. In their response to plaintiff's Request for Admission No. 35, the debtors admitted that they resold vehicles for which the plaintiff held the certificates of title "in spite of the fact that Plaintiff continued to be in possession of those title certificates." The debtors also admitted in response to Request for Admission No. 36 that "Defendants knew that the resale by Defendants of automobiles for which Plaintiff held certificates of title would cause damage to the Plaintiff if he were not repaid." Lastly, the court notes that Mrs. Lewis states in her affidavit, "To the best of my knowledge, information and belief, on several occasions Defendants paid a vehicle off and then re-approached my husband at a later date seeking a new advance of funds on the same vehicle." This evidence, when construed in a light favorable to the plaintiff as this court is required to do when considering a summary

judgment motion, supports the plaintiff's assertion that the debtors engaged in a scheme to defraud him by falsely representing that they would repay him upon the sale of the vehicles when they had no such intention. Accordingly, there is a genuine issue of fact as to the issues of false representation and intent to deceive which preclude summary judgment.

As to the justifiable reliance element of nondischargeability under § 523(a)(2)(A), the debtors contend that the standard the plaintiff must satisfy is that of an expert, "an experienced financier," and that as an expert, he could determine for himself, without reliance on any representations by the debtors, whether a particular make and model of automobile was on the debtors' used car lot. The debtors also note that the plaintiff failed to obtain any supporting information regarding the debtors' credit worthiness and assert that a creditor who fails to investigate the credit worthiness of a debtor assumes the risk that the debtor will default on the loan, citing *Manufacturer's Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082 (6th Cir. 1988). Lastly, the debtors note that plaintiff states in his complaint that he "reasonably relied on the Defendants' representations because [he] and Defendant had conducted business for over a year on similar terms without Defendants failing to pay for automobiles as they were sold ...." The debtors assert that their good payment history is not a misrepresentation and therefore can not be a basis for the plaintiff's reliance.

In adopting the less demanding standard of justifiable, rather than reasonable, reliance for purposes of § 523(a)(2), the United States Supreme Court observed, "Although the plaintiff's reliance on the misrepresentation must be justifiable, this does not mean that his conduct must conform to the standard of the reasonable man. Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct

to all cases." *Field v. Mans*, 516 U.S. 59, 70-71 (1995)(quoting RESTATEMENT (SECOND) OF TORTS § 540 (1977)). "[A] person is justified in relying on a representation of fact 'although he might have ascertained the falsity of the representation had he made an investigation.'" *Id*. at 70. "It is only where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." *Id.* (quoting PROSSER'S LAW OF TORTS § 108 (4th ed. 1971)). *See also In re Meyer*, 296 B.R. 849, 861-862 (Bankr. N.D. Al. 2003) ("Typically, justifiable reliance permits a plaintiff to rely unequivocally on a representation or promise made by a debtor, without investigating or acting reasonably to determine the truth of the representation or promise, unless the statement is patently false.... In other words, the creditor's reliance will likely be justified if there is nothing on the face of the representation that would lead the creditor to believe that the representation is false, or if the creditor does not have actual knowledge from which he should realize the representation is false at the time it is made.").

When this standard is applied to the facts of the present case, the debtors' contentions regarding the plaintiff's alleged inability to establish justifiable reliance at trial are without merit. As noted by the United States Supreme Court, a creditor is under no obligation to conduct an investigation absent the existence of any red flags that would have served as a warning of deception. The debtors have not cited any such red flags. Furthermore, a debtor's good payment history has been recognized as a factor contributing to the creditor's justifiable reliance. *See, e.g., LA Capitol Fed. Credit Union v. Melancon (In re Melancon)*, 223 B.R. 300, 331-332 (Bankr. M.D. La. 1998)("If an issuer puts on sufficient evidence to establish that the holder's account was normal, that there were no facts that would render

obvious the holder's lack of intent to repay, and that it was free of the warning signs ..., then the issuer has established that its reliance on the holder's representation of intent to repay was justified.”). Finally, as to the contention based on *In re Ward*, 857 F.2d 1082 (6th Cir. 1988), that the plaintiff assumed the risk that the debtors will default because he failed to investigate the credit worthiness of the debtors, it must be noted that *Ward* was decided prior to the United States Supreme Court’s ruling in *Field*. *Ward* was based on the reasonable reliance, rather than the justifiable reliance, standard. As previously noted, the Supreme Court rejected the assertion that an investigation was always required and even observed that “contributory negligence is no bar to recovery because fraudulent misrepresentation is an intentional tort.” *Field v. Mans*, 516 U.S. at 70. Furthermore, other courts have determined that *Ward* was overruled by *Field* in this regard. *See Bank of Am. v. Jarczyk*, 268 B.R. 17, 26 (W.D.N.Y. 2001)(“[T]he Sixth Circuit’s holding requiring a creditor to conduct an investigation of the debtor's creditworthiness is somewhat at odds with the Supreme Court’s holding in *Field*, ... indicating that reliance is justifiable even if the relying party could have ascertained the falsity had he made an investigation.”); *Providian Bancorp v. Stockard (In re Stockard)*, 216 B.R. 237, 242 (Bankr. M.D. Tenn. 1997)(noting that *Ward* was “overruled in part”). Even the Sixth Circuit itself has indicated that *Ward* should be limited to its “unique factual setting,” an exception to discharge for credit card debt. *See Unsecured Creditors’ Comm. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573, 581 n.11 (6th Cir. 1998).

The last element of § 523(a)(2)(A) is that the creditor’s reliance on the debtor’s misrepresentations must have been a proximate cause of the loss sustained by the creditor. As held by Judge Stair in a decision last year:

> Proximate cause is something more than speculation as to what the creditor might have

> done in hypothetical circumstances. [Citations omitted.] It depends on whether the debtor's conduct has been so significant and important a cause that the debtor should be legally responsible. [Citations omitted.] In summary, there must be a direct link between the alleged fraud and the creation of the debt. [Citations omitted.]

In re Copeland, 291 B.R. 740, 767 (Bankr. E.D. Tenn. 2003).

The debtors' only contention in this regard is the same one directed at the plaintiff's alleged failure to establish justifiable reliance, that plaintiff was not relying on any representation from the debtors, but instead, by his own admission, on the good payment history of the debtors. In response, the plaintiff asserts that his reliance on the debtors' deceptive actions were the proximate cause of the loss. Clearly, if plaintiff establishes at trial at the debtors misrepresented their intent to repay him and engaged in a scheme to defraud him, a direct link between the alleged fraud and the losses sustained by the plaintiff can be established. None of the evidence tendered by the debtors in connection with their summary judgment motion suggests that the plaintiff will be unable to prove causation at trial. Accordingly, based on all of the foregoing, the debtors' motion for summary judgment as to the plaintiff's claim of nondischargeability under 11 U.S.C. § 523(a)(2)(A) will be denied.

IV.

The court turns next to the issue of nondischargeability under 11 U.S.C. § 523(a)(6), which excepts from discharge a debt arising out of "willful and malicious injury by the debtor to another entity or to the property of another entity." In *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998), the Supreme Court held that only acts of the debtor done with the intent to cause injury, as opposed to acts merely done intentionally, can satisfy the "willful and malicious injury" aspect of 11 U.S.C. § 523(a)(6). In other words,

a deliberate or intentional injury is required, not simply an intentional or deliberate act that leads to an injury. "Negligent or reckless acts . . . do not suffice to establish that a resulting injury is willful and malicious." *Kawaauhau v. Geiger*, 523 U.S. at 64. The Sixth Circuit has interpreted *Geiger* to mean "that unless 'the actor desires to cause consequences of his act, or believes that the consequences are substantially certain to result from it,' ... he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)." *Markowitz v. Campbell*, 190 F.3d 455, 464 (6th Cir. 1999).

The second component of § 523(a)(6), that the injury not only be willful, but also "malicious," means "in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986). Stated another way, "There must ... be a consciousness of wrongdoing.... It is this knowledge of wrongdoing, not the wrongfulness of the debtor's actions, that is the key to malicious under § 523(a)(6)." *ABF, Inc. v. Russell (In re Russell)*, 262 B.R. 449, 455 (Bankr. N.D. Ind. 2001).

The plaintiff contends that the debtors' selling or otherwise disposing of the automobiles without paying him in contravention of their agreement is in the nature of a conversion and therefore, a "willful and malicious injury" within the meaning of 11 U.S.C. § 523(a)(6). The debtors assert that they are entitled to summary judgment on this issue because the plaintiff had no property interest in the automobiles which could be converted. Mr. Brobeck states in his affidavit:

> At no time did Mr. Lewis have a secured interest in any auto that I held or that I purchased with money received from Mr. Lewis. At all times relevant to matters in this adversary proceeding, I never held, sold or otherwise traded a vehicle in which Mr. Lewis had a secured interest. The automobiles in question in my business dealings with Mr. Lewis were, and always had been, owned by me. In fact, Mr. Lewis never had a properly secured interest in any property, of any kind, held by me whatsoever.

....

> I certainly never intended to sell an auto or transfer any property that Mr. Lewis owned, nor did I do so. I purchased used cars in my name and Mr. Lewis provided reimbursement to me to cover those purchases after the fact. The cars were, however, always and at all times, titled to and owned by me.

Similarly, Mrs. Brobeck states in her affidavit: "To the best of my knowledge, Mr. Lewis never owned a single auto sold on the used car lot operated by my husband. I certainly never intended to sell an auto or transfer any property that Mr. Lewis owned, nor did I do so. To the best of my knowledge, Mr. Lewis never held a secured interest in any auto or other real or personal property held by me."

Although the plaintiff does not directly contradict in his own affidavit the debtors' assertion regarding his lack of a security interest in the automobiles, he does indicate that he held the title certificates to the vehicles until they were sold. "Mr. Brobeck routinely tendered to me an original Certificate of Title for each automobile which he purchased with funds advanced by me. He also routinely brought to me or to my wife checks representing repayment for some of the automobiles which he acquired in this manner. When he repaid me for each automobile evidenced by a Title Certificate, I returned the Title Certificate to him." The plaintiff also cites the debtors' response to Request for Admission No. 36 wherein the debtors admit that they "knew that the resale by Defendants of automobiles for which Plaintiff held certificates of title would cause damage to the Plaintiff if he were not repaid." Lastly, in his memorandum of law, the plaintiff argues that even if the debtors' actions did not legally constitute conversion, their behavior in willfully selling or otherwise disposing of the automobiles in contravention of their agreement with plaintiff was in the nature of a conversion.

While the plaintiff may characterize the debtors' actions as a conversion, this court is unable to

conclude that the plaintiff had any property interest in the automobiles that was capable of being converted. In order to create a security interest in property that is not in the possession of the secured party, TENN. CODE ANN. § 47-9-203(1)(a) requires that the debtor sign a "security agreement" containing a description of the collateral. A "security agreement" is defined in TENN. CODE ANN. § 47-9-102(73) as "an agreement which creates or provides for a security interest." It is undisputed that there is no written document signed by the debtors giving the plaintiff security interests in the automobiles and the court is unable to find an authority for the proposition that the plaintiff had any legal right in the automobiles by mere possession of their certificates of title.

In the recent case of *Steier v. Best (In re Best)*, 2004 WL 1544066 (6th Cir. June 30, 2004), the creditor argued that the bankruptcy court had erred in denying his claim for nondischargeability under 11 U.S.C. § 523(a)(6) which was premised on the debtor having sold his assets and used the proceeds to pay other creditors. In ruling on this issue, the Sixth Circuit Court of Appeals held the following:

> [A]n "injury" under section 523(a)(6) must constitute an invasion of the creditor's legal rights. Thus it was appropriate to inquire whether the Bests violated Steier's rights by paying other creditors. If Steier were a secured creditor, using secured assets (or the proceeds from selling such assets) to pay unsecured creditors could have invaded his rights....
>
> Steier, of course, had no such security interest. As an unsecured creditor, he had a legal right to try to collect on his judgment, but not to compel the Bests to pay him ahead of other creditors.... Other unsecured creditors had the same claim to the Bests' assets as Steier.... Thus, the bankruptcy court did not err in concluding that the Bests did not invade Steier's legal rights by selling assets and using the proceeds to pay other creditors instead of paying him.

Id. at *7-8.

Notwithstanding his possession of the title certificates, the plaintiff had no greater interest in the

debtors' automobiles than any other creditor to whom the debtors owed money. Absent such an interest in the automobiles, his § 523(a)(6) action must fall. Other than his fraud claim, the plaintiff's complaint simply raises a breach of contract and "a breach of contract cannot constitute the willful and malicious injury required to trigger § 523(a)(6)." *In re Best*, 2004 WL 1544066, *6 (citing *Salem Bend Condo. Assn. v. Bullock-Williams* (*In re Bullock-Williams)*, 220 B.R. 345, 347 (B.A.P. 6th Cir. 1998)(Section 523(a)(6) "encompasses more than just the 'knowing breach of contract'".)). Accordingly, the debtors will be granted summary judgment on this issue.

V.

Another issue raised by the debtors in their motion is the legal effect of the lack of a written agreement between the parties. The debtors argue that any obligation they may owe the plaintiff is unenforceable under Tennessee's statute of frauds because their agreement was not in writing and not capable of being performed within one year from the date the agreement was made. The debtors also contend that because the plaintiff lends money in connection with the pledge of auto titles, he is a "title pledge lender" under Tennessee law and therefore subject to TENN. CODE ANN. § 45-15-109, which requires written instruments in title pledge relationships and transactions.

With respect to the statute of fraud issue, TENN. CODE ANN. § 29-2-101(a) provides: "No action shall be brought: ... (5) Upon any agreement or contract which is not to be performed within the space of one (1) year from the making of the agreement or contract; unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party." The debtors

contend that this statute is triggered in this case because the "parties' financing arrangement covered three years and was on-going from its initiation." The plaintiff states in his affidavit, however, that "[e]ach advance of funds for the purchase of an automobile represented a separate [loan] transaction," which was "to be repaid within 30 days."

From the limited evidence which is before the court on the statute of frauds issue, the debtors' motion for summary judgment in this regard must be denied. If each loan had a thirty-day repayment term, it was capable of being performed within one year. *See Spruell v. Walls*, 1995 WL 368338, *4 (Tenn. App. June 21, 1995). ("If a contract when made is capable of a full and bona fide performance within the year, without the intervention of extraordinary circumstances, then it is to be considered as not within the statute. The mere fact that the oral contract might continue for more than a year does not bring it within the Statute of Frauds, nor is the improbability of performance sufficient if the contract is susceptible of being performed within the year."). The fact that the parties entered into a series of these thirty-day transactions is not determinative, since presumably each transaction was, as the plaintiff asserts, a separate transaction.

The contention that the parties' loan agreements had to be in writing because plaintiff was a "title pledge lender" as defined by Tennessee law must similarly be rejected. TENN. CODE ANN. § 45-15-103(6) defines "title pledge lender" for purposes of the "Tennessee Title Pledge Act," TENN. CODE ANN. § 45-15-101, *et seq*., which was enacted by the Tennessee legislature in 1995 to "[e]nsure a sound system of making title pledge loans thru licensing of title pledge lenders." TENN. CODE ANN. § 45-15-102(1). Under this statutory scheme, a "'[t]itle pledge lender' means any person engaged in the business of making title pledge agreements and/or property pledge agreements with pledgors," TENN. CODE ANN. § 45-15-103(6); and a "'[t]itle pledge agreement' means a thirty-day written agreement whereby a title pledge

lender agrees to make a loan of money to a pledgor, and the pledgor agrees to give the title pledge lender a security interest in unencumbered titled personal property owned by the pledgor." TENN. CODE ANN. 45-15-103(5). In the present case, although the plaintiff loaned the debtors monies on thirty-day terms, neither party contends that the debtors pledged or gave the plaintiff a security interest in the automobiles. As previously noted, the mere fact that the plaintiff was holding the certificate of titles until repayment did not constitute a pledge or grant of a security interest. Accordingly, because the parties did not enter into a "title pledge agreement," the provisions of TENN. CODE ANN. § 45-15-101, *et seq.*, regarding the requirements imposed on a "title pledge lender" are irrelevant.

VI.

Lastly, the court will address the debtors' contention that Janet Brobeck should be dismissed as a defendant in this adversary proceeding because she "never attempted, made or formed any agreement with Plaintiff either individually or jointly with her husband, Defendant Jeff Brobeck." To substantiate this assertion, Mrs. Brobeck states in her affidavit:

> At all times relevant to this action, I worked for my husband as a secretary and used auto salesperson.... I was at all times treated as an employee, not partner, of the business. I acted only and exclusively at the direction of Jeffery Foster Brobeck, my husband, who ran the business in every regard and detail.
>
> I answered the telephone, sold cars, wrote checks at the specific direction of my husband, Jeff F. Brobeck, and delivered checks and titles on occasion to Mr. Paul Lewis, the Plaintiff in this action, at the direction of my husband.
>
> During my years working for my husband, I made no executive or operational decisions regarding the conduct of business or the sale of used cars on my husband's lot. I made no agreement in any form with Mr. Lewis or anyone else regarding the business operated by husband. I was at all times limited to being an employee, secretary and salesperson for my

> husband, Jeffery F. Brobeck.
>
> I have never had any individual dealings whatsoever with Mr. Paul Lewis.
>
> I was never a party to any agreement, contract, understanding, deal or business relationship that may or may not have existed between Jeffery F. Brobeck, my husband, and Paul Lewis.

The plaintiff, of course, opposes Mrs. Brobeck's dismissal from this action, asserting that she was her husband's partner, even if she did not consider herself one. The plaintiff observes that although Mrs. Brobeck contends that she was only an employee, she did not list in her bankruptcy schedules any salary from her husband and presumably she was compensated by sharing in the profits or losses of the business. The plaintiff also notes that the debtors indicated in their schedules that the obligation to him was a joint one. Lastly, the plaintiff points out that 117 of the checks written to him had been signed by Mrs. Brobeck and that some of his loan checks to the business had been endorsed by her. The plaintiff contends that under Tennessee law, it is the legal effect of the parties' agreement rather than their subjective intent which determines whether they are partners, citing *Jahn v. Lamb (In re Lamb)*, 36 B.R. 184, 188 (Bankr. E.D. Tenn. 1983).

In Tennessee, a partnership is "an association of two (2) or more persons to carry on as co-owners of a business or other undertaking for profit." TENN. CODE ANN. § 61-1-101 (6). The Tennessee Supreme Court has observed that in determining whether an individual is a partner, "no one fact or circumstance is the conclusive test, each case must be decided upon consideration of the totality of all relevant facts." *Roberts v. Lebanon Appliance Serv. Co.*, 779 S.W.2d 793, 795 (Tenn. 1989).

> The controlling intention is the legal intention deductible from the acts of the parties. It is not essential that the parties actually intend to become partners. The existence of a partnership is not a question of the parties' undisclosed intention or even of the words they

> use; nor is it essential that the parties have knowledge of the legal effect of their acts. It is the intent to do the things which constitute a partnership that usually determines whether or not the relationship exists between the parties, and, if they intend to do a thing which in law constitutes a partnership, they are partners whether their purpose was to create or avoid the relationship.

Id. at 795-96 (quoting *Wyatt v. Brown*, 281 S.W.2d 64 (1955)).

Stated more simply:

> Where intent is in dispute, it may be ascertained objectively from all the evidence and circumstances. It is not essential that the parties know that their contract, in law, creates a partnership. The legal effect of the parties' agreement, not their subjective intent, determines whether there is a partnership.

Roberts v. Lebanon Appliance Serv. Co., 779 S.W.2d at 796 (quoting 59A AM. JUR. 2D *Partnership* § 152 (1987)).

It appears from the evidence tendered that there is a genuine issue of material fact as to Mrs. Brobeck's partnership status. Regardless of whether she considered herself a partner, it is clear that Mrs. Brobeck worked in the business with her husband, signed checks, sold cars, and maybe even shared in the profits and losses. Absent certain exceptions which appear to be inapplicable here, "[a] person who receives a share of the profits of a business is presumed to be a partner in the business." TENN. CODE ANN. § 61-1-202(c)(3). Furthermore, it is not determinative that Mr. Brobeck ran the company and that Mrs. Brobeck only acted at his direction, as she asserts. *See In re Lamb*, 36 B.R. at 189 (It is not necessary for the existence of a partnership that the partners contribute equally and have equal responsibilities in management of the business.). Because resolution of this issue must await trial, Mrs. Brobeck's request to be dismissed from this action will be denied.

VII.

In accordance with the foregoing, the court will, contemporaneously with the filing of this memorandum opinion, enter an order denying in part and granting in part the defendants' motion for summary judgment.

FILED: July 27, 2004

BY THE COURT

/s/

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE