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**IN THE MATTER OF: MICHAEL M. MCKENZIE, Debtor. STRONG INDUSTRIES, INC., Plaintiff v. MICHAEL M. MCKENZIE, Defendant.**

**CASE NUMBER: R05-42517-PWB, IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, ADVERSARY PROCEEDING NO. 05-5008**

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION**

**2007 Bankr. LEXIS 4733**

**May 9, 2007, Decided**

**PRIOR HISTORY:** Strong Indus. v. McKenzie (In re McKenzie), 2006 Bankr. LEXIS 827 (Bankr. N.D. Ga., May 21, 2006)

**COUNSEL:** [\*1] For Strong Industries, Inc., Plaintiff: David J. Hungeling, LEAD ATTORNEY, Law Office of David J. Hungeling, PC, Atlanta, GA.

For Michael M McKenzie, Debtor: William E. Otwell, LEAD ATTORNEY, Austell, GA.

**JUDGES:** Paul W. Bonapfel, U.S. Bankruptcy Court Judge.

**OPINION BY:** Paul W. Bonapfel

**OPINION**

**ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT**

Strong Industries, Inc. ("Plaintiff") seeks a determination that a pre-petition judgment obtained by it against the Debtor is nondischargeable pursuant to 11 U.S.C. § 523(a)(6). The Court previously denied the Plaintiff's first motion for summary judgment because the record was insufficient to permit the Court to determine,

for purposes of issue preclusion, whether there was an identity of issues between a judgment for conversion in the Superior Court of Bartow County, Georgia, and the elements necessary for proving the Plaintiff's judgment is nondischargeable pursuant to § 523(a)(6). The Plaintiff has now filed a renewed motion for summary judgment.

Prior to filing bankruptcy, the Debtor owned and operated Cartersville Pool & Leisure ("CP&L"), an unincorporated business. In the course of operating his business, the Debtor entered into an agreement with the Plaintiff, a manufacturer and supplier of ready-built pools and spas, to become [\*2] a licensed dealer of the Plaintiff's pool products. The Debtor was personally liable for the debt. After the Debtor defaulted under the terms of the agreement, the Plaintiff brought suit against the Debtor in the Superior Court of Bartow County, Georgia, in *Strong Industries, Inc. v. Michael McKenzie d/b/a Cartersville Pool & Leisure and Recreational Interiors, and Southern Leisure Products, Inc.*, Civil Action File No. 04CV2497. On July 1, 2005, after a bench trial, the Superior Court entered an Order and Judgment which contained the following conclusions of law:

1. The Court FINDS by a preponderance of the evidence that Michael McKenzie signed the purchase order (Plaintiff's Exhibit 4) in his individual capacity and

not as a representative or agent for any corporation or other legal entity. By failing to register the trade name Cartersville Pool & Leisure, the Court FINDS that Cartersville Pool & Leisure must be considered a trade name or d/b/a for Michael McKenzie personally. Therefore, the Court FINDS by a preponderance of the evidence that Michael McKenzie individually and Michael McKenzie d/b/a Cartersville Pool & Leisure are liable to the Plaintiff under Count I of the Plaintiff's [\*3] complaint for breach of contract.

2. The Court FINDS that the parties presented conflicting evidence of whether Michael McKenzie d/b/a Cartersville Pool & Leisure converted Plaintiff's property. Because the evidence showed that employees or agents of Michael McKenzie d/b/a Cartersville Pool & Leisure sold some of Strong's pools, the Court FINDS that, with respect to the pools sold, Michael McKenzie individually and Michael McKenzie d/b/a Cartersville Pool & Leisure have converted Plaintiff's property as defined by Georgia law. Therefore, Michael McKenzie individually and Michael McKenzie d/b/a Cartersville Pool & Leisure are liable to the Plaintiff under Court III of Plaintiff's complaint for conversion.

The July 1, 2005 Order awarded the Plaintiff damages in the amount of \$ 55,287.42 and post-judgment interest at the statutory rate against the Debtor.

The Plaintiff has renewed its request for summary judgment on its complaint that the judgment debt based upon conversion is nondischargeable pursuant to 11 U.S.C. § 523(a)(6). The Debtor has not filed a response to the motion for summary judgment.

Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the [\*4] debtor to another entity or the property of another entity." 11 U.S.C. § 523(a)(6). The Supreme Court has held that because the word "willful" modifies the word "injury," a finding of nondischargeability requires "a deliberate or

intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (emphasis in original). Thus, negligent or reckless conduct does not fall within the "willful and malicious injury" exception to discharge. Under § 523(a)(6), the debtor must intend the consequences of an act and not simply the act itself. *Id.*, 523 U.S. at 61-62, 118 S.Ct. at 977 (citing RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1964)). A "malicious" injury is one which is "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1164 (11th Cir. 1995) (citations omitted). Malice may be implied or constructive. *Id.*

Under Georgia law, conversion "consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property [\*5] of another inconsistent with his rights; or an unauthorized appropriation." *In re Moir*, 291 B.R. 887, 892 (Bankr. S.D. Ga. 2003) (quoting *Adler v. Hertling*, 215 Ga.App. 769, 772, 451 S.E.2d 91 (1994)). However, as the *Moir* court observed, not all judgments for conversion are nondischargeable as willful and malicious injuries under § 523(a)(6), because a conversion can arise from a reckless or negligent act. *Id.* (citing *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L. Ed. 2d 90 (1998)). Thus, a finding of nondischargeability cannot rest solely on a state court judgment for conversion; there must be some indication that the elements of willfulness, wrongfulness and intentionality have been satisfied.

In support of its motion for summary judgment, Plaintiff relies on its requests for admission to which Debtor did not respond.<sup>1</sup> The relevant requests state as follows:

14. Admit that you knowing failed to make payment to [the Plaintiff] for its Property.

15. Admit that you willfully converted [the Plaintiff's] Property.

16. Admit that you maliciously converted [the Plaintiff's] Property.

17. Admit that you intentionally converted [the Plaintiff's] Property.

18. Admit that you wrongfully converted [the Plaintiff's] [\*6] Property.

19. Admit that you intended to injure [the Plaintiff] by converting its Property.

1 The Requests for Admission are attached as Exhibit B to the Plaintiff's Renewed Motion for Summary Judgment. (Doc. No. 12). The Plaintiff's counsel avers that he received no response to the Requests for Admission in his Affidavit attached as Exhibit D to the Motion.

Debtor's failure to respond to these requests means they are deemed admitted. FED. R. CIV. P. 36(a) (applicable under FED. R. BANKR. P. 7036(a)). Any matter admitted under Rule 36 is "conclusively established" unless the court on motion permits withdrawal or amendment of the admission. Because Debtor has admitted that he willfully and intentionally converted the Plaintiff's property, there is no issue of

material fact in dispute. Further, the amount of the debt, as set forth in the judgment entered by the Superior Court of Bartow County, Georgia, in *Strong Industries, Inc. v. Michael McKenzie d/b/a Cartersville Pool & Leisure and Recreational Interiors, and Southern Leisure Products, Inc.*, Civil Action File No. 04CV2497, on July 1, 2005, has been determined and is subject to claim preclusion. Accordingly, it is

**ORDERED** that Plaintiff's [\*7] Motion for Summary Judgment is granted. A separate judgment shall be entered contemporaneously herewith.

**IT IS ORDERED as set forth below:**

**Date: May 09, 2007**

/s/ Paul W. Bonapfel

**Paul W. Bonapfel**

**U.S. Bankruptcy Court Judge**