2004 BNH 003 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 02-13846-MWV
Chapter 7

Brian Carne and Terry Carne,
Debtors

LaChance Financial Services, Inc.,
Plaintiff

v. Adv. No. 03-1286-MWV

Brian Carne and Terry Carne,
Defendants

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MEMORANDUM OPINION

The Court has before it the complaint of LaChance Financial Services, Inc. ("Plaintiff") seeking an order excepting from discharge damage caused by Debtors-Defendants Brian Carne and Terry Carne ("Defendants") pursuant to sections 523(a)(4) and 523(a)(6) of the Bankruptcy Code. The Court held a one-day trial on January 7, 2004, and took this matter under submission. For the reasons set out below, the Court denies the Plaintiff's complaint.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

Defendant, Brian Carne ("Mr. Carne") was the manager and sole member of an entity known as MicroSmart Technology Solutions, LLC ("MicroSmart") and his wife, Defendant Terry Carne ("Mrs. Carne"), was an employee of MicroSmart. Between April 5, 2001, and December 1, 2001, the Plaintiff and MicroSmart entered into four lease agreements for various computer equipment that were used in the business of MicroSmart (Pl.'s Ex. 1-4). MicroSmart experienced a financial difficulty since the summer of 2002, and the business of MicroSmart eventually failed in December 2002. Upon the failure of MicroSmart, the Defendants started to sell their computer equipment in early December 2002 (Pl.'s Ex. 10). Meanwhile, Mr. and Mrs. Carne filed their voluntary petition under Chapter 7 of the Bankruptcy Code with this Court on December 12, 2002. The Defendants listed the Plaintiff as an unsecured creditor having a claim of $105,000.

On December 31, 2002, Lawrence N. LaChance, the president of the Plaintiff, and David Rabinovitz, the general manager and chief operating officer of the Plaintiff, visited the MicroSmart premises in Bedford, New Hampshire, and recovered some of their equipment leased by MicroSmart. In February 2003, Mr. Rabinovitz recovered additional equipment from the MicroSmart location in Portsmouth, New Hampshire. Following recovery of the equipment, the Plaintiff compiled a list of missing equipment (Pl.'s Ex. 12, 12A) and requested Mr. Carne to return the missing equipment. At the

Plaintiff's request, Mr. Carne arranged for the return of the equipment, both at his house and at Paradigm Computers (Pl.'s Ex. 19), but Paradigm Computers refused to return the equipment located in its facility to the Plaintiff.

The Plaintiff commenced this adversary proceeding on March 17, 2003, asserting that the Defendants sold, transferred or otherwise converted th

Plaintiff fails to prove the second and third elements of embezzlement. While the Plaintiff suspects that Mr. Carne sold the missing equipment when he conducted the sale of assets of MicroSmart without remitting the proceeds to the Plaintiff, the Plaintiff was unable to offer any evidence supporting its suspicions.

The evidence presented also fails to establish that the surrounding circumstances indicate the Defendants' fraudulent intent or deceit. Mr. Carne and his former employee, Sharon Bosse, testified that fifteen to twenty employees of MicroSmart had access to the building where MicroSmart operated its business. That testimony supports Mr. Carne's explanation that disgruntled employees might have taken the missing equipment.

The Plaintiff argues that Mr. Carne wrongfully transferred the Plaintiff's computer equipment to Paradigm Computers without the Plaintiff's consent. However, Mr. Carne testified that he was contemplating a joint venture with Paradigm and he informed the Plaintiff of this deal in February 2003. Mr. Carne also testified that the Plaintiff offered to negotiate with Paradigm and that he thought the equipment kept at Paradigm would be returned to the Plaintiff. No evidence was presented by the Plaintiff to rebut Mr. Carne's testimony. Moreover, the Plaintiff did not dispute the fact that it was unable to recover the computer equipment at Paradigm Computers because it was Paradigm who refused to return the equipment to the Plaintiff. There is no evidence that Mr. Carne took any action with intentional or reckless disregard of the Plaintiff's rights. Accordingly, the Plaintiff has not proven embezzlement for purposes of section 523(a)(4).

B. <u>Count II — 523(a)(6) — Against Both Defendants</u>

A debtor's discharge may be denied for the willful and malicious injury by the debtor to another entity or the property of another entity. 11 U.S.C. § 523(a)(6). The Plaintiff argues that the Defendants' actions constituted willful and malicious injury to property of the Plaintiff and, therefore, the Plaintiff's damage claim is nondischargeable. In order to constitute a willful injury, the act must be deliberate or

intentional. Printy v. Dean Witter Reynolds, Inc., 110 F.3d 853, 859 (1st Cir. 1997). It should be noted that "the word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Gieger, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998). To make out a 523(a)(6) claim, therefore, the Plaintiff must show, by a preponderance of the evidence, that the Defendants acted with an actual intent to injure the Plaintiff's property. See Id. 523 U.S. at 61-62; see also Roumeliotis v. Popa (In re Popa), 140 F.3d 317, 318 (1st Cir. 1998).

The Court finds that the Plaintiff has not carried its burden of proving that the Defendants acted with such an intent. The discussion above relating to the Court's conclusion that the Plaintiff has not proven that the Defendants sold, transferred or otherwise converted the missing equipment is relevant to the instant analysis. The Defendants testified that they understood that every piece of leased equipment from the Plaintiff should be returned to the Plaintiff and that they tried very hard to make sure any of the leased equipment not be sold. The Plaintiff did not present evidence to rebut the Defendants' testimony. Thus, the Plaintiff's claim under section 523(a)(6) is denied.

CONCLUSION

The Court concludes, based upon the testimony and documentary evidence presented, that the Plaintiff has failed to meet its burden of proof with regard to its embezzlement claim under sections 523(a)(4) and 523(a)(6), and its complaint seeking an exception to the Defendants' discharge is denied.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 15th day of January, 2004, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge