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WRITTEN DECISION - NOT FOR PUBLICATION

<p>FILED ENTERED LODGED RECEIVED</p> <p>FEB 14 2007</p> <p>CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA</p> <p>BY <u>144</u> DEPUTY</p>

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:)	Adversary Case No. 03-90294-H7
)	
MICHAEL ALTINGER,)	
)	MEMORANDUM DECISION
Debtor.)	AND ORDER THEREON
)	
Bankruptcy Case No. 03-04642)	
<hr/>		
KEITH SLUDER,)	
)	
Plaintiff,)	
)	
vs.)	
)	
MICHAEL ALTINGER,)	
SALLY WILSON, HERB PACKER,)	
GALLERY ON BROADWAY,)	
)	
Defendants.)	
<hr/>		
MICHAEL ALTINGER,)	
)	
Cross-Claimant,)	
)	
v.)	
)	
KEITH SLUDER,)	
)	
Counter-Defendant.)	
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Keith Sluder ("plaintiff") filed a nondischargeability complaint against Michael Altinger ("debtor"), and others

1 alleging claims for relief under 11 U.S.C. § 523(a)(2)(A), (4), and
2 (6).¹ Debtor answered and filed a counterclaim alleging fraud and
3 breach of written contract.

4 A trial was held on December 7, 2006, January 11, 17, and 24,
5 2007. Plaintiff and debtor appeared pro se.

6 At issue is whether debtor willfully and maliciously intended
7 to injure plaintiff by withholding and then converting plaintiff's
8 artwork and personal effects within the meaning of 11 U.S.C. §
9 523(a)(6).

10 This Court has jurisdiction to determine this matter
11 pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order
12 No. 312-D of the United States District Court for the Southern
13 District of California. This is a core proceeding pursuant to
14 28 U.S.C. § 157(b)(2)(I).

15 I.

16 BACKGROUND FACTS AND SUMMARY OF THE PARTIES ARGUMENTS

17 Debtor either co-owned "Gallery on Broadway" (hereinafter
18 "Gallery") along with Sally Wilson ("Wilson"), or managed it for
19 her. Plaintiff² delivered to debtor approximately 39 original
20
21
22

23 ¹ The Court finds that plaintiff failed to prove the elements under
24 § 523(a)(2)(A) and (a)(4). Based upon the evidence, the Court cannot find that
25 debtor committed fraud when entering into the promotion contract with plaintiff.
Moreover, the Court finds there was no fiduciary duty within the meaning of
(a)(4) between an art promoter such as debtor and artist, plaintiff.

26 Plaintiff also named Sally Wilson, Herb Packer and Gallery on
27 Broadway as defendants. This Court does not have jurisdiction over any of the
non-debtor defendants. The complaint is dismissed as to these three defendants.

28 ² Plaintiff has been an accomplished artist for more than 25 years, with
sales of over 1,000 original works of art.

1 paintings, frames and other personal property³ (hereinafter, the
2 paintings and other personal items will be collectively referred to
3 as "artwork"). Eight of the paintings delivered were owned by
4 family members or friends of plaintiff.

5 According to debtor, he held the artwork as collateral for
6 money that he lent to plaintiff. Debtor promised to pay plaintiff
7 \$800 per month for living expenses and plaintiff would be charged
8 \$2000 per month rent at Gallery where plaintiff would display his
9 art. Debtor maintained that if plaintiff was unable to pay back
10 the money advanced and rent charged, then debtor could keep the
11 artwork. Alternatively, if plaintiff did repay the monies,
12 plaintiff's unsold artwork would be returned to him.

13 Plaintiff denied that this was the agreement. Plaintiff
14 contends that he gave debtor an exclusive right to promote and sell
15 his artwork, but never gave his artwork as collateral for loans
16 from the debtor.

17 Both parties agree that the initial oral agreement was
18 formalized in a written agreement dated November 19, 2001 ("Artists
19 Exclusive Contract Agreement," hereinafter the "Agreement")
20 [Exhibit "C"]. In the Agreement, plaintiff was to pay \$2000 a
21 month for the Gallery space and receive \$800 per month from debtor
22 for living expenses. Debtor also agreed to pay various costs
23 associated with promoting plaintiff's artwork. In exchange,
24 plaintiff was required to produce 12 to 24 pieces of art per year
25 and one work of "masterpiece" quality for each art show, write
26

27
28 ³ The personal property included 79 master slides, 75 limited edition
prints, plaintiff's collector's mailing list, personal poetry, newspaper and
book articles about plaintiff and a photo of plaintiff and one of his
collectors, the late actor, Ernest Borgnine.

1 stories about the various pieces of artwork produced, and generally
2 participate in the marketing and promotion of his work.

3 According to debtor, plaintiff breached the Agreement shortly
4 after signing it by failing to produce the requisite number of
5 artwork and help debtor market and promote plaintiff's art.

6 Approximately two and one-half months after entering into the
7 Agreement, debtor and plaintiff had a disagreement and debtor
8 allegedly severed the relationship. Plaintiff asked for his
9 artwork back, but debtor refused his request. Thereafter,
10 plaintiff filed a lawsuit in state court seeking the return of his
11 artwork. Plaintiff's state court lawsuit was stayed by debtor's
12 bankruptcy filing.

13 II.

14 DISCUSSION

15 A. THE STANDARDS AND ELEMENTS UNDER SECTION 523(a)(6)

16 Section 523(a)(6) prevents discharge from any debt "for
17 willful and malicious injury by the debtor to another entity or the
18 property of another entity." Plaintiff has the burden of proving
19 by a preponderance of the evidence that the debtor acted both
20 willfully and maliciously. Transamerica Comm. Fin. Corp. v.
21 Littleton (In re Littleton), 942 F.2d 551, 554 (9th Cir. 1991).
22 Willful and Malicious are separate requirements. Albarran v. New
23 Form, Inc. (In re Albarran), 347 B.R. 369, 379 (B.A.P. 9th Cir.
24 2006).

25 The willful injury prong under § 523(a)(6) is met, "when it is
26 shown that the debtor had a subjective motive to inflict the
27 injury," Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208
28 (9th Cir. 2001), or the subjective knowledge that harm is

1 substantially certain to occur. Khaligh v. Hadaegh (In re
2 Khaligh), 338 B.R. 817, 831 (B.A.P. 9th Cir. 2006). Thus, the
3 willful requirement focuses on the debtor's intent.

4 The malicious prong involves 1) a wrongful act, 2) done
5 intentionally, 3) which necessarily causes injury, and 4) is done
6 without just cause or excuse. Albarran, 347 B.R. at 379 at n.8;
7 Jercich, 238 F.3d at 1209.

8 In Kawauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 974
9 (1998), the United States Supreme Court noted that
10 nondischargeability under § 523(a)(6) requires a "deliberate or
11 intentional injury, not merely a deliberate or intentional act
12 which causes injury."

13 B. THE TORT OF CONVERSION

14 "The [withholding or] conversion of another's property without
15 his knowledge or consent, done intentionally or without
16 justification and excuse, to the other's injury, constitutes a
17 willful and malicious injury, within the meaning of § 523(a)(6)."
18 Del Bino v. Bailey (In re Bailey), 197 F.3d 997, 1000 (9th Cir.
19 1999) (citation omitted). "While bankruptcy law governs whether a
20 claim is nondischargeable under § 523(a)(6), this Court looks to
21 state law to determine whether an act falls within the tort of
22 conversion." Id. (citation omitted).

23 In California, the elements of a conversion are the creditor's
24 ownership or right to possession of the property at the time of the
25 conversion; the debtor's conversion by a wrongful act or
26 disposition of property rights; and damages. Thiara v. Spycher
27 Brothers (In re Thiara), 285 B.R. 420, 427 (B.A.P. 9th Cir. 2002).
28 A conversion, under California law, establishes the debtor's

1 "wrongful exercise of dominion over the personal property of
2 another," but it does not necessarily decide the type of wrongful
3 intent on the part of the debtor that is necessary for the damages
4 to be a nondischargeable debt under § 523(a)(6). Id. at 429. The
5 court must also find the conversion was intentional. Id. Proof
6 of the debtor's knowledge that he is harming the creditor's
7 interest by converting the collateral establishes that the debtor
8 either intended to inflict such injury or believed that such injury
9 was substantially certain to occur, and thus meets the willfulness
10 requirement of § 523(a)(6). Id. at 432-33.

11 C. ANALYSIS

12 1. THE ALLEGED SECURITY INTEREST: THE ORAL AGREEMENT

13 Debtor testified that he met plaintiff during the mid
14 1970's, and at that time, debtor was one of plaintiff's biggest
15 collectors of art. Debtor testified that he considered plaintiff
16 his friend. Debtor further testified⁴ that in 2000 he was helping,
17 co-defendant and friend Wilson, with her Gallery in San Diego,
18 California. He testified that he told Wilson about plaintiff and
19 "what a tremendous artist he was." Debtor decided to get in touch
20 with plaintiff, who was living in Denver, Colorado, to see if he
21 could place plaintiff's artwork up for sale at the Gallery. Debtor
22 also testified that plaintiff told him that he needed money.
23 According to debtor, although he was very apprehensive, he decided
24 to send plaintiff money under the condition that plaintiff send
25 some artwork as collateral for the monies he sent. Debtor also

26
27 ⁴ This testimony is found in debtor's Exhibit "A" entitled "Brief
28 Statement of Facts," which the Court advised would be considered debtor's direct
testimony. Debtor affirmed under oath in open court that his "Statement" would
be considered under penalty of perjury.

1 testified that he flew to Denver, helped plaintiff move to
2 San Diego, and paid for everything out of his own pocket including
3 the moving truck.

4 According to debtor, his first advance to plaintiff was on
5 October 17, 2000, as evidenced by a long list of expenses, which
6 debtor offered as his Exhibit "F" and which was entitled "Expense
7 Log" ("Log"). The Log indicates that the move to San Diego took
8 place in approximately early September 2001 [Line Item 27].

9 Plaintiff denied that there was any discussion with debtor
10 that he would "advance" him money in exchange for plaintiff giving
11 debtor his artwork as collateral as security for monies advanced.

12 Based on the Court's observation of plaintiff and debtor's
13 demeanor and consideration of their "stories," it does not believe
14 debtor's contention that plaintiff had orally agreed to give him
15 the artwork as security. Moreover, in examining the correspondence
16 between debtor's attorney and plaintiff's attorney in the state
17 court lawsuit, filed in June 2002, neither debtor nor his attorney
18 ever asserted a security interest in the artwork. The first time
19 this contention appears is in this trial. Therefore, the Court
20 concludes that the parties did not enter into an oral agreement
21 giving debtor a security interest in plaintiff's artwork.

22 2. THE ALLEGED SECURITY INTEREST: THE WRITTEN AGREEMENT

23 "Determining whether the parties intended to create a
24 security interest is a two-step process. The court must find both
25 language in a written agreement that objectively indicates the
26 parties' intent to create a security interest and the presence of a
27 subjective intent by the parties to create a security interest."

28 Expeditors Int'l of Washington, Inc. v. The OCC of CFLC, Inc. (In

1 re CFLC, Inc.), 166 F.3d 1012, 1016 (9th Cir. 1999) (citation
2 omitted). "The intent to create a security interest must appear on
3 the face of a written document executed by the debtor." Id.
4 (citation omitted).

5 Debtor testified that the Agreement "formalized" the deal
6 between him and plaintiff, and "delineated their rights and
7 responsibilities." He also asserted this contention in his
8 counterclaim (Debtor's Counterclaim, ¶ 8). But the Agreement,
9 which was drafted and signed by debtor on November 19, 2001, over a
10 year after debtor commenced making his so called "advances" to the
11 plaintiff in October 2000, contains no language evidencing the
12 parties intent to create a security agreement.

13 The Agreement does not contain any language referencing a
14 lender-borrower relationship. There is no mention of advances
15 having to be unconditionally repaid by plaintiff or that the
16 artwork was to be given to debtor as security for advances or costs
17 incurred by debtor in selling and promoting plaintiff's artwork.
18 There is also no language in the Agreement that gives debtor the
19 right to keep plaintiff's artwork in the event he was not repaid
20 the advances or promotional costs paid on plaintiff's behalf. In
21 the Agreement, debtor refers to himself as Promoter, Manager,
22 Publisher, Agent, Exclusive Representative and refers to the
23 plaintiff as the Artist. The Court finds that the Agreement gave
24 debtor nothing more than the exclusive right to be plaintiff's
25 agent.

26 Therefore, the Court concludes that the written Agreement did
27 not give a security interest in plaintiff's artwork.

28 ///

1 3. IF A SECURITY AGREEMENT EXISTED, DEBTOR DID NOT HAVE
2 UNILATERAL RIGHT TO SELL OR DISPOSE OF ARTWORK

3 Even if a security agreement was created and perfected by
4 debtor's possession of plaintiff's artwork, debtor was not entitled
5 to resort to self-help with regard to the artwork.

6 Pursuant to Restatement (First) of Security § 72 (2006),
7 Enforcement of Possessory Liens of the Restatement of the Law --
8 Security & Suretyship and Guaranty, no possessory lienor has the
9 power to reduce his lien to a money equivalent by sale of the
10 chattel.

11 Comment (a) to § 72 notes:

12

13 The privilege of retaining a chattel even
14 without the power of sale gives the lienor an
15 important practical advantage. The lienor can
16 obtain a judgment on his demand and then direct
17 the officers of the law to levy on the chattel
18 so that it can be sold by judicial process. In
19 the meantime, the chattel cannot be levied upon
20 by another creditor.

21 Thus, debtor could not unilaterally sell or dispose of the
22 artwork on his own.

23 4. SECTION 523(a)(6): THE WILLFUL PRONG

24 The willful injury prong under § 523(a)(6) is met, "when
25 it is shown that the debtor had a subjective motive to inflict the
26 injury," Jercich, 238 F.3d at 1208, or the subjective knowledge
27 that harm is substantially certain to occur. Khaligh, 338 B.R. at
28 831. The evidence reveals that debtor had a subjective motive to
inflict injury on plaintiff.

a. DEBTOR'S SCHEME TO PREVENT THE RETURN OF THE ARTWORK

Plaintiff testified that he complained to debtor in

1 early February 2002 that debtor was not paying him the \$800 per
2 month in living expenses agreed to. Plaintiff testified that
3 debtor got extremely angry and suddenly ordered him off the
4 premises of the Gallery and out of the house where he was residing
5 with debtor, Wilson and others. Plaintiff testified that after
6 debtor abruptly threw him out of the Gallery, he had to ask his 87-
7 year-old mother if he could live at her home. He had no car and no
8 money. Debtor did not respond to plaintiff's numerous demands for
9 the return of his artwork or artwork belonging to his friends or
10 family. Accordingly, plaintiff filed his lawsuit against the
11 debtor in the San Diego County Superior Court, on June 5, 2002.
12 Once plaintiff commenced his state court lawsuit, to lawfully
13 recover possession of his artwork, debtor orchestrated and directed
14 with the assistance of his state court attorney, Randall C. Rechs
15 ("Rechs"), a scheme to delay plaintiff in his efforts, first: to
16 locate his artwork, and secondly: to recover his artwork. The
17 chase to recover the artwork was on.

18
19 The Demand for Payment

20 Shortly after the lawsuit was filed, plaintiff's attorney,
21 J. Gary Brown ("Brown") began communicating with debtor's attorney
22 Rechs. On July 31, 2002, Rechs wrote Brown indicating that debtor
23 would return plaintiff's artwork in exchange for \$109,043.61, the
24 amount incurred for debtor's alleged promotional work. Attorney
25 Rechs also unequivocally stated that "my client wants to make it
26 clear that he has not sold any of your client's artwork since the
27 dissolution began and has no intentions of doing so." [Exhibit
28 "10"].

1 writing for the first time that "Mr. Packer currently has the
2 paintings in question. The issue of obtaining the paintings for
3 collateral must be addressed with him." Thus, Brown learned that
4 the mysterious "investor in trust" was none other than Herbert E.
5 Packer ("Packer"), a long time friend and business partner of the
6 debtor who worked at the Gallery, lived with the debtor, and who
7 was also known to plaintiff.

8 By failing to identify Packer outright, debtor and Rechts
9 forced plaintiff into incurring further expense and sustaining
10 further delay in attempting to locate his artwork.

11

12 Packer's Testimony and The Second Transfer

13 Brown, after some difficulty, finally joined Packer as a co-
14 defendant in the state court lawsuit and took his deposition on
15 November 19, 2003. It is in this deposition, that the story about
16 the location of plaintiff's artwork changed again. Specifically,
17 Packer testified that commencing in 2001 and continuing for three
18 years, that he began purchasing plaintiff's artwork from debtor as
19 an investment. Packer testified that he purchased more than
20 \$100,000 in artwork, that he purchased ten or more pieces of
21 artwork, and that as of the date of his deposition on November 19,
22 2003, he still had the artwork in his possession.

23

24

25 paintings and start selling prints of his paintings. Plaintiff testified that
26 one of the CD's had been given to a man named Kelly at Omni Fine Arts.
27 Plaintiff testified that after debtor had thrown him out of the Gallery, he
28 called Kelly to buy his copy of his CD so that he could at least start selling
prints of the original paintings which debtor was holding. Plaintiff testified
that Kelly told him that debtor had instructed him to destroy his copy of
plaintiff's CD. Plaintiff argues that Rechts' January 15, 2003, letter is just
another example of how debtor intended to injure him and permanently put him out
of business.

1 Packer's testimony was in sharp contrast to Rechs' July 31,
2 2002, letter, wherein he advised Brown that he wanted to make it
3 clear that debtor had not sold any of his client's artwork and had
4 no intentions of doing so and that debtor would turnover the
5 artwork if plaintiff paid him \$109,043.61.

6 It is also clear from Packer's deposition and 341(a) hearing
7 testimony that debtor had advised Packer on what to say. At
8 Packer's 341(a) hearing on March 30, 2005, he testified as he had
9 in his deposition testimony, that he had purchased the artwork.
10 Mary Testerman-Duvoisin ("Testerman-Duvoisin"), an attorney with
11 the United States Trustee's Office, asked Packer to produce
12 receipts and continued the 341(a) hearing to May 3, 2005. It was
13 at this hearing that Packer, after being pressed by Testerman-
14 Duvoisin, completely contradicted his deposition testimony and his
15 initial 341(a) hearing testimony by testifying that he had not
16 purchased the artwork but had been given the artwork by debtor for
17 the repayment of credit card advances that he made to debtor's
18 creditors, "probably around May of 2003." [341(a) Hearing
19 Transcript 9:10, Exhibit "9"].

20 In his May 3, 2005, continued 341(a) hearing, Packer testified
21 that debtor then asked him in May 2003, whether he would let him
22 use the art or give him the art to use as collateral for
23 architectural renderings done at debtor's request by an architect
24 named Paul Thoryk. Packer testified that although the debtor asked
25 him in May "we actually took the art to his sister's house around
26 December." The sister referred to is Linda Thoryk, the architect's
27 ///
28 ///

1 sister and debtor's former girlfriend.⁶ In a declaration filed in
2 this proceeding in connection with debtor's motion to set aside a
3 previously entered default judgement, Linda Thoryk testified that
4 she obtained plaintiff's paintings in approximately 2003. In her
5 declaration, executed on December 8, 2005, she testified that she
6 was currently holding 18-20 of plaintiff's paintings and didn't
7 know who owned them. Further, Linda Thoryk stated that Altinger
8 (debtor) informed her that he was owed money from Mr. Sluder
9 (plaintiff) for a multitude of things since approximately 2002 and
10 that he was holding the paintings until he was paid by Sluder.

11 In stark contrast to Packer's initial deposition testimony,
12 debtor testified in the trial that he gave the art to Packer (his
13 close friend and real estate business partner) in April 2002, two
14 months after plaintiff was forced out of the Gallery. Debtor never
15 testified that Packer purchased the artwork. In fact, one of
16 debtor's complaints against plaintiff, was that he was able to sell
17 only one piece of art during the existence of the two and one-half
18 month exclusive contract.

19
20 The Debtor Always Had Control of the Artwork

21 What is apparent to the Court is that throughout all these
22 inconsistencies, debtor had complete control over all the artwork.
23 On the one hand, debtor testified that he gave the artwork to
24 Packer in April 2002. On the other hand, Packer testified that he
25 began purchasing the artwork in 2001 as an investment and he
26 purchased ten or more pieces of art. However, if Packer purchased

27 _____
28 ⁶ Linda Thoryk testified that she has known the debtor for more than twenty
years and previously dated him on and off for six years starting in approximately
1998

1 only ten pieces, that would leave the balance of the artwork,
2 28 pieces, with the debtor.

3 That debtor had never relinquished control of plaintiff's
4 artwork was further corroborated by Packer's testimony at 341(a)
5 hearing on May 3, 2005, when he testified that debtor told him to
6 take the artwork to Linda Thoryk and "we actually took the artwork
7 to his sister's house around December." (emphasis added) [Herbert
8 E. Packer 341(a) hearing, May 3, 2005, 9:24-25]. In addition,
9 Linda Thoryk's declaration makes it clear that despite all of the
10 debtor's representations about an unnamed investor, as of December
11 2005, he "was still holding the paintings until he was paid by
12 Mr. Sluder" (Thoryk Declaration 2:18) [Exhibit "13"]. Another,
13 inconsistency, is that if debtor owed architect Paul Thoryk
14 \$100,000 for architectural plans, why were the 18-20 pieces taken
15 to the architect's sister's home? Debtor provided no corroborating
16 evidence from Paul Thoryk, such as testimony, a declaration,
17 invoices, or a contract.

18
19 Debtor Fails to Disclose Liabilities and Assets

20 Debtor filed his bankruptcy on May 14, 2003. The obligation
21 to Thoryk, based on Packer's testimony existed in May 2003. Debtor
22 did not list the purported \$100,000 debt to Paul Thoryk on his
23 schedules. Debtor also did not list the artwork on the schedules
24 or the \$109,043.61 allegedly owed by the plaintiff to debtor as an
25 asset.

26 The debtor should have listed all or some of the artwork on
27 his schedules or, if he had transferred the artwork to Packer to
28 Thoryk prior to the filing of his bankruptcy on May 14, 2003, the

1 transfers should have been listed, particularly the alleged
2 transfer of the artwork to Paul Thoryk in satisfaction of the
3 \$100,000 debtor allegedly owed him.

4 The Court finds that debtor intentionally left this
5 information off his bankruptcy schedules to prevent plaintiff from
6 discovering the location of his artwork and making a claim for
7 ownership in debtor's bankruptcy proceeding.

8
9 The Debtor Still Has Some of the Artwork and Personal Property

10 The Court also notes that since Packer testified that he had
11 10 pieces of artwork and Thoryk testified that she had 18-20
12 pieces, that would still leave 8-10 pieces in the hands of the
13 debtor. Neither Packer nor Thoryk testified that they had or were
14 holding plaintiff's photo album, N.A.F.E. pencil renderings, the 75
15 Limited Edition prints of "Backstreets of 57," the 79 master slides
16 and the Collector's Mailing List, personal property, newspaper/book
17 articles and plaintiff's photo of Ernest Borgnine. The debtor must
18 still have these items in his possession or have control of them.

19 The Court notes that debtor not only refused, and continues to
20 refuse, to turnover debtor's paintings, but he also refuses to
21 turnover the additional items he was given.⁷ Debtor's refusal to
22 turnover these personal items in addition to the artwork
23 demonstrates that he has intended, and still intends, to hurt his
24 former friend and to punish him for not paying him \$109,043.61
25 demanded by his attorney in his July 31, 2002, letter. Also,

26
27
28 ⁷ The return of items such as the 79 master slides and the plaintiff's mailing list would enable plaintiff to continue to his art career on his own. Debtor also has not returned plaintiff's personal poetry, newspaper and book articles, or his photo of Ernest Borgnine.

1 debtor still hasn't forgiven the plaintiff for losing \$10,000
2 debtor invested on plaintiff's behalf in 1983! (Brief Statement of
3 Facts, unnumbered paragraph 3) [Exhibit "A"].

4 If Debtor was truly acting in good faith, he would have
5 attempted to settle the dispute or proceed as expeditiously as
6 possible before the Superior Court to have that court resolve the
7 issues regarding debtor's alleged loans to plaintiff and whether
8 plaintiff has given debtor possession of his artwork and personal
9 effects as security for payment of those loans. If debtor had been
10 acting in good faith, he wouldn't have orchestrated his scheme to
11 delay plaintiff from obtaining his artwork. The only reason debtor
12 failed to proceed expeditiously in state court was to pressure the
13 plaintiff into paying him \$109,043.61.

14 The case bears a strong resemblance to the Ninth Circuit case
15 of Banks v. Gill Distrib. Ctrs., Inc. (In re Banks), 263 F.3d 862
16 (9th Cir. 2001). The chapter 7 debtor, who was an attorney, failed
17 to remit proceeds of a cause of action according to terms of a
18 settlement agreement. The plaintiff-client filed a
19 nondischargeability complaint alleging willful and malicious injury
20 under § 523(a)(6). The Ninth Circuit upheld the bankruptcy court's
21 finding that the debtor-attorney intended to injure his plaintiff
22 client by forcing it to take substantially less than it was owed
23 under the settlement agreement, or perhaps nothing at all. The
24 Ninth Circuit upheld the bankruptcy court's finding that the act
25 was wrongful, the debtor knew it was wrongful, and the debtor had
26 no justification for withholding the money from his client and had
27 no justification for his attempts to delay the client in its
28 inquiry into what happened to the money.

1 With a slightly different twist, this is almost exactly what
2 debtor did in this matter. He wrongfully claimed that the
3 plaintiff owed him money, wrongfully claimed a security interest in
4 the artwork, even though there was absolutely nothing in the
5 Agreement which supported this contention, and then consistently
6 attempted to delay and frustrate the plaintiff's efforts to regain
7 possession of his artwork. Debtor hid the artwork from plaintiff,
8 and continues to do so to this very day.

9 5. SECTION 523(a)(6): THE MALICIOUS PRONG

10 The malicious prong involves 1) a wrongful act, 2) done
11 intentionally, 3) which necessarily causes injury, and 4) is done
12 without just cause or excuse. Albarran, 347 B.R. at 379 at n. 8;
13 Jercich, 238 F.3d at 1209.

14 The Court finds that the malicious prong is met in this case.
15 Debtor knew that he did not have a security interest in plaintiff's
16 artwork and that injury to plaintiff was substantially certain to
17 occur if debtor did not return the artwork to plaintiff so that
18 plaintiff could continue with his profession. Despite this
19 knowledge, debtor embarked on a course of action to frustrate and
20 hinder plaintiff's efforts to recover his artwork, even after
21 plaintiff expended time and money in filing a lawsuit against
22 debtor and hiring an attorney. Debtor has pointed to no just cause
23 or excuse for his behavior. The Court finds that the injury
24 inflicted by debtor was malicious within the meaning of 11 U.S.C. §
25 523(a)(6).

26 D. DAMAGES

27 California's standard measure for damages arising from a
28 wrongful conversion action is found in California Civil Code § 3336

1 ("CC § 3336"). That section provides that the detriment caused by
2 the wrongful conversion of personal property is presumed to be:

3 First-The value of the property at the time of
4 the conversion, with the interest from that
5 time, or an amount sufficient to indemnify the
6 party injured for the loss which is the
7 natural, reasonable and proximate result of the
8 wrongful act complained of and which a proper
9 degree of prudence on his part would not have
10 averted; and

11 Second-A fair compensation for the time and
12 money properly expended in pursuit of the
13 property.

14 see In re Finkel, 21 B.R. 17 (B.A.P. 9th Cir. 1982).

15 Plaintiff requests damages as follows:

16	1. 38 originals, plus frames, plus 17 CDs, plus photo album	\$116,000
18	2. Potential income from each print 19 sale @ \$750,000	\$29,250,000
20	Potential income from 39 print 21 sales	
22	3. N.A.F.E. pencil renderings	\$2,000
23	4. 75 Limited Edition prints of 24 "Backstreets of 57"	\$7,500
25	5. 79 Master Slides (cost to produce)	\$2,000
26	6. Collectors' Mailing List, personal 27 property, newspaper/book articles 28 about him, photo of him with his collector, actor Ernest Borgnine	\$5,000
	7. Attorney fees for Gary Brown	\$3,500
	8. Attorney fees for Bryan Sampson	\$1,600
	9. Child support arrears	\$11,000
	10. Student loan plus interest	\$40,000
	11. Costs to recover artwork [i.e. U- Haul, Sheriff]	\$250.00
	12. Punitive and exemplary damages to compensate for pain and suffering, loss of creativity, loss of livelihood, and to punish Michael Altinger for his willful and malicious conduct	\$1,000,000

13.	Pre-judgment and post-judgment interest on the nondischargeable judgment	
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The Court finds the value of the property converted by debtor to be supported by the evidence. Debtor, an accomplished artist, for some 25 years, is amply qualified to value his artwork and personal effects. Additionally, the voluminous evidence submitted by plaintiff supports the fact that his artwork has been displayed in numerous galleries around the country.

Accordingly, the Court awards damages as follows:

- 1) \$91,578.96:⁸ For the 30 originals, plus frames, plus CDs, plus photo album;
- 2) \$2,000: For the N.A.F.E. pencil renderings;
- 3) \$7,500: For the 75 Limited Edition prints of "Backstreets of 57";
- 4) \$2,000: For 79 Master Slides (cost to produce);
- 5) \$5,000: For plaintiff's Collectors' Mailing List, personal property, newspaper/book articles about him, photo of him with his collector, actor Ernest Borgnine; and
- 6) \$250.00: For costs to recover the artwork.

///

⁸ Plaintiff testified that 8 paintings were not owned by him but rather family members. The parties agree that the debtor sold 1 painting during the exclusive agency. That leaves 38 originals. Plaintiff did not submit any evidence itemizing the value of each painting. Accordingly, the Court divided the \$116,000 in damages claimed by the 38 originals and came up with an average value of \$3,052.53 per painting and multiplied that by 8. That resulted in the sum of \$24,421.04, representing the value of the 8 paintings owned by plaintiff's family and friends. That sum was deducted from the \$116,000 to arrive at the \$91,578.96.

1 1. ATTORNEY FEES

2 Attorney fees are not recoverable under CC § 3336 relating to
3 fair compensation for time and money expended in pursuit of the
4 converted property. Haines v. Parra, 193 Cal.App.3d 1553, 1558,
5 239 Cal.Rptr. 178 (1987).

6 2. MISCELLANEOUS DAMAGES

7 The Court will not allow plaintiff his request for potential
8 income from each print sale. That figure totals \$29,250,000.

9 The Court also declines to award plaintiff his request of
10 \$11,000 for child support arrears, and \$40,000 for student loans
11 plus interest.

12 3. INTEREST

13 The federal prejudgment interest rate applies to actions
14 brought under a federal statute, such as bankruptcy proceedings,
15 unless the equities of the case require a different rate. Banks,
16 263 F.3d at 872.

17 Because of the debtor's outrageous conduct, including such
18 things as failing to turnover plaintiff's Collectors' Mailing List,
19 personal property, newspapers/book articles about him and his photo
20 of himself with collector actor Ernest Borgnine, the Court will
21 allow prejudgment interest at the higher California rate of seven
22 percent (7%) pursuant to Cal. Const. Art. XV, § 1, from February 7,
23 2002, until the date of judgment. The equities of this case justify
24 the higher state court rate.

25 4. EXEMPLARY DAMAGES

26 "When punitive damages have been awarded, those damages are
27 nondischargeable if a plaintiff establishes a § 523(a)(6) claim."
28 Sunclipse, Inc. v. Butcher (In re Butcher), 200 B.R. 675, 678

1 (Bankr. C.D. Cal. 1996) citing In re Levy, 951 F.2d 196, 199 (9th
2 Cir. 1991). Under California law, "[t]he statutory scheme for
3 allowance of punitive damages requires both a tort action and a
4 finding of 'oppression, fraud, or malicious.'" Butcher, 200 B.R. at
5 679 (citations omitted). "[A]n award of exemplary damages cannot be
6 based on mere speculation; it depends instead on a definite showing
7 of willingness to vex, harass, or injure consistent with a wrongful
8 intent to injure." Id. (citation omitted). "[E]xemplary damages
9 are properly awardable in an action for conversion, given the
10 required showing of malice, fraud or oppression." Id. at 680.

11 In this case, the Court finds that debtor's actions commencing
12 on or about February 7, 2002, and continuing to this very date,
13 constitute severe and substantial oppression, harassment and malice
14 directed toward plaintiff by defendant with a wrongful intent to
15 injure him.

16 Plaintiff requests exemplary damages of \$1,000,000. In
17 awarding punitive damages, courts must ensure that the measure of
18 the punishment is both reasonable and proportionate to the amount of
19 the harm to the plaintiff and that general damages involved. State
20 Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513
21 (2003); See also BMW of North America v. Gore, 116 S.Ct. 1589
22 (1996). "[I]n practice, few awards exceeding single-digit ratio
23 between punitive and compensatory damages will satisfy due process."
24 Campbell, U.S. 408, 410 (citation omitted). Given the fact that the
25 total compensatory damages are \$108,328.96, the Court grants
26 plaintiff punitive damages in the amount of \$75,000.

27 E. RELIEF REQUESTED

28 Plaintiff has requested that this Court order the immediate

1 return of his artwork, including frames and his personal property
2 within one week from the date of the judgment. The Court does not
3 have the authority to grant this relief.

4 However, the Court has found that debtor willfully and
5 maliciously converted plaintiff's artwork, frames and his personal
6 property as set forth therein. Accordingly, the debt including the
7 interest and punitive damages is nondischargeable. Since the debt
8 is not discharged, plaintiff is able to pursue the enforcement of
9 his Writ of Possession and other procedural remedies afforded him
10 under California law to recover possession of his personal
11 property.⁹ See In re Munoz, 287 B.R. 546, 557 (B.A.P. 9th Cir.
12 2002) ("The corollary is that the § 542(a)(2) discharge injunction
13 does not, by its straightforward terms, apply to protect the debtor
14 from any debt that is not discharged."). Debtor may also pursue the
15 collection of his monetary award for damages from this Court
16 pursuant to the ancillary enforcement jurisdiction of this Court to
17 enforce its judgments. In re McCowan, 296 B.R. 1 (B.A.P. 9th Cir.
18 2003).

19 Although plaintiff may have to file a state court action
20 against Linda Thoryk to recover the approximately 18-20 paintings
21 she is holding under instruction from the debtor, her December 8,
22 2005, declaration filed in this adversary proceeding states in
23 pertinent part that she doesn't know who owns the paintings. This
24 Court finds that plaintiff has always owned the paintings, frames
25 and his personal effects.

26

27

28 ⁹ It is doubtful that the state court would require plaintiff to post
a bond in connection with the Writ of Possession, since the question of ownership
of the artwork and personal effects has been resolved in this adversary proceeding.

1 F. THE COUNTERCLAIM

2 Debtor filed a counterclaim for damages for fraud, breach of
3 contract and common counts against plaintiff. Since plaintiff filed
4 his own personal bankruptcy on May 17, 2005, the claims for relief
5 based on contract and common counts are discharged. With the
6 respect to the claim for fraud,¹⁰ debtor alleged that plaintiff
7 made misrepresentations of material fact concerning his desire to
8 produce artwork for him. Specifically, the misrepresentation
9 included "Mr. Sluder's promise to produce at least 12 pieces of art
10 per year, and that at least one work of 'master piece' quality would
11 be produced for each art show, and that Mr. Sluder would help
12 promote and market his artwork" [Counterclaim, ¶ 12]. The debtor
13 further alleged that these promises were false because plaintiff had
14 no intention of fulfilling any of the promises and made the promises
15 to deliberately induce debtor to give him money in hopes of
16 recouping it when the artwork was sold. Debtor alleged that he lost
17 at least \$100,000 by paying plaintiff to produce artwork that was
18 promised but never delivered.

19 After hearing debtor's prove-up testimony, the Court finds his
20 counterclaim is without merit. Debtor did not submit any evidence
21 in support of his fraud claim for relief. The Court finds debtor's
22 allegations of plaintiff's failure to produce 12 pieces of art per
23 year absurd, in light of the fact that debtor terminated the
24 arrangement on or about February 7, 2002, and threw plaintiff out of
25

26 ¹⁰ The Court heard debtor's claim for fraud, since plaintiff failed to list
27 debtor as a creditor in his bankruptcy proceeding. The Court advised the parties
28 that in all probability if debtor moved to reopen plaintiff's bankruptcy so that
debtor could litigate his fraud claim under § 523(a)(2)(A), the Court would probably
grant his motion. Accordingly, the parties agreed to proceed with the counterclaim
alleging fraud against the plaintiff in his proceeding.

1 his studio and home after only two and one-half months after the
2 Agreement was entered into on November 19, 2001. Further, debtor
3 testified that during the two-day drive from Denver to San Diego, he
4 reminded plaintiff that he never had a venture that had worked and
5 that since they were 55 years of age he told plaintiff, "we have to
6 make it work."

7 Debtor also testified that plaintiff "did his best for a
8 while." He also voluntarily offered reasons for the failure of the
9 venture after only two and one-half months. Specifically, at this
10 portion in the testimony and at several times during the trial,
11 debtor mentioned that after September 11, 2001, the bottom fell out
12 of the art market. He testified that twelve galleries in the
13 San Diego area had closed down and that despite this fact, "we
14 proceeded to ride out the storm." Debtor's testimony, in essence,
15 proved that there was no intent to deceive on plaintiff's part. The
16 arrangement just didn't work out.

17 Accordingly, the Court enters the judgment for plaintiff on the
18 fraud counterclaim for relief.

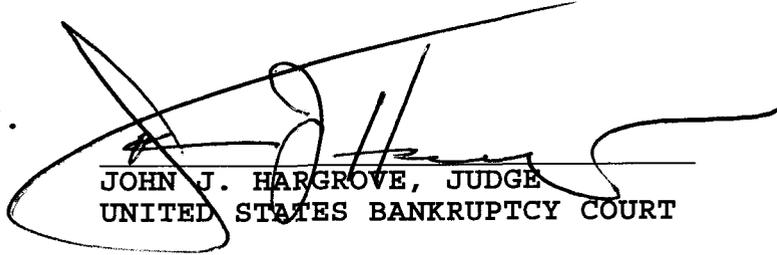
19 III.

20 CONCLUSION

21 This Memorandum Decision constitutes findings of fact and
22 conclusions of law pursuant to Federal Rule of Bankruptcy Procedure
23 7052. Since the parties are pro se, the Court will file its
24 judgment currently herewith.

25 IT IS SO ORDERED.

26
27 Dated: February 14, 2007.

28 
JOHN J. HARGROVE, JUDGE
UNITED STATES BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991

In re: Bankruptcy Case No. 03-04642-H7
Adversary Case No. 03-90294-H7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached documents, to wit:

1. **MEMORANDUM DECISION AND ORDER THEREON; AND**
2. **JUDGMENT DETERMINING DISCHARGE OF DEBT – CONVERSION; 11 U.S.C. § 523(a)(6)**

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

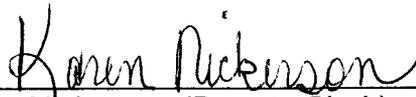
Plaintiff, In Pro Per:

**Keith Sluder
P.O. Box 900521
San Diego, CA 92190-0521**

Defendant, In Pro Per:

**Michael Altinger
1555 Vista de Montemar
El Cajon, CA 92021**

Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on February 14, 2007.



Karen Nickerson (Deputy Clerk)
Judicial Assistant to the Honorable John J. Hargrove