United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: **In re Ted Mlsna**

Bankruptcy No. 01 B 03732

Adversary Caption: **The Remington Tech Corporation, Inc. v. Ted Mlsna**

Adversary No. 01 A 00422

Date of Issuance: **July 31, 2003**

Judge: **John H. Squires**

Appearance of Counsel:

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Attorney for Defendant: Pro Se

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 7
TED MLSNA,	)	Bankruptcy No. 01 B 03732
	)	Judge John H. Squires
Debtor.	)	
	)	
	)	
THE REMINGTON TECH	)	
CORPORATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 01 A 0422
	)	
TED MLSNA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the complaint filed by The Remington Tech Corporation, Inc. (the "Creditor") against the debtor, Ted Mlsna (the "Debtor"), to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(2)(A) § 523(a)(4) and § 523(a)(6). For the reasons set forth herein, the Court finds the debt non-dischargeable under § 523(a)(6) in the amount of the judgment previously awarded in the state court in the sum of $312,849.46, plus reasonable attorneys' fees and costs incurred in this matter. The Court, however, finds the debt dischargeable under § 523(a)(2)(A) and § 523(a)(4).

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. FACTS AND BACKGROUND

The Debtor was the vice president and employee of Teleresources, Inc. ("Teleresources"), which sold and serviced telephone systems to the public. The Debtor's duties included office operations, bookkeeping, sales, accounts receivable, accounts payable, making deposits into Teleresources' accounts and invoicing customers for work performed by Teleresources. The Debtor's spouse assisted him and she was the sole shareholder of Teleresources.

On August 7, 1996, Teleresources, by its president, Hans Herrmann ("Herrmann"), entered into a factoring agreement (the "Agreement") with the Creditor whereby the Creditor agreed to lend money to Teleresources in return for an assignment of Teleresources' eligible receivables. See Creditor's Exhibit A. The Debtor did not sign the Agreement because he opposed it as too onerous and expensive. Herrmann guaranteed the Agreement pursuant to a written guaranty. See Creditor's Exhibit J. Pursuant to paragraph eight of the Agreement, the Creditor received a security interest in all accounts receivable, contract rights, assets, equipment, customer lists and all proceeds of the accounts receivable and contract rights. See Creditor's Exhibit A, ¶ 8. Under paragraph 6, Teleresources, as the seller, made certain

representation, warranties and covenants to the Creditor, as the purchaser. Specifically, this paragraph provided in pertinent part:

> Each Account shall be the Property of the Purchaser and shall be collected by Purchaser, but if for any reason it should be paid to Seller, Seller shall promptly notify Purchaser of such payment, shall hold any checks, drafts, or monies so received in trust for the benefit of Purchaser, and shall promptly endorse, transfer and deliver the same to the Purchaser. . . .

See Creditor's Exhibit A at ¶ 6.

The Creditor was to collect all amounts on receivables of Teleresources, pay the interest and other charges due pursuant to the Agreement, and remit the funds less the interest and other charges to Teleresources. Under the Agreement, title of the accounts receivable passed to the Creditor upon execution of the document. Moreover, under the Agreement, Teleresources was not permitted to deposit any collected receivables to its own account. Teleresources, however, did in fact deposit accounts receivable payments that should have been transferred to the Creditor. See Creditor's Exhibits JJ, KK, LL, MM, NN and OO.

The Creditor issued its schedule status reports evidencing the accounts that the Creditor purchased under the Agreement on July 29, 1997, October 19, 1998, January 7, 1999 and January 12, 1999. See Creditor's Exhibits X, Z, FF and GG. From the date of its execution through November 7, 1997, the Agreement was amended seven times to increase the factoring credit line from the original amount of $50,000.00 to $185,000.00. See Creditor's Exhibits B, C, D, E, F, G and H. Like the Agreement, each amendment extending the credit line was signed and guaranteed by Herrmann.

On February 17, 1998, when the amount being lent to Teleresources was increased pursuant to the eighth amendment from $185,000.00 to $235,000.00, Roland Kaeser ("Kaeser"), the president of the Creditor, insisted that the Debtor be bound by the Agreement and requested that he sign the amendment. The Debtor reluctantly signed the eighth amendment. See Creditor's Exhibit I. The Debtor contends that he signed the amendment only as a corporate officer, not as a guarantor, although there was no reference on or near the signature space in what capacity the Debtor signed the amendment.

Teleresources also had a separate distributor agreement with Ameritech Corporation ("Ameritech"). See Creditor's Exhibit K. Teleresources had a long-standing relationship with Ameritech as an authorized distributor for its products, and received commissions from it for sale of products and services. Teleresources would obtain contracts for customers with Ameritech, which in turn would pay Teleresources commissions and residuals arising under its distributor agreements. Ameritech would wire the monies directly into Teleresources' bank account. Teleresources, at one point, was owed approximately $400,000.00 in accounts receivable from Ameritech. See Creditor's Exhibit S.

Ameritech's agreement contained restrictions and provisions preventing its commissions owed to Teleresources from being assigned. Ameritech's agreement expressly stated that it was not assignable and that the receivables for monies for commissions due by Ameritech could not be transferred to any creditor of Teleresources. See Creditor's Exhibit K. Thus, the Debtor testified that the Ameritech receivables were not assigned to the Creditor under the Agreement or any of its amendments. The Debtor did not advise the Creditor of the restriction in the Ameritech

agreement. Teleresources received substantial payments directly from Ameritech, which were not paid to the Creditor. See Creditor's Exhibit O. There was nothing in the Agreement referring to the fact that the Ameritech receivables could not be assigned to the Creditor. Kaeser testified that the Ameritech receivables were one of the major reasons the Creditor agreed to lend Teleresources money under the Agreement. Additionally, Herrmann testified that the Ameritech receivable was included under the Agreement and was intended to be assigned to the Creditor.

Kaeser testified that when he entered into the Agreement with Teleresources on behalf of the Creditor, he was under the belief that all of the eligible accounts receivable under the terms of the Agreement assigned by Teleresources were valid; that the receivables did not cover warranty work; work had not been cancelled; and none of the receivables had been encumbered in favor of another creditor. Kaeser stated that had he known that collections were being made by Teleresources outside of the terms of the Agreement, or that notices had been sent to assigned accounts receivable to pay Teleresources directly, instead of the Creditor, he, on behalf of the Creditor, would not have agreed to lend any money to Teleresources. Relations between the firms deteriorated and Teleresources was unable to maintain the required ratio under the borrowing base terms of the Agreement for eligible receivables to debt owed.

On January 8, 1999, the Creditor terminated the Agreement, tendered all purchased receivables to Teleresources and demanded payment of the unpaid factoring line of credit and other charges from Teleresources. The defaults persisted and the demand was not satisfied. Hence, the Creditor filed a lawsuit in the Circuit Court of Cook County, Illinois against, inter alia, Teleresources, the Debtor and Herrmann. See Creditor's Exhibit PP. On September 13, 2000,

the Creditor was awarded a default judgment in the sum of $285,149.96, plus attorneys' fees in the amount of $27,699.50 against the Debtor and Herrmann. Id. The Creditor never received repayment of the principal amount lent to Teleresources. The Creditor did, however, receive payment for interest pursuant to the Agreement through December 1998.

The Debtor filed a Chapter 7 bankruptcy petition on February 5, 2001. Thereafter, the Creditor filed the instant adversary proceeding on May 4, 2001. Pursuant to its second amended complaint, the Creditor alleges that in January 1999, it learned that the Debtor, on behalf of Teleresources, had, in violation of the Agreement: (1) transferred receivables from Teleresources to the Creditor that the Debtor knew were in dispute by the account debtors or were subject to offset or credit; (2) transferred receivables to the Creditor that the Debtor knew were in litigation; (3) contacted Teleresources' account debtors and told them to pay Teleresources directly and not the Creditor; (4) changed invoices to Teleresources' account debtors and deleted the Creditor's invoices from the payment directions and directed that all payments be made directly to Teleresources and not the Creditor; (5) attempted to transfer certain Ameritech receivables to the Creditor that the Debtor knew could not be transferred to any third party; (6) sent a letter to account debtors on November 19, 1998, advising them to change the mailing address from the Creditor's address in Schaumburg, Illinois to Teleresources' address in Oak Park, Illinois; (7) received monies from the account debtors on accounts that were transferred to the Creditor and failed to advise the Creditor; (8) received funds from the account debtors for the receivables transferred to the Creditor and failed to pay the monies to the Creditor; (9) misappropriated monies that were due to the Creditor by failing to endorse, transfer and deliver all payments on

accounts purchased by the Creditor that were received by the Debtor and Teleresources and used the monies for his own purposes instead of delivering them to the Creditor; and (10) assumed an unauthorized and wrongful assumption of control over the receivables that were property of the Creditor pursuant to the Agreement and its amendments by failing to deliver all monies subject to the Agreement to the Creditor. The three-count complaint seeks to have the debt owed by the Debtor to the Creditor held non-dischargeable under 11 U.S.C. § 523(a)(2)(A), § 523(a)(4) and § 523(a)(6). The Court held an evidentiary hearing and thereafter took the matter under advisement.

III. DISCUSSION

A. Dischargeability Standards in the Seventh Circuit

The party seeking to establish an exception to the discharge of a debt bears the burden of proof. In re Harasymiw, 895 F.2d 1170, 1172 (7th Cir. 1990); Banner Oil Co. v. Bryson (In re Bryson), 187 B.R. 939, 961 (Bankr. N.D. Ill. 1995). The United States Supreme Court has held that the burden of proof required to establish an exception to discharge is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). See also In re McFarland, 84 F.3d 943, 946 (7th Cir.), cert. denied, 519 U.S. 931 (1996); In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994). To further the policy of providing a debtor a fresh start in bankruptcy, "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor." In re Scarlata, 979 F.2d 521, 524 (7th Cir. 1992) (quoting In re Zarzynski, 771 F.2d 304, 306 (7th Cir. 1985)). Accord In re Morris, 223 F.3d 548, 552 (7th Cir. 2000); In re Reines, 142 F.3d

970, 972-73 (7th Cir. 1998), cert. denied, 525 U.S. 1068 (1999).

B. 11 U.S.C. § 523(a)(2)(A)

Section 523 of the Bankruptcy Code enumerates specific, limited exceptions to the dischargeability of debts. Section 523(a)(2)(A) provides:

> (a) A discharge under section 727 . . . does not discharge an individual debtor from any debt-
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by-
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) lists three separate grounds for dischargeability: actual fraud, false pretenses and false representation. Bletnitsky v. Jairath (In re Jairath), 259 B.R. 308, 314 (Bankr. N.D. Ill. 2001). A single test was applied to all three grounds even though the elements for each vary under common law. Id. (citations omitted). The Seventh Circuit, however, has made it clear that misrepresentation and reliance therein is not always required to establish fraud. McClellan v. Cantrell, 217 F.3d 890, 894 (7th Cir. 2000).

The Seventh Circuit Court of Appeals recently defined the term "fraud:"

> 'Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth.

> No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.'

McClellan, 217 F.3d at 893 (quoting Stapleton v. Holt, 207 Okla 443, 250 P.2d 451, 453-54 (Okla. 1952)). "Actual fraud" is not limited to misrepresentation, but may encompass "'any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another.'" McClellan, 217 F.3d at 893 (quoting 4 L. King, Collier on Bankruptcy, ¶ 523.08[1][e] at 523-45 (15th ed. rev. 2000)). Hence, a different analysis must be utilized when a creditor alleges actual fraud. Id. The McClellan court opined that because common law fraud does not always take the form of a misrepresentation, a creditor need not allege misrepresentation and reliance thereon to state a cause of action for actual fraud under § 523(a)(2)(A). Id. Rather, the creditor must establish the following: (1) a fraud occurred; (2) the debtor was guilty of intent to defraud; and (3) the fraud created the debt that is the subject of the discharge dispute. Id. The fraud exception under § 523(a)(2)(A) does not reach constructive frauds, only actual ones. Id.

The determination of whether the debtor had the requisite scienter is a factual question which is resolved by a review of all of the relevant circumstances of a particular case. Park Nat'l Bank & Trust of Chicago v. Paul (In re Paul), 266 B.R. 686, 694 (Bankr. N.D. Ill. 2001) (citations omitted). Proof of intent to deceive is measured by a debtor's subjective intention at the time of the matter at bar. Mercantile Bank v. Canovas, 237 B.R. 423, 428 (Bankr. N.D. Ill. 1998). Where a person knowingly or recklessly makes false representations which the person knows or should know will induce another to act, the finder of fact may logically infer an intent to

deceive. Glucona America, Inc. v. Ardisson (In re Ardisson), 272 B.R. 346, 357 (Bankr. N.D. Ill. 2001).

Reliance on a false pretense or false representation under § 523(a)(2)(A) must be "justifiable." Field v. Mans, 516 U.S. 59, 74-75 (1995). Justifiable reliance is an intermediate level of reliance. It is less than reasonable reliance, but more than reliance in fact. The justifiable reliance standard imposes no duty to investigate unless the falsity of the representation is readily apparent. Id. at 70-72. Whether a party justifiably relies on a misrepresentation is determined by looking at the circumstances of a particular case and the characteristics of a particular plaintiff, and not by an objective standard. Id. at 71. To satisfy the reliance element of § 523(a)(2)(A), the creditor must show that the debtor made a material misrepresentation that was the cause-in-fact of the debt that the creditor wants excepted from discharge. In re Mayer, 51 F.3d 670, 676 (7th Cir.), cert. denied, 516 U.S. 1008(1995) ("reliance means the conjunction of a material misrepresentation with causation in fact").

The Creditor argues that the Debtor, as vice president of Teleresources, verbally consented to and reaffirmed representations and warranties contained in the Agreement and its subsequent amendments. Specifically, the Creditor contends that the Debtor made false representations to the Creditor regarding which receivables had been assigned to the Creditor under the Agreement; that the Debtor knowingly failed to disclose to the Creditor which invoices had been collected; that the Debtor knowingly failed to disclose and made false representations to the Creditor regarding the status of certain accounts receivable, i.e., whether they involved warranty work, were involved in litigation, or whether the account debtors could claim a set-off or credit; and that the Debtor

advised certain account debtors to pay Teleresources directly, rather than the Creditor, as required under the Agreement.

After considering the totality of the evidence adduced at trial, the Court concludes that none of the required elements under § 523(a)(2)(A) have been proven by a preponderance of the evidence. The Debtor's involvement in the various breaches of the Agreement by Teleresources did not rise to the level of fraud either at the time the parties entered into the Agreement or after the fact when it was subsequently amended. It is undisputed that the Debtor refused to execute the Agreement, any separate personal guaranty or any of the first seven amendments. The Court finds that the Creditor has not established by a preponderance of the credible evidence that the Debtor caused Teleresources to obtain the subject funds from the Creditor by means of either fraud, false pretenses or a false representation.

All funds advanced and lent by the Creditor were furnished to Teleresources and there is no evidence that any of the funds initially loaned under the Agreement or any subsequent advances made under the eight amendments thereto were received by the Debtor personally. He only reluctantly executed the eighth amendment to the Agreement. The parties dispute the capacity in which the Debtor executed the Agreement. He signed it individually with no reference to either his corporate officer status with Teleresources or as guarantor. That ambiguity is construed against the Creditor who prepared the document. The testimony of the witnesses conflicted regarding their respective understandings of the capacity in which he executed the eighth amendment. In any event, all of the loan proceeds up to that point were disbursed in reliance on Herrmann's execution of the Agreement, his personal guaranty and the first seven amendments thereto, not on any oral

statements made by the Debtor.

Further, the Creditor failed to demonstrate that the Debtor possessed the requisite intent to deceive it at the time the Agreement was executed or amended to cover subsequent advances by the Creditor to Teleresources. Moreover, the Court will not infer an intent to deceive on the part of the Debtor. For purposes of § 523(a)(2)(A), proof of intent to deceive is measured at the time the debtor obtained the funds from the creditor. See, e.g., Canovas, 237 B.R. at 428. Ensuing conduct contrary to a former representation by a debtor does not establish that the original representation was false. Wittman v. Potter (In re Potter), 88 B.R. 851, 852-53 (Bankr. N.D. Ill. 1988). The Court cannot find on this record the requisite fraudulent scienter on the part of the Debtor in either executing the eighth amendment or refusing to sign the Agreement and the prior seven amendments. There is no credible evidence that the Creditor justifiably relied on any fraudulent misrepresentations made by the Debtor which induced it to lend funds to Teleresources. The subsequent breaches of the Agreement by Teleresources are not the legal equivalent of fraud for purposes of § 523(a)(2)(A).

C. 11 U.S.C. § 523(a)(4)

Section 523(a)(4) of the Bankruptcy Code provides that a debtor cannot discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). In order for the Creditor to prevail under § 523(a)(4), it must prove that the Debtor committed (1) fraud or defalcation while acting as a fiduciary; or (2) embezzlement; or (3) larceny. The Creditor alleges that the Debtor's conduct amounted to embezzlement. Thus, the Court will not discuss the other prongs of tortious conduct proscribed under this section. The

Creditor argues that when Teleresources received payments from account debtors and did not advise the Creditor of the receipt of these monies or pay the Creditor these monies, the Debtor misappropriated and assumed wrongful control over these monies, which should have been remitted to the Creditor.

Embezzlement under § 523(a)(4) has been defined as the "fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." In re Weber, 892 F.2d 534, 538 (7th Cir. 1989) (quoting Moore v. United States, 160 U.S. 268, 269 (1895)). To prove embezzlement, the Creditor must show: (1) the Debtor appropriated the subject funds for his own benefit; and (2) the Debtor did so with fraudulent intent or deceit. Weber, 892 F.2d at 538; see also Schaffer v. Dempster (In re Dempster), 182 B.R. 790, 802 (Bankr. N.D. Ill. 1995); Pawlinski, 170 B.R. at 390. A fiduciary relationship or a trust relationship need not be established in order to find a debt non-dischargeable by an act of embezzlement. Id.

The Court finds that Creditor failed to demonstrate embezzlement. The Creditor did not prove that the Debtor appropriated funds for his own benefit. All monies wrongfully received and retained by Teleresources were deposited into Teleresources' bank account. These actions constitute conversion, not embezzlement. Teleresources undoubtedly either sold goods or rendered services to its customers, thereby generating receivables. Same were likely paid by check, draft or other negotiable instrument payable to Teleresources and sent to it. Thus, Teleresources, as payee, needed to endorse the instrument, which it likely did, but instead of forwarding the endorsed instrument to the Creditor, Teleresources, through the Debtor's direction

and control, deposited the instrument into its bank account. That action constitutes conversion, not embezzlement because Teleresources, as the payee, had to endorse the instrument submitted in payment of the accounts receivable.

That the Debtor was paid his salary by Teleresources for his work for that firm and that some of that salary may have been funded from the wrongfully diverted proceeds does not constitute embezzlement. After all, the Debtor was working for Teleresources, not the Creditor. Had he been on the Creditor's payroll as its employee and personally pocketed some or all of the diverted funds, then he would have embezzled. There was no evidence adduced to show that the Debtor personally took any of those funds wrongfully deposited into Teleresources' account. Additionally, for the same reasons articulated in the discussion regarding the Creditor's § 523(a)(2)(A) claim, the Court finds that the Debtor's actions do not rise to the level of fraud and the Court will not infer an intent to deceive on the part of the Debtor. Hence, the Creditor's cause of action under § 523(a)(4) fails.

D. 11 U.S.C. § 523(a)(6)

Section 523(a)(6) of the Bankruptcy Code provides:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt–
>
> > (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6). In order to be entitled to a determination of non-dischargeability under § 523(a)(6), the Creditor must prove three elements by a preponderance of the evidence: (1) that the Debtor intended to and caused an injury to the Creditor's property interest in the assigned

receivables and their proceeds; (2) that the Debtor's actions were willful; and (3) that the Debtor's actions were malicious. Glucona America, Inc. v. Ardisson (In re Ardisson), 272 B.R. 346, 356 (Bankr. N.D. Ill. 2001); French, Kezelis & Kominiarek, P.C. v. Carlson (In re Carlson), 224 B.R. 659, 662 (Bankr. N.D. Ill. 1998) (citation omitted), aff'd, No. 99 C 6020, 2000 WL 226706 (N.D. Ill. Feb. 22, 2000), aff'd, No. 00-1720, 2001 WL 1313652 (7th Cir. Oct. 23, 2001). "Willful" for purposes of § 523(a)(6) means intent to cause injury, not merely the commission of an intentional act that leads to injury. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). Under Geiger and its more stringent standards, to satisfy the requirements of § 523(a)(6), the Creditor must plead and prove that the Debtor actually intended to harm it and not merely that the Debtor acted intentionally and it was thus harmed. Id. at 61-62. The Debtor must have intended the consequences of his act. Id. Injuries either negligently or recklessly inflicted do not come within the scope of § 523(a)(6). Id. at 64. Because a person will rarely admit to acting in a willful and malicious manner, those requirements must be inferred from the circumstances surrounding the injury. Cutler v. Lazzara (In re Lazzara), 287 B.R. 714, 723 (Bankr. N.D. Ill. 2002).

The Supreme Court did not define the scope of the term "intent" utilized to describe willful conduct. Recent decisions, however, have found that either a showing of subjective intent to injure the creditor or a showing of a debtor's subjective knowledge that injury is substantially certain to result from his acts can establish the requisite intent required in Geiger. See In re Su, 259 B.R. 909, 913 (B.A.P. 9th Cir. 2001); State of Texas v. Walker, 142 F.3d 813, 823 (5th Cir. 1998),

cert. denied, 525 U.S. 1102 (1999); In re Markowitz, 190 F.3d 455 (6th Cir. 1999); Fidelity Fin. Servs. v. Cox (In re Cox), 243 B.R. 713, 719 (Bankr. N.D. Ill. 2000).

"Malicious" means "in conscious disregard of one's duties or without just cause or excuse. . . ." Thirtyacre, 36 F.3d at 700. The test for maliciousness under § 523(a)(6) is (1) a wrongful act, (2) done intentionally, (3) which causes injury to the creditor, and (4) is done without just cause and excuse. Park Nat. Bank & Trust v. Paul (In re Paul), 266 B.R. 686, 696 (Bankr. N.D. Ill. 2001) (citations omitted). A debtor does not have to act with ill will or a specific intent to do harm to the creditor for the conduct to be malicious. Thirtyacre, 36 F.3d at 700. Whether an actor behaved willfully and maliciously is ultimately a question of fact reserved for the trier of fact. Id.

The Creditor contends that the Debtor, acting as the officer of Teleresources, caused the diversion and conversion of collected accounts receivable, which had been assigned under the Agreement, to the damage of the Creditor. After review of all the credible evidence, the Court finds and concludes that the Creditor has met its burden of proof to establish its claim under § 523(a)(6). There is no question that the Debtor intended to and caused the diversion to Teleresources of receivable proceeds that should have been paid to the Creditor, thereby causing the Creditor injury to its property interest in the assigned receivables. As Herrmann acknowledged, Teleresources received accounts receivable payments that should have been transferred to the Creditor. See Creditor's Exhibits JJ, KK, LL, MM, NN and OO. The Debtor admittedly caused those funds to be deposited into Teleresources' bank account. The Debtor testified that he received permission from Kaeser and other agents of the Creditor to deposit

collected receivables into Teleresources' bank account. Kaeser, on the other hand, testified that he never authorized such actions. The Court finds Kaeser's testimony more credible than the Debtor's statement. The Debtor's testimony at trial was impeached via his deposition testimony. Moreover, Kaeser's testimony was corroborated by the letter he wrote to the Debtor on November 24, 1998, which reminded him that all payments on Teleresources' receivables were to be paid to the Creditor. See Creditor's Exhibit T.

The Debtor clearly caused Teleresources to convert funds that belonged to the Creditor. He wrote to the account debtors of Teleresources and requested that they send all funds directly to Teleresources and not to the Creditor as required on the invoices. See Creditor's Exhibits U and V. The state court found that the Debtor converted over $200,000.00 in funds from account debtors directly, by failing to remit monies that were received by Teleresources to the Creditor. Moreover, the Debtor ensured that Teleresources' commissions due from Ameritech went directly to Teleresources instead of the Creditor.

Robert Henze ("Henze"), a former employee of Teleresources for nine years who had been its sales manager, testified that he had conversations with the Debtor in 1998 and 1999 regarding Teleresources invoicing customers for warranty work. He testified that occasionally customers would call to complain and he would cancel the receivable. Henze stated that the Debtor told him that if customers complained about the invoice, he was to tell them it was a mistake. Henze surmised that the Debtor was improperly attempting to obtain funds from customers. The Debtor denied that he sent invoices to customers for warranty work just to see if the customers would inadvertently pay those invoices. The Court found Henze's testimony more credible than the

Debtor's testimony on this point. Henze's statements lend support to the Creditor's claim that the Debtor knowingly orchestrated the conversion by Teleresources of the Creditor's assigned receivable proceeds in order to meet Teleresources' dire cash shortage, which preceded its own failure and demise.

The Court finds that the Debtor acted willfully and intentionally and intended the resulting consequences of his actions–that Teleresources receive the collected accounts receivable instead of the Creditor. The Debtor's actions were intentional and the conversion was not innocent or technical. As an experienced businessman, the Debtor knew that the resulting injury would occur to the Creditor when it did not receive the payments it was entitled to under the Agreement. Moreover, the Court finds that the Debtor's actions in directing and orchestrating the conversion of the assigned receivables were malicious for purposes of § 523(a)(6). Those actions were wrongful and intentional over an extended period of time, which caused the resulting injury to the Creditor who was deprived of the proceeds. Further, the Debtor's actions were taken without just cause or excuse in clear violation of the Agreement. Thus, the Court finds the debt non-dischargeable, as liquidated by the state court, in the sum of $312,849.46 under § 523(a)(6).

E. Request for Punitive Damages and Attorneys' Fees

Punitive damages are not intended to compensate the injured party, but rather to punish the defendant and to deter him and others from similar conduct. E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 295 (2002). Illinois law views punitive damages as a punishment. Kochan v. Owens-Corning Fiberglass Corp., 242 Ill. App.3d 781, 797, 610 N.E.2d 683, 693 (5th Dist.), appeal denied, 152 Ill.2d 561, 622 N.E.2d 1208 (1993). Although punitive damages are generally

disfavored because of their penal nature, punitive damages may be awarded where the defendant committed a tort with actual malice. Lowe Excavating Co. v. International Union of Operating Engineers Local No. 150, 327 Ill. App.3d 711, 724, 765 N.E.2d 21, 34 (2d Dist.), appeal denied, 199 Ill.2d 557, 775 N.E.2d 3 (2002). Where pre-petition conduct justifies the award of punitive damages, a bankruptcy court may include those punitive damages in the judgment finding non-dischargeability. Diaz v. Diaz (In re Diaz), 120 B.R. 967, 982 (Bankr. N.D. Ind. 1989). The Court finds that the Debtor's pre-petition conduct, which was willful and malicious, potentially justifies an award of punitive damages. The state court that rendered the default judgment against the Debtor in favor of the Creditor awarded judgment on the Creditor's conversion claim and liquidated the Creditor's damages, including its attorney's fees, in the sum of $312,849.46, but did not see fit to award any punitive damages nor find that the Creditor was entitled to judgment on its fraud-based claim. See Creditor's Exhibit PP. Thus, like the state court, this Court declines to assess punitive damages against the Debtor. The previously liquidated compensatory damages, plus interest and reasonable attorneys' fees, will make the Creditor whole. In this fashion, the Court will give the state court judgment the full faith and credit it deserves under 28 U.S.C. § 1738.

Regarding attorneys' fees, pursuant to paragraph 6 of the Agreement, the Creditor is entitled to its attorneys' fees and costs for bringing this matter. Paragraph 6 of the Agreement specifically provides:

> Seller shall hold harmless and defend Purchaser from and against any and all losses, claims, demands, liabilities, suits, actions, causes of action, administrative proceedings or costs (including attorneys' fees and costs and expenses of defense) arising out of (a) any breach or violation of any representation, guarantee or

> warranty set forth in this Agreement . . . or (c) any other breach or violation of this Agreement by Seller.

See Creditor's Exhibit A, ¶ 6.

Accordingly, the Creditor shall submit detailed attorneys' fees and costs incurred in prosecution of this adversary proceeding within ten days hereof. Those reasonable fees and costs shall be included in the judgment and held non-dischargeable in a supplemental order to be entered hereafter.

F. The Debtor's Affirmative Defenses

In his answer to the second amended complaint, the Debtor asserts three affirmative defenses: (1) the Creditor lacks standing to pursue this adversary proceeding; (2) the Creditor did not dispose of the collateral pursuant to a motion to modify the automatic stay it filed in a commercially reasonable manner; and (3) the alleged debt has been fully satisfied by the sale of Teleresources' assets to Carnegie International. The Debtor failed to set forth any persuasive evidence or cite to any controlling authority to establish these affirmative defenses on which he has the burden of proof. Moreover, the Debtor failed to demonstrate that these affirmative defenses properly defeat the Creditor's claims under § 523(a)(2)(A), § 523(a)(4) and § 523(a)(6). Perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived. See United States v. Lanzotti, 205 F.3d 951, 957 (7th Cir.), cert. denied, 530 U.S. 1277 (2000) (collecting cases). The Court does not have a duty to research and construct legal arguments available to a party. Head Start Family Educ. Program, Inc. v. Cooperative Educ. Serv. Agency 11, 46 F.3d 629, 635 (7th Cir. 1995).

Because the Debtor's affirmative defenses are unsupported by any legal authority, they are therefore rejected and denied.

IV. CONCLUSION

For the foregoing reasons, the Court finds the debt non-dischargeable under § 523(a)(6) in the amount of the judgment previously awarded in the state court in the sum of $312,849.46, plus reasonable attorneys' fees and costs incurred in this matter. The Court, however, finds the debt dischargeable under § 523(a)(2)(A) and § 523(a)(4).

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: ________________ ________________________________

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 7
TED MLSNA,	)	Bankruptcy No. 01 B 03732
	)	Judge John H. Squires
Debtor.	)	
___________________________________	)	
	)	
THE REMINGTON TECH	)	
CORPORATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 01 A 00422
	)	
TED MLSNA,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 31st day of July 2003, the Court finds the debt owed by Ted Mlsna to The Remington Tech Corporation, Inc. non-dischargeable under 11 U.S.C. § 523(a)(6) in the amount of the judgment previously awarded in the state court in the sum of $312,849.46, plus reasonable attorneys' fees and costs incurred in this matter. The Remington Tech Corporation, Inc. shall submit detailed attorneys' fees and costs incurred in prosecution of this adversary proceeding within ten days hereof. Those reasonable fees and costs shall be included in the judgment and held non-dischargeable in a supplemental order to be entered hereafter. The Court further finds the debt dischargeable under 11 U.S.C. § 523(a)(2)(A) and § 523(a)(4).

ENTERED:

DATE: ________________

____
John H. Squires

United States Bankruptcy Judge

cc: See attached Service List