

FILED & ENTERED

MAY 01 2013

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY **egarcia** DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:) EVA VOONG,)) Debtor.)	Case No. 2:11-bk-53724-PC Adversary No. 2:12-ap-01135-PC Chapter 7
BMW FINANCIAL SERVICES N.A.,) LLC, service provider for FINANCIAL) SERVICES VEHICLE TRUST,) Plaintiff,) v.) EVA VOONG,) Defendant.)	<p>FINDINGS OF FACT AND CONCLUSIONS OF LAW</p> <p>Date: April 24, 2013 Time: 9:00 a.m. Place: United States Bankruptcy Court Courtroom # 1468 255 East Temple Street Los Angeles, CA 90012</p>

At the above captioned date and time, this action came on for trial before the court. Appearances were stated on the record. The evidentiary record having closed and the issues having been duly tried, the court makes the following findings of fact and conclusions of law pursuant to F.R.Civ.P. 52(a), as incorporated into FRBP 7052:

FINDINGS OF FACT

1
2 1. On or about November 14, 2008, an individual by the name of Chi Ho executed and
3 delivered to Chapman Scottsdale Autoplex, a Motor Vehicle Lease Agreement (hereinafter
4 “Lease Agreement”) for the lease of certain personal property described as a 2008 BMW X6
5 XDR50I motor vehicle, VIN#5UXFG83528LZ92128 (“the Vehicle”).

6 2. The Lease Agreement provides for monthly lease payments of \$1,457.83 for a period
7 of 36 months beginning November 14, 2008 and thereafter on the 14th day of every month until
8 the lease matured on November 14, 2011.

9 3. Thereafter, the Lease Agreement was assigned to Plaintiff BMW Financial Services
10 NA, LLC, service provider for Financial Services Vehicle Trust by Chapman Scottsdale
11 Autoplex.

12 4. Under paragraph 21 of the Lease Agreement, Lessor agrees not to “allow an uninsured
13 person to operate the Vehicle at any time, or allow any third party, other than [the Lessor’s]
14 spouse, to operate the Vehicle without written permission from [the Lessee] “

15 5. Under paragraph 5 of the Lease Agreement, Lessor agrees “to immediately notify
16 [Lessee] if the Vehicle is damaged or destroyed in an accident, stolen, abandoned, or taken by a
17 police or governmental agency.”

18 6. On or about April 30, 2009, Chi Ho and Defendant executed and delivered to Plaintiff
19 a Lease Transfer Agreement (“Assumption Agreement”) transferring Chi Ho’s interest in the
20 Vehicle to Defendant. Per the Assumption Agreement, Plaintiff consented to the transfer of Chi
21 Ho’s interest in the Vehicle to Defendant on May 5, 2009.

22 7. Defendant never registered the Vehicle. Exhibit 2 is a copy of a duplicate Arizona
23 Certificate of Title to the Vehicle dated January 11, 2010, which refers to a previous certificate
24 of title to the Vehicle issued on December 2, 2008. Title to the Vehicle is in the name of Chi Ho,
25 as Lessor, and Financial Services Vehicle Trust, as Lessee.

26 8. Defendant did not receive a certificate of title from Plaintiff. There is no evidence that
27 title to the Vehicle was ever issued in the name of Defendant, as Lessor, after the date of the
28 Assumption Agreement.

1 9. Plaintiff received monthly lease payments on the Vehicle from November 24, 2008 to
2 July 31, 2009, according to Exhibit 4. The last payment that Plaintiff received from Defendant
3 was on July 31, 2009.

4 10. Defendant asserts that the Vehicle was stolen in May of 2009.

5 11. Defendant never reported to Plaintiff that the Vehicle was stolen.

6 12. Defendant testified that she went to the police station in Walnut, California to file a
7 police report in May 2009, but ultimately a police report was not taken. According to
8 Defendant's testimony, the officer did not consider the Vehicle stolen or lost at the time because
9 she had lent the Vehicle to someone. Defendant could not testify as to the date of the attempted
10 report nor the identity of the police officer or other individual to whom she spoke regarding the
11 report. Defendant could not provide any documentation to substantiate her testimony regarding
12 her attempt to file a police report.

13 13. Plaintiff has made efforts to locate and recover the Vehicle but has not been able to
14 find it.

15 14. Defendant testified that in February or March 2009, Ben Ly, a friend, introduced her
16 to Nguyen Thai Huy ("Nguyen"), who worked at New World Exchange Inc., d/b/a New World
17 Auto Trade, 1801 Katella Avenue, # 7, Anaheim, California. Nguyen introduced Defendant to
18 Chin Ho and assisted Defendant in securing an assumption of the Lease Agreement under which
19 Chin Ho was leasing the Vehicle.

20 15. Defendant testified that Nguyen asked to use the Vehicle in May 2009 after his car
21 "broke down," and she loaned the Vehicle to him trusting that he would return it the next day.

22 16. Defendant testified that when Nguyen did not return the Vehicle, she "called him and
23 left messages but did not hear back." According to the deposition attached to her declaration,
24 Defendant called Nguyen for "[a] few months," but "after [she] couldn't reach him, [she]
25 reported it to the police." Deposition of Eva Voong, 29:12-13.

26 17. Defendant testified that she contacted Ben Ly for assistance, but that Ben Ly could
27 not locate Nguyen or the Vehicle after several attempts at Nguyen's office and home addresses.
28

1 18. Defendant did not report the Vehicle lost or stolen to State Farm Insurance, the
2 insurance company that issued the insurance policy on the Vehicle. Defendant cancelled her
3 insurance policy on the Vehicle on August 22, 2009.

4 19. Defendant testified that she did not renew her insurance on the Vehicle in August
5 2009 because she “thought [she] did not need the insurance because [she] did not have the
6 Vehicle anymore.”

7 20. On September 2, 2011, Defendant advised a repossession agent for Plaintiff that
8 Nguyen had borrowed the Vehicle and Defendant never saw Nguyen or the Vehicle again.

9 21. Defendant has a high school education. Defendant speaks little English. Cantonese
10 is Defendant’s primary language. Defendant worked as a waitress at the Walnut Tree restaurant
11 at the time of her deposition.

12 22. Defendant has no criminal history.

13 23. Defendant testified that she did not know she was required to report the Vehicle lost
14 or stolen under the Lease Agreement.

15 24. Defendant testified that when she stopped receiving statements from Plaintiff in
16 September 2009, she “thought [Plaintiff] might have found the car and everything was taken care
17 of.”

18 25. As of November 14, 2011, the maturity date of the Lease Agreement, Defendant
19 defaulted by failing to either pay off the Vehicle or return possession of the Vehicle to Plaintiff.

20 26. Plaintiff has been required to hire an attorney to collect and enforce the obligations
21 under the Lease Agreement and Assumption Agreement, and to commence and pursue this
22 proceeding. Plaintiff has incurred attorney’s fees, costs and expenses attempting to collect and
23 enforce the obligations under the Lease, including commencement and pursuit of this
24 proceeding.

25 27. Defendant currently owes Plaintiff a balance on the Lease Agreement of \$67,184.12
26 plus interest, collection fees, attorney’s fees and costs.

27 28. The retail value of the Vehicle was \$56,975 as of January 4, 2012.
28

CONCLUSIONS OF LAW

1
2 1. This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§
3 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (E), (H)
4 and (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a). Plaintiff and Defendant have
5 consented to the entry of a final judgment by this court.

6 2. Section 523(a)(6) of the Code excepts from discharge debts resulting from “willful and
7 malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. §
8 523(a)(6).

9 3. A “deliberate or intentional injury” is required before § 523(a)(6) will render a debt
10 nondischargeable. See Kawaaukau v. Geiger, 523 U.S. 57, 61 (1998) (stating that
11 nondischargeability under § 523(a)(6) “takes a deliberate or intentional injury, not merely a
12 deliberate or intentional act that leads to injury”).

13 4. Section 523(a)(6) requires separate findings on the issues of “willful” and
14 “malicious.” Carrillo v. Su (In re Su), 290 F.3d 1140, 1146 (9th Cir. 2002).

15 5. The “willful” injury requirement of § 523(a)(6) is met “when it is shown either that
16 the debtor had a subjective motive to inflict injury *or* that the debtor believed that injury was
17 substantially certain to occur as a result of his conduct.” Id., at 1144 (quoting Petralia v. Jercich
18 (In re Jercich), 238 F.3d 1202, 1208 (9th Cir.), cert. denied, 533 U.S. 930 (2001)).

19 6. A “malicious injury” involves “(1) a wrongful act, (2) done intentionally, (3) which
20 necessarily causes injury, and (4) is done without just cause or excuse.” Id. at 1146-47 (quoting
21 Jercich, 238 F.3d at 1209).

22 7. Objections to the dischargeability of a debt are literally and strictly construed against
23 the objector and liberally construed in favor of the debtor. See Quarre v. Saylor (In re Saylor),
24 108 F.3d 219, 221 (9th Cir. 1997); In re Adeeb, 787 F.2d 1339, 1342 (9th Cir. 1986).

25 8. Debts that arise solely from recklessly inflicted injuries do not fall within the scope of
26 § 523(a)(6). See Geiger, 523 U.S. at 64.
27
28

1 9. A subjective standard is applied to “substantial certainty” under § 523(a)(6), not the
2 objective standard applied to “reckless disregard.” See Su, 290 F.3d. at 1145-46. See also Conte
3 v. Gautam, 33 F.3d 303, 307 (3d Cir. 1994) (holding that knowledge of a high probability of
4 harm, though amounting to “recklessness,” does not amount to a “substantial certainty” under §
5 523(a)(6)).

6 10. The Plaintiff has not established a “willful” injury.

7 11. Although Plaintiff has established a debt in the amount of \$67,184.12 and injury as a
8 result of the Defendant’s transfer of possession of the Vehicle to Nguyen, Plaintiff has failed to
9 establish by a preponderance of the evidence that Defendant had a subjective motive to injure the
10 Plaintiff at the time she loaned the Vehicle to Nguyen or that Defendant believed with
11 substantially certainty that Plaintiff would be injured as a result of loaning the Vehicle to
12 Nguyen.

13 12. The Plaintiff has not established a “malicious injury.”

14 13. Defendant intended to loan the Vehicle to Nguyen, and Defendant’s loan of the
15 Vehicle to Nguyen may have been wrongful in that it violated paragraph 21 of the Lease
16 Agreement. However, Plaintiff has failed to establish by a preponderance of the evidence that
17 Defendant’s loan of the Vehicle to Nguyen would necessarily cause injury to Plaintiff.

18 14. Defendant presented some evidence of just cause or excuse. Nguyen was the person
19 who arranged the Assumption Agreement between Defendant, Chin Ho and Plaintiff. Defendant
20 loaned the Vehicle to Nguyen, at Nguyen’s request, believing that Nguyen’s car had “broke[n]
21 down” and that Nguyen would return the Vehicle the following day. Defendant continued to
22 make payments under the Assumption Agreement until July 31, 2009.

23 ////

24 ////

25 ////

26 ////

27 ////

28

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): **Findings of Fact and Conclusions of Law** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner stated below:

1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF) – Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of (*date*) 05-1-2013, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

- Michael Y Lo michaellolaw@yahoo.com, bklolaw@gmail.com
- Tom Roddy Normandin tnormandin@pnbd.com, nwong@pnbd.com
- United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

Service information continued

on attached page

2. SERVED BY THE COURT VIA UNITED STATES MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Service information continued

on attached page