UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 21-40030
	)	Chapter 7
SCOTT GENE JAVERS SSN/ITIN xxx-xx-4452	)	
and	)	
PAMELA JEAN JAVERS SSN/ITIN xxx-xx-7310	)	
Debtors.	)	
RELIABANK DAKOTA	)	Adv. No. 21-4003
Plaintiff	)	
-vs-	)	
	)	DECISION RE: PENDING MOTIONS
SCOTT GENE JAVERS and PAMELA JEAN JAVERS	)	
Defendants.	)	

The matters before the Court are Debtors-Defendants Scott Gene Javers and Pamela Jean Javers's Motion for Summary Judgment (doc. 31) and Plaintiff Reliabank Dakota's Motion for Partial Summary Judgment (doc. 36) and Motion to Strike and Motion in Limine (doc. 45). These are core proceedings pursuant to 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.R.Bankr.P. 7052. For the reasons discussed below, the Court will not impose sanctions as requested in Plaintiff's Motion to Strike and Motion in Limine, but will reopen discovery. The Court will grant Debtors-Defendants' Motion for Summary Judgment in part, afford Plaintiff no relief against Debtor-Defendant Pamela Jean Javers under 11 U.S.C. § 523(a)(6) or under 11 U.S.C. § 727(a)(2)(A) or (a)(3), and

afford Plaintiff no relief against Debtor-Defendant Scott Gene Javers under 11 U.S.C. § 523(a)(6). The Court will deny Plaintiff's Motion for Partial Summary Judgment. The Court will schedule a final pre-trial conference with counsel to set a trial date.

I.

A & S Construction, Inc. and Elite Precast Erectors, Inc., two business entities in which Debtors-Defendants Scott Gene Javers and Pamela Jean Javers ("Debtors") were involved, obtained commercial loans from Plaintiff Reliabank Dakota ("Bank"). Debtors personally guaranteed the debts, and Debtor Scott Javers eventually pledged a 2015 Camaro race car as collateral. Following a default, Bank obtained in state court, on October 6, 2020, a summary judgment against Debtors and the two business entities. After Debtors sought chapter 7 relief, Bank timely filed an unsecured claim for $660,259.03 and commenced this adversary proceeding seeking a determination its particular claim against Debtors is excepted from discharge under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(4), or (a)(6) or that Debtors should be denied a general discharge of all debts pursuant to 11 U.S.C. § 727(a)(2)(A) or (a)(3). Debtors now seek summary judgment on all counts, and Bank seeks summary judgment under 11 U.S.C. § 727(a)(3). By separate motion, Bank also requests certain discovery sanctions.

Debtors' statement of material facts in support of their motion for summary judgment, with Bank's disputes noted therewith, is[1]:

1. [Debtors'] chapter 7 petition was filed on February [9], 2021.

[1] Paragraphs 24, 25, 26, and 27 are references to particular parts of the record rather than statements of material fact.

See docket [in Bankr. No. 21-40030 (D.S.D.)].

2. [Debtor] Scott [Javers] had a long-term banking relationship with [Bank] and loan officer Jeremy Keizer, starting 2011. [Keizer deposition at] page 5.

3. The banking relationship continued with several businesses. [Keizer deposition at] pages 6-8.

4. [Keizer] is an experienced banker[,] graduating from South Dakota State University and obtaining a masters in banking from the University of Wisconsin. [Keizer deposition at] page 5.

5. [Bank's] complaint alleging false representations referred to the race car. [Keizer deposition at] pages 8 & 9.

6. [Keizer] never inspected the race car, didn't know if it had an engine, never kicked the tires or opened the door. [Keizer deposition at] pages 10 & 11. Scott [Javers] affidavit [dated December 21, 2021].

7. [Keizer] admits the only thing he thought was false about the accounts receivable in the businesses was the quality of the accounts. [Keizer deposition at] pages 11-14.

8. [Bank] considered Scott [Javers] the only owner of the race car. [Keizer deposition at] pages 15 & 16.

9. The UCC filing by [Bank] to perfect on non-titled race car was strictly against Scott [Javers], not Pam[ela Javers]. [Keizer deposition at] page 16.

10. [Keizer] never checked with Scott [Javers] as far as comparable race car values. [Keizer deposition at] page 18.

11. [Bank] received financial information as relates to the businesses and personal financial statements along with tax returns on a regular basis. [Keizer deposition at] pages 19 & 20.

12. Cash flow was tight for the businesses from the beginning. [Keizer deposition at] pages 20 & 21.

13. [Keizer] doesn't know of any fraud involved from [D]ebtors, except as involves the race car. [Keizer deposition at] pages 22 & 23.

14. As far as [Keizer] is concerned the main issue is the race car

and its sale. [Keizer deposition at] page 23.

15. As far as financial statements, [D]ebtors would come into [Bank], meet with [Keizer], annually, and [Keizer] would type out the financial statement along with conversations with [D]ebtors. [Keizer deposition at] page 24. See 2017 financial statement, exhibit #6.

16. [Keizer] admits there was no outside verification as relates to financial statements. [Keizer deposition at] pages 24-27.

17. Balance sheet values would absolutely be different than bank liquidation values, especially if liquidation is through [Bank]. [Keizer deposition at] pages 25 & 26.

18. The next personal financial statement dated 2018, was exactly the same, [Keizer] did not verify any single item listed on the financial statement. [Keizer deposition at] page 28. Exhibit #7.

19. Same issue with the financial statement for 2019, [B]ank did not verify a single line item. [Keizer deposition at] pages 30 & 31. Exhibit #8.

20. [Keizer] would have suggested Scott [Javers] sell personal assets and proceeds for the business. [Keizer deposition at] pages 34 & 35.

Bank responded to this statement, saying: "Not disputed but requires clarification. [Keizer] suggested that [Debtors] sell personal assets in which they had equity and that they use that equity to operate their business entities. (Jeremey [sic] Keizer Affidavit)."

21. Bank understood collection issues on the businesses[']accounts receivable related to change orders primarily. [Keizer deposition at] pages 39 & 40.

22. [Keizer] back dated the security granted in the race car and perfected in 2018 not 2017. [Keizer deposition at] pages 40-42.

23. Prior portion of [Keizer's deposition] relating to the security granted, in the race car in 2017, and the related sloppy perfection filing, was not accurate, [Keizer deposition at] pages 16 & 17.

Bank responded to this statement, saying:

> Not disputed but requires clarification. Keizer did not remember prior to being shown documents during his deposition that he and Scott [Javers] agreed to back date the security agreement relating to the race car. Keizer [deposition page 15, line 3, through page 17, line 2, and page 40, line 5, through page 42, line] 5.
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> 24. The security agreement adding the race car, with only Scott [Javers]'s signature[,] not Pam[ela Javers]'s [signature,] was exhibit 2 of [Keizer's deposition].
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> 25. [Bank's] financing statement perfection on the race car, in Scott [Javers]'s name only is exhibit 3 of [Keizer's deposition].
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> 26. [Debtors'] 2017, 2018, [and] 2019 personal financial statements are exhibits 6, 7[,] and 8 of [Keizer's deposition].
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> 27. Email from [Keizer] to Scott [Javers] relating to sale of personal assets to operate the business is exhibit 10 of [Keizer's deposition].

Bank responded to this statement, saying: "Not disputed that Exhibit 10 of [Keizer's deposition] is an email between Scott Javers and Jeremy Keizer. [Bank] disputes Debtors' characterization of the email."

> 28. Scott [Javers] graduated from high school in Lennox and from vo-tech school at Southeast for auto mechanics. Scott [Javers deposition at] page 9.
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> 29. The 2015 Camaro race car at issue was built for Scott [Javers] in 2015. Exhibit 1 of Scott [Javers's deposition] is the related document for this race car purchase by Scott [Javers]. Purchase price $84,475.00[,] which included a trade in. Scott [Javers] obtained this document from the seller July 22nd, 2021, several years later.
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> 30. The race car was a hobby. Scott [Javers deposition at] page 33.
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> 31. The race car was not listed on the loan documents in 2017, date of loan, but [Keizer] added in 2018. [Unspecified document at] pages 36 & 37.

> 32. The race car was listed as having a value of $125,000.00 on financial statements given to [Bank] because it was purchased for $84,475.00 without a drive train. No motor, transmission, rear end and no wiring, a bare rolling car. Scott [Javers deposition at] pages 40-42.
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> 33. [Keizer] told [D]ebtors if they had any personal assets to sell to continue the business that's what needed to be done. [Keizer] specifically included the race car was a personal item to sell. Scott [Javers deposition at] page 43.

Bank responded to this statement, saying: "Disputed. [Keizer] suggested to [D]ebtors that they sell personal assets in which they had equity and use that equity to fund their business. (Keizer [affidavit at paragraph] 3)[.]"

> 34. Scott [Javers] attempted to sell the race car online with a starting price of $135,000.00. Scott [Javers deposition at] page 44.

Bank responded to this statement, saying: "Disputed but not material."

> 35. Race car was sold to Mr. Bowling, on January 10, 2020, delivered on that date in exchange for $100,000.00. Scott [Javers deposition at] page 47. Scott [Javers] affidavit [dated December 21, 2021].
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> 36. Scott [Javers]'s friend, Terry Pope, accompanied Scott to the sale of the race car and witnessed the exchange of funds. Scott [Javers deposition at] page 49 & 50. Also, Terry Pope's affidavit filed in this proceeding.
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> 37. The funds were injected into A&S Construction as needed. Scott [Javers deposition at] pages 52 & 53 and Scott [Javers] affidavit [dated December 21, 2021].

Bank responded to this statement, saying: "Disputed. See [Bank]'s motion to strike and motion in limine."

> 38. Scott [Javers] interpreted emails from [Keizer as] giving him authority to sell the race car and inject the funds into the business. Scott [Javers deposition at] pages 55-57 and Scott [Javers] affidavit [dated December 21, 2021].

Bank responded to this statement, saying:

> Disputed. [Keizer] never authorized the sale of the race car. Keizer Affidavit [at paragraphs] 4-7. [Scott] Javers knew he did not have any equity in the race car. [Scott] Javers depo[sition at page 57, line 16, through page 58, line] 5.
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> 39. Scott [Javers]'s discussion as far as collecting accounts receivable and change orders, etcetera begins at Scott [Javers deposition at] page 62 through page 72.
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> 40. [Bank]'s agent, [Keizer], never asked detailed questions about the race car, not what Scott [Javers] paid for it, not even if in working condition. Scott [Javers] affidavit [dated December 21, 2021].
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> 41. There were substantial accounts to collect for the businesses, which Scott [Javers] believed were collectible. There were valid services and product provided on jobs that were owed to Elite. Attorneys were hired to collect change orders and retainage but claims not pursued once [B]ank took over. Scott[Javers] affidavit [dated December 21, 2021].

Bank responded to this statement, saying: "Disputed."

Bank's statement of material facts in support of its motion for partial summary judgment, with Debtors' disputes noted therewith, is:

1. [Bank] timely filed its proof of claim in this matter in the amount of $660,259.03. Claim No. 19.

Debtors responded to this statement, saying: "Not disputed except as to amount owed."

2. Debtors were the shareholders and in control of businesses known as A&S Construction, Inc. and Elite Precast, Inc. Complaint ¶¶ 6-7; Answer ¶7.

3. [Bank] had a lending relationship with A&S Construction, Elite Precast and the Debtors.

4. Debtor Scott Javers signed a Commercial Security Agreement dated May 14, 2017, pursuant to which he pledged a 2015 Camaro Stroupe Race Cars Series 07 and Model 7:15 (the "Race Car") to [Bank] as collateral. [Scott] Javers [deposition Exhibit] 2 and [pages] 35-36.

Debtors responded to this statement, saying:

> Disputed. [Bank]'s agent, commercial lender Jeremy Keizer, admitted he backdated the documents relating to security for the 2015 Camaro race car. Documents were not executed in 2017 but rather in 2018. [Keizer] Deposition pages 40-42. Scott Javer[s d]eposition pages 36 & 37.

5. Scott Javers claims to have sold the race car on January 10, 2020 for $100,000. Debtors' Answers to Interrogatory 5 and 6.

6. The purchase price for the vehicle was paid to Scott [Javers] in the form of a check totaling $20,000.00 made out to Scott Javers personally and $80,000.00 in cash. [Scott] Javers [deposition at pages] 50-51.

7. Scott Javers has no documentation relative to the sale of the Race Car, there was no purchase agreement, no bill of sale and no title. [Scott] Javers [deposition at pages] 51-52.

Debtors responded to this statement, saying: "Disputed. Scott [Javers] did provide the purchaser of the race car a bill of sale. Scott Javer[s] Affidavit [dated December 21, 2021 at paragraph 4 and Exhibit 1 attached thereto]."

8. Scott Javers deposited the $20,000 check he received from the buyer of the Race Car into his personal account at First Premier Bank. [Scott] Javers Depo[sition at page] 53.

Debtors responded to this statement, saying: "Disputed. The funds were ultimately used for the business A & S Construction as shown by [Exhibit 3 to Scott Javers affidavit dated December 21, 2021 and Scott Javers deposition at] pages 52 & 53."

9. Scott Javers claims that the $80,000 in cash he received was placed into his desk drawer at the office and was used as an ATM or line of credit. [Scott] Javers Depo[sition at page] 53.

Debtors responded to this statement, saying: "Disputed, taken out of context. The funds were deposited in bank accounts and transfers made and put into the business, as detailed in [Exhibit 3 to Scott Javers affidavit dated December 21, 2021]."

10. Scott Javers claims that the $80,000.00 is gone. [Scott] Javers Depo[sition at page] 53.

11. When Scott Javers sold the Race Car in January 2020, he believed he did not have any equity in the Race Car because it was on the loan, which was more than it was worth. [Scott] Javers [deposition at page] 58.

Debtors responded to this statement, saying:

> Not disputed, but not the full answer. Scott [Javers] believed [Bank] gave him permission to sell the race car and use the funds to run the business. [See exhibit 10 attached to Keizer deposition, Scott Javers affidavit at paragraph 33, and Scott Javers deposition at pages 52, 53, and 55-57]. [Court note: Neither of Scott Javers's affidavits had a paragraph 33.]

12. To the extent the proceeds from the Race Car went [to Bank], the proceeds were not used to pay down loans. [Scott] Javers [deposition at page] 62.

Debtors responded to this statement, saying: "Not disputed, but not the full answer.

Funds were used to operate the business, with [Bank]'s permission, see Statement of

Disputed Facts, supra #11."

13. The documents produced in this case do not include any documentation to show where or how the proceeds from the sale of the Race Car were used. *See, generally,* Debtors' responses to [Bank]'s request for production of documents.

Debtors responded to this statement, saying:

> Disputed. Exhibit three (3) attached to Scott [Javers's] Affidavit [dated December 21, 2021 with] Debtors' Motion for Summary Judgment has accounting of deposits and expenses. Bank received financial information on a regular basis as to the business and cash flow. [Keizer] Deposition [at] pages [19 and 20].

II.

Bank has asked the Court, pursuant to Fed.R.Civ.P. 37(b)(2)(A) and (c)(1),[2] to strike and exclude from consideration a bill of sale regarding the race car sold by Debtor Scott Javers (Exhibit 1 attached to Debtor Scott Javers's affidavit dated December 21, 2021) and some self-created summary documents, copies of deposited checks, and bank statements (collectively "account documents") Debtors contend show the cash proceeds from the race car sale were utilized for business expenses (Exhibit 3 attached to Debtor Scott Javers's affidavit dated December 21, 2021). Debtors did not produce all these documents during earlier discovery.[3]

The Court finds Fed.R.Civ.P. 37(b)(2)(A) does not apply because no earlier discovery order has been entered that Debtors have failed to obey. The Court's general discovery deadline order (doc. 18) and related extension order (doc. 26) seemingly do not fall among those discovery orders described in the rule. *See Avionic Co. v. Gen. Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1992) (quoting therein *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1213 (8th Cir. 1981) (the purpose of the prior order requirement in Fed.R.Civ.P. 37(b)(2) is to give the party failing to comply with discovery adequate notice of what is required and "an

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[2] Federal Rule of Civil Procedure 37 is made applicable in bankruptcy adversary proceedings pursuant to Fed.R.Bankr.P. 7037.

[3] The Court compared the documents attached to Debtor Scott Javers's deposition and those attached to Debtor Scott Javers's affidavit dated December 21, 2021. A Funds Transfer receipt dated February 24, 2020 for $3,000.00 and a deposit slip at Bank dated February 24, 2020 for $12,000.00 were exhibits to both the deposition and the December 21, 2021 affidavit. Another deposit slip at Bank dated February 19, 2020 for $5,000.00 may have been in both; a close examination revealed slight variances.

opportunity to contest the discovery sought prior to the imposition of sanctions")).

Under Fed.R.Civ.P. 37(c)(1), "a party [who] fails to provide information . . . as required by Rule 26(a)" cannot "use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed.R.Civ.P. 37(c)(1).

> To determine if the failure was substantially justified or harmless, the court considers "the reason for noncompliance, the surprise and prejudice to the opposing party, the extent to which the information or testimony would disrupt the order and efficiency of the trial, and the importance of the information or testimony." *Id*. Further the court must consider if a continuance is useful. *Amplatz v. Country Mut. Ins. Co.*, 823 F.3d 1167, 1172 (8th Cir. 2016). "[T]he party who is alleged to have failed to comply with Rule 26 bears the burden to show that its actions were substantially justified or harmless." *In re Air Crash Near Kirksville, Mo.*, No. 05MD1702, 2007 WL 2363505, at *4 (E.D. Mo. Aug. 16, 2007) (internal quotations and citations omitted).

Cheatwood v. Mwanza, No. 2:19-CV-02088, 2022 WL 533960, at *1 (W.D. Ark. Feb. 21, 2022).

At this juncture in the adversary proceeding, Bank has not been harmed by Debtors' delayed production of the alleged bill of sale and the account documents Debtors contend show the disposition of the proceeds from the race car sale. Foremost, the bill of sale and the account documents play no role in the Court's summary judgment decision herein. Second, before trial, the Court will reopen discovery so Bank may request additional discovery related to the subject bill of sale and account documents. Accordingly, the automatic exclusion imposed by Rule 37(c)(1) does not come into play, and Debtors may, absent some subsequent

exclusion order, introduce the subject bill of sale and account documents at trial.[4]

If the bill of sale becomes relevant at trial, Debtor Scott Javers will need to address the fact that during his November 23, 2021 deposition he clearly stated there was no documentation associated with his sale of the race car; Debtors' July 23, 2021 answers to Bank's interrogatories and response to Bank's request for production of documents were consistent with his deposition. Debtor Scott Javers will also need to demonstrate the several business account deposits Debtors contend were the cash proceeds from the race car sale actually were the race car sale proceeds and not cash from some other source–an admittedly difficult task. Debtors' account documents seemingly leave that gap in the record. The account documents also do not answer why Debtors would put the $80,000.00 in cash proceeds[5] in a desk drawer rather than deposit the proceeds as soon as possible after selling the race car.

III.

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(a). An issue of material fact is *genuine* if

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[4] The Court cautions Debtors that Fed.R.Civ.P. 37(c)(1) creates an *automatic* penalty when a party fails to disclose or supplement information sought during discovery. That automatic penalty is exclusion of the information as evidence on a motion or at trial. Fed.R.Civ.P. 37(c)(1). Only because Debtors' failure produced no harm does the automatic penalty not apply. If the automatic penalty had applied, Debtors would have needed to file a *motion* if they wanted the Court to consider a lesser sanction. *See Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 705 (8th Cir. 2018).

[5] There is also, of course, the unanswered question of why 80% of the race car's price was paid in cash, rather than all by check. The answer to that question may or may not be material to this particular proceeding.

the evidence is such that a trier of fact could find for either party. *Rademacher v. HBE Corp.*, 645 F.3d 1005, 1010 (8th Cir. 2011). A genuine issue of fact is *material* if its resolution affects the outcome of the case. *Gazal v. Boehringer Ingelheim Pharmaceuticals, Inc.,* 647 F.3d 833, 838 (8th Cir. 2011) (cite therein).

Federal Rule of Civil Procedure 56(c) "'mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Erenberg v. Methodist Hosp.,* 357 F.3d 787, 791 (8th Cir. 2004), *quoting Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986), *cited in Duluth, Winnipeg & Pac. Ry. Co. v. City of Orr*, 529 F.3d 794, 797 (8th Cir. 2008). In reviewing a motion for summary judgment, the Court considers the pleadings, the discovery and disclosure materials in the record, and any affidavits. *Wood v. SatCom Marketing, LLC*, 705 F.3d 823, 828 (8th Cir. 2013). The Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). The nonmovant receives the benefit of all reasonable inferences supported by the evidence. *B.M. ex rel. Miller v. South Callaway R-II School Dist*., 732 F.3d 882, 886 (8th Cir. 2013).

The movant bears the burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Gibson v. American Greetings Corp.*, 670 F.3d 844, 853 (8th Cir. 2012). If the movant meets its burden, the nonmovant, to defeat the motion, must establish a genuine factual issue. *Residential Funding Co. v. Terrace Mortg. Co.*, 725 F.3d 910, 915 (8th Cir. 2013).

The nonmovant may not rest on mere allegations or pleading denials, *Conseco Life Ins. Co. v. Williams*, 620 F.3d 902, 910 (8th Cir. 2010), or "merely point to unsupported self-serving allegations." *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 531 (8th Cir. 2008) (quoted in *Residential Funding*, 725 F.3d at 915). Instead, the nonmovant must come forward with specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). In other words, "[a] properly supported motion for summary judgment is not defeated by self-serving affidavits. Rather, the [nonmovant] must substantiate allegations with sufficient probative evidence that would permit a finding in the [nonmovant]'s favor." *Frevert v. Ford Motor Co.*, 614 F.3d 466, 473-74 (8th Cir. 2010) (citations omitted) (quoted in *Kansas v. Bailey* (*In re Bailey*), Bankr. No. 18-41858-btf7, Adv. No. 18-04225-btf, 2019 WL 2179732, at *7 (Bankr. W.D. Mo. May 17, 2019)).

IV.

Bank, in its response to Debtors' motion for summary judgment (doc. 46-4), concedes it does not have sufficient evidence to proceed under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), and (a)(4). Remaining is Bank's request for a determination that its particular claim is excepted from discharge under 11 U.S.C. § 523(a)(6) and its request that Debtors be denied a discharge of all debts pursuant to 11 U.S.C. § 727(a)(2)(A) and (a)(3). In its motion for partial summary judgment, Bank seeks relief under § 727(a)(3) only as to Debtor Scott Javers. In their respective motions for summary judgment, statements of material facts, supporting affidavits, and responses, the parties principally focused on the sale of Debtor Scott Javers's race car, not on

any issues regarding Debtors' businesses' accounts receivable.[6] The Court has done the same.

None of Bank's allegations in its complaint specifically identify any actions taken by Debtor Pamela Javers relating to the sale of the race car or the disposition of the sale proceeds or to the couple's record keeping. Accordingly, Debtors' motion for summary judgment will be granted in part, Bank's pre-petition claim against Debtor Pamela Javers will not be excepted from discharge under 11 U.S.C. § 523(a)(6), and Debtor Pamela Javers will not be denied a general discharge of debts in Bankr. No. 21-40030 (D.S.D.) under 11 U.S.C. § 727(a)(2)(A) or (a)(3).

As to Bank's request for a determination that its claim against Debtor Scott Javers be declared nondischargeable under 11 U.S.C. § 523(a)(6), Bank has the burden of proving each element of that subsection by a preponderance of the evidence. *Grogan v. Garner,* 498 U.S. 279 (1991); *Valley National Bank v. Bush* (*In re Bush*), 696 F.2d 640, 644 n.4 (8th Cir. 1983). If any element is not met, the debt is not excepted from discharge under that provision. *Equitable Bank v. Miller* (*In re Miller*), 39 F.3d 301, 304 (11th Cir. 1994). The evidence must be viewed consistent with the congressional intent that exceptions to discharge be narrowly construed against the creditor and liberally for the debtor, thus effectuating the fresh start policy of the bankruptcy code. *Caspers v. Van Horne* (*In re Van Horne*), 823 F.2d 1285,

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[6] Debtors' statement of material facts at paragraphs 39 and 41 mention the accounts receivable, and Debtors' brief in support of their summary judgment motion also mentions the accounts receivable. In its responsive brief, Bank acknowledges: "The crux of [Bank's] claim relates to [D]ebtors['] sale of a race car which was pledged as collateral to [Bank.]"

1287 (8th Cir. 1987).

Under § 523(a)(6), Bank must establish three elements: (1) Debtor Scott Javers caused an injury to the creditor; (2) the injury was willfully inflicted; and (3) Debtor's actions were malicious. *Luebbert v. Global Control Systems, Inc.* (*In re Luebbert*), 987 F.3d 771, 778 (8th Cir. 2021).

> Courts considering the applicability of the § 523(a)(6) exception to discharge must "first determine exactly what injury the debt is for, and then determine whether the debtor both willfully and maliciously caused that injury." *In re Patch*, 526 F.3d at 1181 (cleaned up). Willfulness and maliciousness must each be shown by a preponderance of the evidence. *Id*. at 1180.
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> Evaluating willfulness requires an inquiry into the debtor's subjective intent to cause injury. To meet the willfulness requirement, there must be "proof that the debtor desired to bring about the injury or was, in fact, substantially certain that his conduct would result in the injury that occurred." *Id*. at 1180-81 (citation omitted). This means that there must have been a "deliberate or intentional invasion of the legal rights of another." *In re Roussel*, 829 F.3d 1043, 1047 (8th Cir. 2016) (citation omitted).
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> Malice requires "conduct targeted at the creditor at least in the sense that the conduct is certain or almost certain to cause harm." *In re Waugh*, 95 F.3d at 711 (citation omitted). Malice is only implicated by "conduct more culpable than that which is in reckless disregard of creditors' economic interests and expectancies." *In re Long*, 774 F.2d at 880. "[K]nowledge that legal rights are being violated is insufficient to establish malice, absent some additional aggravated circumstances." *Id*. at 881 (citation omitted). "While intentional harm may be very difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent." *Id*. A robust collection of bankruptcy court and circuit court authority suggests that the point of the malice inquiry is to determine whether the debtor's conduct was "aggravated" or "socially reprehensible" such that an imputation of malice is justified. *In re Blankfort*, 217 B.R. 138, 143-44 (Bankr. S.D.N.Y. 1998) (collecting cases); *see also In re Khafaga*, 419 B.R. 539, 550 (Bankr. E.D.N.Y. 2009).

Luebbert, 987 F.3d at 780-81 (8th Cir. 2021).

While perhaps not distinctly declared, Bank's injury under § 523(a)(6) is apparently the shortfall in the value of the collateral to cover its claim against Debtors and the unpaid portion of the resultant state court judgment. Accordingly, Bank must show Debtor Scott Javers, by selling the race car and not using the proceeds to pay down business debt owed to Bank, wanted to bring about that injury to Bank or Debtor Scott Javers was substantially certain his conduct would result in that injury to Bank–the "willfulness" element. Bank must also establish Debtor Scott Javers was not merely reckless but his actions were aggravated or socially reprehensible–the "malicious" element. Bank, however, has not identified the probative evidence it has for trial that would establish Debtor Scott Javers's conduct was either "willful" or "malicious." *See Frevert,* 614 F.3d at 473-74. Accordingly, summary judgment must be entered for Debtor Scott Javers regarding Bank's nondischargeability request under § 523(a)(6).

For a debtor to be denied a general discharge of debts under 11 U.S.C. § 727(a)(2)(A),

> a creditor must prove: (1) the act serving as the basis for the claim took place within one year before the petition date; (2) the act was that of the debtor; (3) the act amounted to a transfer, removal, destruction, mutilation or concealment of debtor's property; and (4) the debtor committed the act with an intent to hinder, delay or defraud a creditor or the trustee. *See City Nat'l Bank of Ft. Smith v. Bateman* (*In re Bateman*), 646 F.2d 1220, 1222 (8th Cir. 1981); *Georgen-Running v. Grimlie* (*In re Grimlie*), 439 B.R. 710, 716 n.11 (B.A.P. 8th Cir. 2010).

Dunker v. Bachman, No. 8:17CV284, 2018 WL 2272791, at *3 (D. Neb. May 17, 2018). Debtor Scott Javers and Bank's principal legal dispute–or at least their initial legal dispute–is whether Debtor's act was outside the one-year look-back provision in

§ 727(a)(2)(A). Debtor Scott Javers contends the January 10, 2020 race car sale date as determinative; Bank argues there was a continuing concealment of the race car's sale that extended to April 2020, when Keizer learned about the race car's sale, and argues there was concealment continuing into the year before Debtors' petition date because the true disposition of the proceeds remains unknown.

> Although the first element of § 727(a)(2)(A)—one of the focuses of this claim—requires the act to have occurred a year before the petition date, the doctrine of continuing concealment makes that date not as absolute as it appears. "[C]oncealment is a continuing event and under the established doctrine of 'continuing concealment,' a concealment that originated outside the one year limitation period is within the reach of § 727(a)(2)(A) if the concealment continued on into the year preceding the filing coupled with the requisite intent." *Korte v. United States* (*In re Korte*), 262 B.R. 464, 472 (8th Cir. BAP 2001) (citations omitted); *but see, Small v. Bottone* (*In re Bottone*), 209 B.R. 257, 262-63 (Bankr. D. Mass. 1997) (recognizing the friction between the doctrine of continuing concealment and the requirement for courts to narrowly construe § 727(a)(2) in furtherance of a fresh start). Typically, asset concealment exists "where the interest of the debtor in property is not apparent but where actual or beneficial enjoyment of that property continued." *Id*. "What is critical under the concealment provision of § 727(a) is whether there is concealment of *property*, not whether there is concealment of a transfer." *Rosen v. Bezner*, 996 F.2d 1527, 1532 (3d Cir. 1993).

McDermott v. Petersen (*In re Petersen*), 564 B.R. 636, 645-46 (Bankr. D. Minn. 2017) (emphasis by underscoring added).

The undisputed record is, within one year before Debtors' petition date, Debtor Scott Javers's property included $100,000.00 (or some portion thereof) in proceeds from the sale of his race car a month earlier. Focusing on that property, did Debtor Scott Javers transfer, remove, destroy, mutilate, or conceal it and, if so, did he do so with the intent to hinder, delay, or defraud Bank, another creditor, or the eventual chapter 7 trustee?

The Court is unable, after considering the discovery materials, depositions and attendant exhibits, and the affidavits and attendant exhibits, to discern there are no material facts in dispute concerning the two elements for a denial of discharge under § 727(a)(2)(A). In large part, the present record does not, contrary to Debtors' assertion, clearly establish what Debtor Scott Javers did with the race car sale proceeds. Further, as noted above, on a summary judgment motion, the Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Here, there are clearly issues for trial, and Debtors' motion for summary judgment regarding Bank's request for relief under § 727(a)(2)(A) will be denied as a matter of law.

The Court notes the results herein regarding summary judgment under §§ 523(a)(6) and 727(a)(2)(A) differ because the willful and malicious elements of § 523(a)(6) are not the same as the intent element of § 727(a)(2)(A).

> Recognizing the nearly identical wording of Code sections 522(o), 548(a)(1)(A) and 727(a)(2), the Eighth Circuit Court of Appeals and numerous bankruptcy courts apply the same standard of "intent to hinder, delay or defraud" a creditor to cases under these sections. *See Addison v. Seaver* (*In re Addison*), 540 F.3d 805, 811-12 (8th Cir. 2008); *In re Sholdan*, 218 B.R. 475, 481 (Bankr. D. Minn. 1998), *aff'd* 217 F.3d 1006 (8th Cir. 2000) (citing cases) ("The Eighth Circuit has approved the use of the same inferential process in applying the statutory language 'with intent to hinder, delay or defraud creditors,' wherever that language is found—in state fraudulent-transfer statutes, 11 U.S.C. § 548(a), or 11 U.S.C. § 727(a)(2)"). This standard includes the badges of fraud analysis. *In re Addison*, 540 F.3d at 811-12; *Dantzler v. Zulpo* (*In re Zulpo*), 592 B.R. 231, 247 (Bankr. E.D. Ark. 2018) ("Courts have applied the inferential 'badges of fraud' approach to determine whether a debtor acted with fraudulent intent, regardless of which of these provisions is being construed.").

Doeling v. Reimer (*In re Reimer*), Bankr. No. 18-30752, Adv. No. 19-7072, 2021 WL

1621295, at *11 n.18 (Bankr. D.N.D. Apr. 26, 2021). Because the present record discloses some badges of fraud regarding Debtor Scott Javers's intent to hinder, delay or defraud a creditor or the trustee under § 727(a)(2)(A), summary judgment in favor of Debtor Scott Javers under § 727(a)(2)(A) cannot be entered.

> The "badges of fraud" include: (1) lack or inadequacy of consideration; (2) family, friendship or other close relationship between the transferor and transferee; (3) retention of possession, benefit or use of the property in question; (4) financial condition of the transferor prior to and after the transaction; (5) conveyance of all of the debtor's property; (6) secrecy of the conveyance; (7) existence of trust or trust relationship; (8) existence or cumulative effect of pattern or series of transactions or course of conduct after the pendency or threat of suit; (9) instrument affecting the transfer suspiciously states it is bona fide; (10) debtor makes voluntary gift to family member; and (11) general chronology of events and transactions under inquiry. *Id*. The list is non-exhaustive, and courts are free to consider "any other factors bearing upon the issue of fraudulent intent." *Ritchie Capital Mgmt., LLC v. Stoebner*, 779 F.3d 857, 863 (8th Cir. 2015) (in the context of a fraudulent transfer action under 11 U.S.C. § 548(a)(1)(A)) (quoting *Jensen v. Dietz* (*In re Sholdan*), 217 F.3d 1006, 1009-10 (8th Cir. 2000)); *Dunker v. Bachman* (*In re Bachman*), 2017 WL 3098093, at *4 (Bankr. D. Neb. July 20, 2017).
>
> The presence of a single badge is typically not sufficient to establish actual fraudulent intent. *Brown v. Third Nat'l Bank* (*In re Sherman*), 67 F.3d 1348, 1354 (8th Cir. 1995). The confluence of several badges, however, creates a presumption of fraudulent intent. *Ritchie Capital Mgmt.*, 779 F.3d at 861-62; *Kelly v. Armstrong*, 141 F.3d 799, 802 (8th Cir. 1998); *Dantzler v. Zulpo* (*In re Zulpo*), 592 B.R. 231, 247 (Bankr. E.D. Ark. 2018); *see also Rademacher v. Rademacher* (*In re Rademacher*), 549 B.R. 889, 894 (Bankr. E.D. Mo. 2016) (noting that the presence of more than one badge of fraud "strongly indicates that the debtor did, in fact, possess the requisite intent.").

Doeling v. Gapp (*In re Gapp*), 604 B.R. 371, 384-85 (Bankr. D.N.D. 2019). Here, the present record shows Debtor Scott Javers's and his businesses' financial conditions were strained and Debtor did not, upon receipt, deposit all the race car sale proceeds in a bank account: both badges of fraud. Thus, the intent element under

§ 727(a)(2)(A) is appropriately further developed and considered at trial.

Both Bank and Debtor Scott Javers seek summary judgment regarding the application of § 727(a)(3). To make a *prima facie* case, Bank must show, first, Debtor Scott Javers failed to maintain and preserve adequate records regarding the sale of the race car and, second, such failure makes it impossible to ascertain his and his businesses' respective financial condition. *Snyder v. Dykes* (*In re Dykes*), 954 F.3d 1157, 1163 (8th Cir. 2020) (quotes therein omitted). "Section 727(a)(3) embodies an objective standard of reasonableness; it does not require proof of intent." *Id*. (quoting *Davis v. Wolfe* (*In re Wolfe*), 232 B.R. 741, 745 (B.A.P. 8th Cir. 1999)).

> In determining whether a debtor's record keeping was justified, the Bankruptcy Code "requires the trier of fact to make a determination based on all the circumstances of the case." *Meridian Bank*, 958 F.2d at 1231. The inquiry turns on factors such as the education, experience, and sophistication of the debtor; the volume and complexity of the transactions; and "any other circumstances that should be considered in the interest of justice." *Id*. (quotation omitted). For this inquiry, "the trial court must first determine what records someone in like circumstances to [the debtor] would keep." *In re Sendecky*, 283 B.R. 760, 764 (8th Cir. B.A.P. 2002).

Dykes, 954 F.3d at 1163. If Bank meets its initial burden, then Debtor Scott Javers must go forward to offer a justification for his record keeping or lack thereof. *Id*. Bank, however, bears the ultimate burden of proof on all elements. *Id*.

The record is not sufficiently developed on the two elements of § 727(a)(3) for the Court to determine either party is entitled to summary judgment. What records Debtor Scott Javers maintained regarding the sale of the race car and the disposition of the sale proceeds need to be more fully addressed. The account documents Debtors offered as part of their summary judgment record, without explanatory and

linking testimony, were insufficient. The Court notes it is not concerned the race car itself was not a business asset. It became relevant to Debtors' businesses when Debtor Scott Javers pledged it as collateral for his guaranty of the business debt.

An appropriate order on the parties' three motions will be entered.

Finally, the Court directs to the United States Trustee's attention two matters disclosed in the adversary proceeding to date. The first is Debtor Scott Javers and Keizer's agreement to backdate the security agreement giving Bank a lien on the race car (doc. 57-2). Debtor Scott Javers, in an e-mail (doc. 57-11), asked Keizer to date the security agreement for February 1, 2018 to "put it before I met with my attorney the first time." Keizer, in his deposition, stated Debtor Scott Javers wanted a lien on the race car created and the security agreement backdated from 2018 to 2017 so the Internal Revenue Service would not take the car (doc. 57, p. 41). The second matter is it is unclear whether any applicable state or local taxes were paid when Debtor Scott Javers sold the race car in January 2020. The Court thus refers both matters to the United States Trustee for further investigation and, if appropriate, a subsequent referral if violations of the law are indicated.

Dated: March 28, 2022.

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 21-40030
	)	Chapter 7
SCOTT GENE JAVERS	)	
SSN/ITIN xxx-xx-4452	)	
	)	
and	)	
	)	
PAMELA JEAN JAVERS	)	
SSN/ITIN xxx-xx-7310	)	
	)	
Debtors.	)	
	)	
RELIABANK DAKOTA	)	Adv. No. 21-4003
	)	
Plaintiff	)	
	)	
-vs-	)	ORDER RE: PENDING MOTIONS
	)	AND SETTING FINAL
SCOTT GENE JAVERS and	)	PRE-TRIAL CONFERENCE
PAMELA JEAN JAVERS	)	
	)	
Defendants.	)	

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED Plaintiff Reliabank Dakota's Motion to Strike and Motion in Limine (doc. 45) is denied.

IT IS FURTHER ORDERED discovery is reopened through May 27, 2022 as to exhibit 1 and exhibit 3 attached to Debtor-Defendant Scott Gene Javers's affidavit dated December 21, 2021.

IT IS FURTHER ORDERED Debtors-Defendants Scott Gene Javers and Pamela Jean Javers's Motion for Summary Judgment (doc. 31) is granted in part, Plaintiff is denied relief against Debtor-Defendant Pamela Jean Javers under 11 U.S.C. § 523(a)(6) and 11 U.S.C. § 727(a)(2)(A) and (a)(3), and Plaintiff is denied relief against Debtor-Defendant Scott Gene Javers under 11 U.S.C. § 523(a)(6).

IT IS FURTHER ORDERED Plaintiff's Motion for Partial Summary Judgment (doc. 36) is denied.

IT IS FURTHER ORDERED a final pre-trial conference will be held June 3, 2022 at 11:30 a.m. (Central) to set a trial date on Plaintiff's request for relief against Debtor-Defendant Scott Gene Javers under 11 U.S.C. § 727(a)(2)(A) and (a)(3). The conference will be telephonic. The Court will initiate the call to counsel for all parties.

So ordered: March 28, 2022.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota