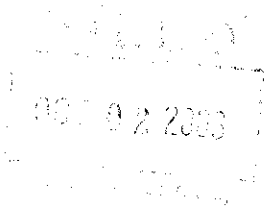
UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION



In re:

Case No. 02-23248

MARLA L. DEFREESE,

Debtor.

Chapter 7

TAMPA BAY FEDERAL CREDIT UNION,

Plaintiff,

vs.

Adv. No. 8:03-ap-122-PMG

MARLA L. DEFREESE,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OPINION

THIS CASE came before the Court for a final evidentiary hearing in the above-captioned adversary proceeding.

The Plaintiff, Tampa Bay Federal Credit Union, commenced this proceeding by filing a Complaint to Determine Dischargeability of Debt. In the Complaint, the Plaintiff alleges that a debt owed by the Debtor to the Plaintiff is nondischargeable pursuant to §523(a)(2)(A) of the Bankruptcy Code because it is a debt based upon false pretenses, false representations, or actual fraud. Specifically, the Plaintiff contends that the Debtor cashed a Loan Check and used her VISA account shortly before the filing of her chapter 7 case, and that she had no intention of repaying the obligations at the time of the transactions.

In response, the Debtor asserts that she intended to repay the debts at the time that they were incurred, but that she was forced to file her bankruptcy petition because of circumstances that arose after the credit was extended.

Background

Over a period of time, the Debtor incurred unsecured debt in a total amount that exceeded $50,000. The debt primarily consisted of credit card charges on eight separate credit card accounts.

Beginning in the summer of 2002, the Debtor consulted with a debt consolidation company to determine whether her bills could be consolidated. According to the Debtor, she was advised by the company to pay off a student loan, and also to satisfy a debt owed to Chase Bank.

On July 3, 2002, the Debtor was diagnosed with breast cancer.

On July 22, 2002, the Plaintiff issued a check made payable to the Debtor in the amount of $4,000. The following language was preprinted on the reverse side of the check:

> By endorsing this check you acknowledge receipt of the attached Promissory Note and Truth-in-Lending Disclosure and agree to the terms and conditions thereof, which govern this loan transaction.

(Plaintiff's Exhibit 3). The check was not issued pursuant to any Loan Application made by the Debtor. Instead, the check was sent to the Debtor in an unsolicited mailing to her home.

The Debtor endorsed the check, and the check was cashed on August 27, 2002.

Prior to September of 2002, the Plaintiff had issued a VISA credit card to the Debtor. The Debtor's VISA account was identified as account number 4229 3696 1000 3390.

On September 9, 2002, the Debtor used her VISA card to accomplish a "balance transfer" from Sallie Mae to the Plaintiff. Essentially, the transaction allowed the Debtor to satisfy or reduce a

student loan owed to Sallie Mae, and to incur a new indebtedness on her VISA account in the amount of the student loan.

On or about September 12, 2002, shortly after the "balance transfer" was concluded, the Debtor was informed that her initial cancer treatment had not been successful, and that radical surgery was then indicated to treat the disease.

One and one-half weeks later, the Debtor consulted with an attorney for the first time concerning her financial situation. She engaged Samuel R. Mallard, Esquire as her bankruptcy attorney on or about September 24, 2002.

The Debtor underwent cancer surgery on October 18, 2002.

On November 21, 2002, the Debtor filed a petition under chapter 7 of the Bankruptcy Code. On her "Schedule I - Current Income of Individual Debtor," the Debtor listed her only income as unemployment income in the amount of $980.00 per month.

The Plaintiff subsequently commenced this proceeding by filing a Complaint to Determine Dischargeability of Debt. In the Complaint, the Plaintiff alleges that the Debtor "objectively could not and subjectively did not intend to honor her obligation to the Plaintiff to satisfy the indebtedness represented by the Loan Check and the indebtedness represented by the Cash Advance ["balance transfer"]. (Complaint, ¶ 13). Consequently, the Plaintiff asserts that the debt owed to it by the Debtor in the total amount of $8,535.00 "was obtained through false pretenses, false representations, or actual fraud," and is therefore nondischargeable pursuant to §523(a)(2)(A) of the Bankruptcy Code.

Discussion

Section 523(a)(2)(A) of the Bankruptcy Code provides as follows:

11 U.S.C. § 523. Exception to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 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). "The purposes of th[is] provision are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." In re Rossiter, 2002 WL 31987288, at 3 (Bankr. E.D.Pa.) (quoting 4 Collier on Bankruptcy, ¶ 523.08[1][a], at 523-41).

If a debtor did not intend to repay a debt at the time that it was incurred, the debt may be excepted from discharge under §523(a)(2)(A). The use of a credit card, for example, is generally considered to constitute an actual or implied representation that the debtor intends to repay the debt incurred. In re Manning, 280 B.R. 171, 185 (Bankr. S.D. Ohio 2002). If the representation is false, therefore, the obligation may fall within the exception to discharge set forth in §523(a)(2)(A).

"In determining whether a debtor's representations of intent to repay are knowingly false and made with the intent and purpose of deceiving the creditor, a subjective standard is utilized." In re Rossiter, 2002 WL 31987288, at 4(citing In re Feld, 203 B.R. 360, 367)(Bankr. E.D. Pa. 1996).

"Because intent to defraud is rarely proved by direct evidence, a majority of courts have utilized the 'totality of the circumstances' approach . . . to discern a debtor's subjective intent." In re Truong, 271 B.R. 738, 745 (Bankr. D. Conn. 2002). Whether a debtor falsely represented that he intended to

repay a specific debt must be determined from the totality of the circumstances. In re Manning, 280 B.R. 171, 185 (Bankr. S.D. Ohio).

To determine a debtor's subjective intent under the "totality of the circumstances" approach, courts generally consider the following factors:

1. The length of time between the creation of the debt and the filing of the bankruptcy.

2. Whether the debtor consulted a bankruptcy attorney before the debt was incurred.

3. The number and amount of the transactions.

4. The financial condition of the debtor at the time that the debt was incurred.

5. Whether the debt exceeded the debtor's credit limit.

6. Whether multiple debts were incurred on the same day.

7. Whether the debtor was employed, or if not, whether the debtor had meaningful prospects for employment.

8. The financial sophistication of the debtor.

9. Whether the debtor's spending habits changed suddenly.

10. Whether the debts were incurred for luxuries or necessities.

In re Manning, 280 B.R. at 186; In re Truong, 271 B.R. at 746. The factors listed above are merely guidelines to assist the court in determining the debtor's intent, and should be considered in view of the overall principle that exceptions to discharge must be strictly construed in favor of the debtor. In re Manning, 280 B.R. at 186; In re Truong, 271 B.R. at 745.

Application

In this case, the Court finds that the Plaintiff did not establish by a preponderance of the evidence that the debt owed by the Debtor is nondischargeable under §523(a)(2)(A). See In re Manning, 280

B.R. at 178-79. Specifically, the Court finds that the Debtor intended to repay the debts at the time that they were incurred. The primary facts that the Court relies on in reaching this determination include the following:

> 1. The Debtor did not meet with an attorney or consider filing a bankruptcy case until after she had cashed the Loan Check and completed the "balance transfer." The two transactions at issue occurred on August 27, 2002, and September 9, 2002, respectively. She did not consult with a bankruptcy attorney, however, until September 24, 2002, more than two weeks after the last transaction.
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> 2. The Debtor received a critical medical diagnosis on September 12, 2002, after both debts had been incurred.
>
> 3. The "Loan Check" sent to the Debtor by the Plaintiff was unsolicited. The Debtor did not apply for the loan. This factor evidences the absence of any scheme or design on the part of the Debtor to obtain the loan for an improper purpose.
>
> 4. No evidence was presented that the Debtor purchased any luxuries with the proceeds of the credit, or that she lived an extravagant lifestyle. On the contrary, the Debtor testified that she used the money from the Loan Check to perform necessary home repairs, and to pay her normal living expenses.
>
> 5. Although she was receiving unemployment benefits at the time of the transactions, the Debtor planned at that time to develop a business as a computer consultant. "Fraudulent intent should not be implied solely based on the use of a credit card when there is no immediate ability to repay." In re Manning, 280 B.R. at 185(quoting In re Shartz, 221 B.R. 397, 400 (6th Cir. BAP 1998))(Emphasis supplied). A finding of fraudulent intent should not depend solely on the Debtor's financial condition at the time that the credit was extended.
>
> 6. The Debtor testified that her efforts prior to September 24, 2002, were focused on consolidating her debts, rather than avoiding them. The purpose of the "balance transfer," for example, was to achieve a lower rate of interest on the debt, and as a response to the debt consolidation company's advice that they could only consolidate credit card bills, not student loans. (See Plaintiff's Exhibit 4, Transcript of §341 meeting, p. 20).

Under these circumstances, the Court finds that the debts claimed by the Plaintiff are not based on false pretenses, false representations, or actual fraud. Clearly, the transactions at issue occurred within

a relatively short period of time prior to the filing of the chapter 7 petition. The Court is satisfied, however, that the timing of the events was caused by circumstances beyond the Debtor's control, and not by any fraudulent purpose on her part. The evidence shows that the Debtor intended to honor her obligations to the Plaintiff when the transactions occurred, and that her intentions were altered only after she received a critical medical diagnosis.

The Plaintiff did not meet its burden of proving that the debt is nondischargeable under §523(a)(2)(A), and the debts claimed by the Plaintiff are therefore dischargeable in the Debtor's chapter 7 case.

Accordingly:

IT IS ORDERED that:

1. The debts owed to the Plaintiff, Tampa Bay Federal Credit Union, by the Debtor, Marla L. Defreese, are not excepted from the Debtor's discharge pursuant to §523(a)(2)(A) of the Bankruptcy Code.

2. A separate Final Judgment in favor of the Debtor, Marla L. Defreese, and against the Plaintiff, Tampa Bay Federal Credit Union, will be entered in this case.

DATED this 2nd day of October, 2003.

BY THE COURT

PAUL M. GLENN
Chief Bankruptcy Judge