UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

ANDREW C. BOWER, Case No. 08-8212-PMG

Debtor.
_____/

CHASE BANK USA, N.A.

Plaintiff,

v. Adversary No. 09-179-PMG

ANDREW C. BOWER,

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Proceeding came before the Court for a final evidentiary hearing to consider the dischargeability of a debt owed by Andrew C. Bower (Defendant/Debtor) to Chase Bank USA, N.A. (Plaintiff) pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(C).

The debt, totaling $20,224.07, arises from a cash advance and charges made by the Defendant on his Visa credit card prior to the order for relief. The Plaintiff alleges that the Defendant misrepresented that he had the ability to repay the debt, that he did not intend to repay the debt, and that the representations, on which the Plaintiff justifiably relied, were made with the intent and purpose to deceive the Plaintiff. (Pl.'s Complaint) (Pl.'s Ex. 5).

The primary charges at issue are: (i) a $3,997.00 charge for a software program designed to help individuals earn money online, (ii) a $7,628.00 charge for non-elective dental surgery, and (iii) a $7,000.00 cash advance used by the Defendant to pay child support.

Background

On December 30, 2008, the Debtor filed a petition under Chapter 7 of the United States Bankruptcy Code. Pre-petition the Plaintiff issued the Debtor a Visa credit card with a credit limit of $20,000.00. On the petition date, the Debtor owed $20,224.07 on the credit card.

The Plaintiff filed a complaint alleging that the Debtor's prepetition credit card charges of $20,224.07 are nondischargeable under §§ 523(a)(2)(A) and 523(a)(2)(C). The charges are comprised of a $7,000.00 cash advance made within seventy days of the petition date, and credit card charges totaling $13,224.07 made within ninety days of the Petition Date. (Pl.'s Ex. 4 & 5). The credit card was not revoked at the time the Defendant made the charges.

The Debtor filed an answer denying the majority of the allegations in the complaint. The Debtor's answer included an affirmative defense that the Plaintiff was not the holder of the Visa account and a counterclaim requesting attorney's fees pursuant to Fla. Stat. § 57.105. The Plaintiff filed a response to the Debtor's affirmative defense and an answer to the counterclaim, denying that it was not the real party in interest[1] and asserting that it was not proper for the Debtor to request attorney's fees in the form of a counterclaim.

Debtor's Schedules list his average monthly expenses as $10,136.14, and his monthly income as $0.00. (Pl.'s Ex. 2). The schedules also list $395,113.37 in secured claims and $126,361.50 in unsecured nonpriority claims. (Pl.'s Ex. 2). The Debtor testified that the monthly expenses were incurred when he was earning almost one hundred thousand dollars per year and

[1] The Debtor did not raise the issue of the Plaintiff not being the proper party in interest at the trial.

trying to maintain two homes following his divorce. (Tr. p. 18-19). The Debtor has since lost the home in which he resided in a foreclosure action and now lives with his parents. (Tr. p. 10).

The Debtor was employed by Ring Power Corporation, a Caterpillar dealer, for twelve years. (Tr. p. 19, 61). His most recent position was as general service manager, with supervisory responsibility over about 150 people (Tr. p. 62), and his annual salary was almost $100,000.00.[2] Apparently as a result of the general economic circumstances and their affect on his employer, he lost his job on September 15, 2008. Based on his past work experiences, the Debtor testified that he was confident he would find new employment fairly easily. (Tr. p. 19).[3] However, since losing his job, the Debtor has not found employment and has had no income. (Tr. p. 18-19).

In October of 2008, the Debtor purchased a software program called Surfdocs that cost $3,997.00, and charged the purchase price to his Chase credit card.[4] The program was designed to help generate income online by tracking the searches of internet users and then using that information to solicit businesses that would be interested in purchasing such information. (Tr. p. 23). The program was marketed as "Revolutionary Red-Hot State-of-the-Art LeadEvolution Software and Fool-Proof 'Cash on Demand' Lead Generation System." (Pl.'s Ex. 6). The Debtor purchased the program because he thought he may have to accept a job that paid less than his previous position and this could help supplement his income up to $5,000 a month. (Pl's Ex. 4, Tr. pp. 21-22, 64). The Debtor, however, never earned any money from the program. (Tr. p. 22). The Debtor testified that at the time he purchased Surfdocs, "bankruptcy was the last thing I wanted to do. I hadn't given that a thought at that point." (Tr. p. 68).

---

[2] The Debtor's Statement of Financial Affairs shows that in 2007 he earned $98,790.18. (Pl's Ex. 1).

[3] The Debtor stated he was "fairly confident, really confident, actually, that I was going to get a job pretty much immediately." (Tr. p. 68).

[4] The Debtor also charged purchases in much smaller amounts that were related to the operation of the software program.

The Debtor also had non-elective dental surgery in October of 2008, that cost $7,628.00 and was charged to his Chase card. The Debtor testified that bone grafting surgery was necessary because of a gum infection that had progressed into a bone. He indicated that he had been receiving treatment for eight months prior to the surgery, and that the entire process cost approximately $24,000.00. (Tr. p. 29, 40).

On November 5, 2008, the Debtor took a cash advance of $7,000.00 to pay child support payments that were overdue to his former wife. (Tr. pp. 27-28, 36, 62). The final judgment of divorce requires the Debtor to pay child support payments of $2,800.00 a month. (Def.'s Ex. 3).

Although the Debtor had a telephone consultation with the Mickler law firm in October of 2008, he testified that he had several job interviews lined up and that he "had no intention of taking bankruptcy at that time." (Tr. p. 28). The Debtor did not retain the Mickler Law Firm until he met with Mr. Mickler in person on November 28, 2008. (Tr. p. 11).

Despite having significant unsecured credit card debts at the time of filing, the Debtor testified that it was always his intent to pay his credit cards because the monthly payments on the cards were "fairly minimal" while he was earning almost a hundred thousand dollars a year. (Tr. p. 44-45).

The Debtor made payments on the debt owed to the Plaintiff until the time he met with his attorney in late November, and testified that it was always his intent to pay these debts. (Tr. p. 69).

Discussion

The Plaintiff asserts that the debt owed to it by the Debtor is nondischargeable in the Debtor's bankruptcy case pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(C).

A. The Plaintiff's burden under 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) provides that a discharge under chapter 7 does not discharge a debtor from a debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud...." 11 U.S.C. § 523(a)(2)(A).

A creditor objecting to the dischargeability of a debt carries the burden of proof, and the standard of proof is preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); Alta One Federal Credit Union v. Bumgarner, 402 B.R. 374, 379 (M.D. Fla. 2007)("Pursuant to the *Grogan* decision, the objecting party must establish each of the four elements of fraud by a preponderance of the evidence."); In re Wiggins, 250 B.R. 131, 134 (Bankr. M.D. Fla. 2000); Fed. R. Bankr. P. 4005 (2007).

Exceptions to discharge "should be strictly construed against the creditor and liberally in favor of the debtor." Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986).

B. The presumption of nondischargeability for luxury goods or services and cash advances under 11 U.S.C. § 523(a)(2)(C)

Section 523(a)(2)(C) provides:

> **11 U.S.C. § 523. Exceptions to Discharge**
>
> . . .
>
> (C)(i) for purposes of subparagraph (A)—
>
> > (I) consumer debts owed to a single creditor and aggregating more than $550 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
> >
> > (II) cash advances aggregating more than $825 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this paragraph—

(I) the terms 'consumer,' 'credit,' and 'open end credit plan' have the same meaning as in section 103 of the Truth in Lending Act; and

(II) the term 'luxury goods or services' does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

(Emphasis Supplied).

11 U.S.C. § 523(a)(2)(C) provides that "[a] presumption of fraud arises where luxury goods and services are purchased or cash advances are taken shortly before the filing of a bankruptcy case." George, 381 B.R. at 915. The presumption "transforms the burden into one of proving the debt is dischargeable and places that burden squarely on the shoulders of the debtor." Chase Bank USA, N.A. v. Swanson, 398 B.R. 328, 333 (Bankr. N.D. Iowa 2008)(citing In re Cron, 241 B.R. 1, 8 (Bankr. S.D. Iowa 1999). "If the presumption applies, the debtor's intent becomes the only relevant factor and it becomes the debtor's burden to prove the debt was not incurred in contemplation of bankruptcy." Id. at 333.

"The legislative history indicates that this presumption was meant to prevent 'loading up' or credit buying sprees by consumers in contemplation of filing bankruptcy." John Deere Community Credit Union v. Allen F. Feddersen, 270 B.R. 733, 736 (N.D. Iowa 2001).

Goods reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor are not luxury goods. 11 U.S.C. § 523(a)(2)(C)(ii)(II). "Circumstances surrounding the purchase are relevant to the determination whether the good is a luxury good. Relevant considerations are whether the good served a significant family function and if the transaction evidences any fiscal responsibility." George, 381 B.R. at 916 (internal citations omitted). It is also appropriate to consider "the reason the Debtor purchased the item and the actual use by the

Debtor of the item under consideration." General Motors Acceptance Corporation v. McDonald, 129 B.R. 279, 283 (Bankr. M.D. Fla. 1991).

(i) The credit card purchases

Within 90 days of the petition date, the Debtor made charges totaling $13,224.07 on the Chase card. The primary charges include a $3,997.00 charge for an income generating online software program called Surfdocs and items needed for the software program. Another significant charge was for non-elective dental surgery in the amount of $7,628.00. The remaining charges are for miscellaneous items such as food, clothes, gas, and family items. There is also a $390.00 charge for a rental storage unit, a $112.99 charge from Bowl America for a birthday party for the Debtor's children, and $44.90 in charges for traffic school.

(a) Debts incurred for a profit motive are not typically considered consumer debt

Consumer debt under 11 U.S.C. § 101(8) is defined as "debt incurred by an individual primarily for a personal, family, or household purpose." In deciding whether a debt qualifies as a consumer debt, courts consider the purpose for which the debt was incurred.

Courts have held that "if the credit transaction involves a profit motive, then it is not a consumer debt." Feddersen, 270 B.R. at 736; see also In re Palmer, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990)(recognizing that if a credit transaction involves a profit motive then it is not a consumer debt); In re Kountry Korner Store, 221 B.R. 265, 270 (Bankr. N.D. Okla. 1998)(finding that a $3,000 advance to purchase a "tanker" of gasoline for a store was not a consumer transaction since it was used for a commercial purchase).

The record is clear that the Debtor purchased Surfdocs for the sole purpose of supplementing his income so he would be able to meet his monthly financial obligations, including $2,800 monthly child support payments. (Tr. pp. 21-22, 64). There is no evidence that

the Debtor purchased Surfdocs with anything other than a profit motive in mind. The $3,997.00 charge for Surfdocs and the related charges, such as the $270.00 charge for Wordtracker, do not constitute consumer debts as defined by § 101(8).[5] Accordingly, the presumption under § 523(a)(2)(C)(I) does not arise with respect to these purchases.

(b) The remaining charges do not constitute charges for luxury goods or services

The evidence reflects that the dental surgery for the Debtor was non-elective. The Debtor testified that the surgery was necessary due to a gum infection that had worked its way into a bone, and that he had been receiving treatment for the infection for eight months prior to the surgery, an entire process that cost approximately $24,000.00. (Tr. pp. 29-30, 40). Accordingly, the $7,628.00 charge for the surgery does not constitute a charge for a luxury service.

The remaining charges reflect purchases for items such as food, gas, clothing, traffic school, a storage unit, and a birthday party for his children. The charges with respect to food, gas, and clothing are reasonable as no one charge reflects an excessive amount that would indicate the purchase of a luxury item. With respect to the storage unit, the Debtor testified that the unit held furniture and other items that he had to store after his divorce. (Tr. p. 33). The birthday party for his children was not a necessity, but it was a moderately priced party and not a "lavish" affair. Accordingly, the Court does not find that any of these charges constitute luxury goods or services.[6] Thus, the presumption of nondischargeability does not arise since the Debtor did not incur charges aggregating more than $550.00 for luxury goods or services.

---

[5] The additional charges relating to items the Debtor needed in conjunction to operating the Surfdocs software include: $113.00 for Magicjack.com and $169.60 for E-fax Plus Service. (Tr. pp. 32-34).

[6] With the exception of the $390.64 charge for the storage unit, and the charges incurred in connection with the income generating software, all remaining charges were under $115.00.

(ii) The cash advance for delinquent child support

On November 5, 2008, the Debtor took a $7,000.00 cash advance for the purpose of paying delinquent child support payments to his former wife. (Tr. p. 62). The cash advance was within seventy days of the petition date, was greater than $825.00, and was taken under an open end credit plan as defined in 15 U.S.C. § 1602(i). The adjective "consumer" when used with reference to a credit transaction characterizes the transaction as one primarily for personal, family, or household purposes. 15 U.S.C. § 1602(h). Accordingly, it appears that this cash advance is presumed to be nondischargeable, and the burden shifts to the Debtor to rebut the presumption.

"If the presumption applies, the debtor's intent becomes the only relevant factor and it becomes the debtor's burden to prove the debt was not incurred in contemplation of bankruptcy." Chase Bank v. Swanson, 398 B.R. at 333.

For the reasons discussed below, the Court finds that the debt was not incurred in contemplation of bankruptcy. The Debtor's testimony that it was always his intent to pay the credit card indebtedness was credible, and is supported by the fact that he continued to make payments to the Plaintiff until he met with his attorney in late November, 2008. (Tr. pp. 44-45, 69) (Def.'s Ex. 7). See Branch Banking and Trust Company v. Park, 2007 WL 4287748, *4 (Bankr. E.D. Va. 2007)(recognizing that the debtor's behavior in continuing to make payments during the 90-day period preceding the bankruptcy petition was "inconsistent with a debtor who seeks to 'load up' on debt in anticipation of bankruptcy, the practice the presumption seeks to prevent."). The Court finds that the Debtor has sufficiently rebutted the presumption and that at the time the cash advance was made he possessed the actual, subjective intent to repay the Plaintiff.

C. The debts are not excepted from the discharge under § 523(a)(2)(A)

Since the presumption of nondischargeability does not arise, or has been rebutted, with respect to the foregoing items, the burden of proof is on the Plaintiff.

(i) False Pretenses or False Representations

Section 17a(2) of the Bankruptcy Act of 1898 provided an exception to the discharge for obtaining money or property by false pretenses or false representations. The Eleventh Circuit has held that the continued use by a debtor of a credit card after clear revocation of the credit card has been communicated to the cardholder will result in liabilities obtained by false pretenses or false representations.[7] In re First National Bank of Mobile v. Roddenberry, 701 F.2d 927 (11 Cir. 1983). Although Roddenberry was decided under § 17(a)(2) of the Bankruptcy Act of 1898, which did not reference actual fraud, the decision is still recognized with respect to allegations of false pretenses or false representations. See AT&T Universal Card Services Corp., v. Acker, 207 B.R. 12 (Bankr. M.D. Fla. 1997)(recognizing that a creditor cannot prevail under §523(a)(2)(A) on allegations of false pretense or false representations with respect to credit card debt if the creditor did not revoke the credit privileges of the debtor).

In this case, the evidence does not show that the Plaintiff had revoked the Debtor's rights to the card prior to his making the charges. Thus, the Plaintiff is not entitled to have the debt declared nondischargeable under a theory of false pretenses or false representations. See also Bumgarner, 402 B.R. at 380.

[7] Section 17a [Bankruptcy Act of 1898] provides that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as ... (2) are liabilities for obtaining money or property by false pretenses or false representations, …." 11 U.S.C. § 17a(2) (repealed 1978).

(ii) Actual fraud

"[A]ctual fraud, with which the Court in Roddenberry did not deal, will prevent a debt from being discharged. Where purchases are made through the use of a credit card with no intention at that time to repay the debt, that debt must be held to be nondischargeable pursuant to § 523(a)(2)(A). To hold otherwise would be to ignore he plain language of the statute and to reward dishonest debtors." In the Matter of Carpenter, 53 B.R. 724, 728-30 (Bankr. N.CD. Ga. 1985.

To preclude the discharge of a debt because of fraud, the Eleventh Circuit has stated that "[t]he debtor must be guilty of positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." Schweig v. Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986).

A debtor's intent not to repay the charges at the time the charges were made is required for a finding of actual fraud. Acker, 207 B.R. at 16. Courts have considered the following factors in determining whether a debtor had the intention of paying the charges:

1. the length of time between the charges made and the filing of bankruptcy;

2. whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;

3. the number of charges made;

4. the amount of the charges;

5. the financial condition of the debtor at the time the charges were made;

6. whether the charges were above the credit limit of the account;

7. did the debtor make multiple charges on the same day;

8. whether or not the debtor was employed;

9. the debtor's prospects for employment;

10. financial sophistication of the debtor;

11. whether there was a sudden change in the debtor's buying habits; and

12. whether the purchases were made for luxuries or necessities.

Barnett Bank of Pinellas County v. Tinney, 188 B.R. 1015, 1019 (Bankr. M.D. Fla. 1995).

"No single factor is determinative. Instead, the Court must consider the totality of the evidence and make the determination of intent on a case-by-case basis. Accordingly, the Court must focus on factors which indicate the debtor's intent to repay the debt at the time the charges or cash advances were made." Id. at 1019.

The Plaintiff contends that the Debtor's lack of employment and troubled financial condition at the time he made the charges support its position that it was the Debtor's intent not to repay the charges at the time they were incurred. Courts, however, have recognized that although a debtor's inability to repay a debt may be a factor in proving subjective intent, a debtor does not subjectively intend to defraud a creditor simply because he should know that he lacks the ability to repay a debt when it is incurred. See Lind-Waldock & Company v. Morehead, 2001 WL 7516, *2 (4th Cir. 2001); see also Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1286 (9th Cir 1996)("the hopeless state of a debtor's financial condition should never become a substitute finding of bad faith"). The availability of credit for difficult financial times is one very good reason to establish credit.[8] The test for nondischargeability is not whether the credit was used in difficult times; the test for nondiscghargeability is whether the credit was used with the intent not to repay.[9]

[8] See In re Cordova, 153 B.R. 352, 356 (Bankr. M.D. Fla. 1993).
[9] See In re Anastas, 94 F.3d at 1287.

The Debtor's testimony was credible and candid on all material points. The Debtor had been employed in a responsible position with a substantial salary, he had the reasonable belief that he had good prospects for a new job, his purchases were for an income producing project, necessary surgery, overdue child support, and other items necessary for the support of his family. He continued making payments on his debt until he met with his attorney at the end of November, 2008. (Tr. pp. 44-45, 69). The Court finds that at the time the Debtor incurred the charges, he did not intend not to repay the Plaintiff. The Plaintiff did not prove by a preponderance of the evidence that it was the Debtor's intent not to repay the charges at the time they were incurred. Accordingly, the debts owed by the Debtor to the Plaintiff are dischargeable.

D. The Debtor's request for attorney's fee's pursuant to Fla. Statute § 57.105(2)

In this proceeding, the Debtor seeks attorney's fees pursuant Florida Statute § 57.105(2). Florida Statute § 57.105(2) provides:

> If a contract contains a provision allowing attorney's fees to a party when he is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. (Emphasis added).

The provisions of § 57.105(2) leave the determination as to whether to award attorney's fees to the court's discretion. Another court in this District has reasoned with respect to this issue that:

> Section 57.105(2) is clearly discretionary providing that the court "may" allow attorney fees to the prevailing party in a contractual dispute. In this case, it would add insult to injury for a plaintiff who had a legitimate claim but who ultimately failed to be required to pay the attorney's fees of the opposing side. Shifting of fees in this case would be unjust. However, the Court does not reject the possibility that such fees may be appropriate in other cases. For example, when an overreaching creditor files a complaint in bad faith, attorney's fees may be appropriate.

Tester v. Estrada, 2004 WL 3202201, *1 (Bankr. M.D. Fla. 2004).

The Court agrees with the reasoning set forth in Estrada. In this case there is no evidence that the Plaintiff filed the complaint in bad faith, and the Court does not find it appropriate to award the Debtor attorney's fees under § 57.105(2). The Court's decision, however, does not foreclose the possibility in other cases, such as when there are indicia of bad faith.

Conclusion

Based on the above, the debts owed by the Debtor to the Plaintiff are not excepted from the discharge under § 523(a)(2)(A) and § 523(a)(2)(C). The parties shall each bear their own attorney's fees and costs.

A separate Final Judgment consistent with these Finding of Fact and Conclusions of Law will be entered in accordance with the foregoing.

Dated this 30 day of September, 2010, in Jacksonville, Florida.

BY THE COURT

/s/ Paul M. Glenn

_____

Paul M. Glenn
Chief United States Bankruptcy Judge