

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

AUGUSTO CESAR MENENDEZ,

Case No. 09-1832-PMG

Debtor.

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VYSTAR CREDIT UNION

Plaintiff,

v.

AUGUSTO CESAR MENENDEZ,

Adversary No. 09-607-PMG

Defendant.

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING  
DISCHARGEABILITY UNDER § 523(a)(2)(A) AND § 523(a)(2)(C)**

This Proceeding came before the Court for a final evidentiary hearing to consider the dischargeability of a debt owed by Augusto Cesar Menendez (Defendant/Debtor) to Vystar Credit Union (Plaintiff) pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(C).

The debt, totaling \$12,000.00, arises from pre-petition cash advances taken by the Debtor on his Visa credit card within seventy days prior to the order for relief. The Plaintiff alleges that when the Defendant took the cash advances he had no intent or ability to repay the funds.

**Background**

On March 13, 2009, the Debtor filed a petition under Chapter 13 of the United States Bankruptcy Code. On April 1, 2009, the Debtor's Chapter 13 plan was filed. The plan provided

that there would be no distribution to the unsecured creditors. (Main case, Doc. 8). On October 1, 2009, the Court entered an Order converting the Debtor's case to a Chapter 7.

The Plaintiff filed a complaint alleging that the Debtor's pre-petition cash advances, totaling \$12,000.00, are nondischargeable under §§ 523(a)(2)(A) and 523(a)(2)(C). The cash advances were monies advanced on a pre-petition Visa line of credit extended from the Plaintiff to the Defendant. The cash advances are comprised of the following transactions: \$8,000.00 on February 2, 2009, \$1,500.00 on February 20, 2009, and \$2,500 on February 27, 2009.

The Debtor filed an Amended Answer denying the allegations that he did not have the ability or intent to repay the cash advances at the time they were incurred.

On the petition date, the Debtor was self-employed as an officer of his businesses, Tri Trust Transportation and Agape Logistics. (Tr. p. 9). The Debtor, who ran the businesses for approximately six years prior to the petition date, testified that the companies transported "products on flatbeds, big 18 wheelers from one location to another location, mostly throughout the southeast part of the United States, sometimes in other parts of the country." (Tr. p. 10).

In order to obtain credit for his businesses, the Debtor had to extend personal guarantees. The Debtor testified that "[e]verything had to be guaranteed from the initiation of the company throughout the final days through my signature, my personal signature. There's no credits that were really offered to the company itself. And as the company developed - - that's the way it had to be for every single purchase of every single item: truck, trailers, et cetera. I had to guarantee those loans under my own signature." (Tr. 10).

From the inception of the businesses, the Debtor funded their operations through cash advances. He testified that it was "the only way I could get liquidity, because no one would pay us on a timely basis. We had to net 30 days initially so we would get paid on 30 days. But I had

to pay fuel right up front I had to pay insurance up front, labor, et cetera. So I had to fund the company through personal loans." (Tr. p. 12).

The Debtor used the \$12,000.00 in pre-petition cash advances in the operation of the businesses. The Debtor's testimony reflects that there were substantial weekly and monthly expenses associated with running the businesses, such as \$7,500 weekly on fuel, \$3,500 for monthly vehicle maintenance and repairs, \$2,400 monthly for basic preventive maintenance, and \$3,500 for cargo insurance. (Tr. 14-15).

The Debtor testified that it was "absolutely" his intent to repay the cash advances and that prior to his bankruptcy filing, there were no defaults or late payments on any of his loans. (Tr. pp. 16, 26-27). The Debtor began thinking about filing for bankruptcy sometime between the middle and end of 2008, and consulted with a bankruptcy attorney at some point in February of 2009. (Tr. p. 19-20). Although the Debtor took the cash advances on February 2, 20, and 27, 2009, and consulted with a bankruptcy attorney at some time in February, 2009, the Debtor testified that at the time he took the cash advances he ". . . had the intent [to repay his creditors]. I wanted the ability to pay down everybody as soon as possible. As creditors, as people, as companies that we did business for paid us, I turned around and paid whomever was immediately due." (Tr. p. 25). The Debtor also stated that Vystar was the primary business entity he went to, and that the history of his relationship with Vystar illustrates that he "had every intent to continue to operate the business." (Tr. p. 26).

At the time the Debtor filed for bankruptcy he was attempting to keep his businesses operating, and was hopeful the economy would begin to recover. (Tr. pp. 12-13, 32). Although the Debtor's Chapter 13 Plan provided no distribution to unsecured creditors, the Debtor testified that he was "intent" on seeing everyone get paid as much as possible. The Debtor stated that his

"hope was to pay off everybody, not to run off and not to, you know, rob Peter to pay Paul, et cetera, but to pay everybody just like I've done in the five or six years leading up to that point."

(Tr. p. 31).

In October of 2009, a \$12,000 insurance renewal came due that the Debtor did not have the funds to pay. The business' clients had also stopped paying, which included a bankrupt company that owed the business over \$12,000.00. (Tr. p. 15). Accordingly, the Debtor made the decision to cease business operations. In October, 2009, his Chapter 13 case was converted to a case under Chapter 7. (Tr. 13). The Debtor was unemployed at the time of the trial.

### **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 (11<sup>th</sup> 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).

Pursuant to 11 U.S.C. § 523(a)(2)(C), "[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 (N.D. Iowa 2001).

The first clause of § 523(a)(2)(C) is not applicable in this case since there is no evidence that the Debtor utilized the cash advances for luxury goods or services.

The issue for the Court's determination arises under § 523(a)(2)(C)(i)(II) which deals with cash advances aggregating more than \$825. Pursuant to the Consumer Credit Protection Act ("CCPA"), the extension of credit by virtue of a credit card is an "open end credit plan." See 15 U.S.C. § 1601 et seq.<sup>1</sup> The issue is whether the cash advances taken by the Debtor were extensions of "consumer credit" as defined by the CCPA.

Section 1602(h) of the CCPA states:

The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

15 U.S.C. § 1602(h).

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

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<sup>1</sup> The Truth in Lending Act was codified at 15 U.S.C. § 1601 et seq.

that a \$3,000 advance to purchase a "tanker" of gasoline for a store was not a consumer transaction as it was used for a commercial purchase).

The Debtor's testimony that he took the cash advances for the purpose of continuing the operations of his business was detailed and credible. The Debtor's testimony also indicates that his business' liquidity was funded from the inception through cash advances. (Tr. p. 11-12, 15). There is no evidence to indicate that the money was used for anything other than a business purpose. Accordingly, the Court finds that the \$12,000.00 in cash advances were not consumer transactions, since they were not used primarily for personal, family, or household purposes. Since the Debtor used the cash advances with a profit motive in mind, the Plaintiff is not entitled to the benefit of the presumption of fraud under § 523(a)(2)(C).

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

Since the presumption of nondischargeability does not arise with respect to the cash advances, 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.<sup>2</sup> 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 relayed will result in liabilities obtained by false pretenses or false representations. 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

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<sup>2</sup> 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).

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, there is no allegation or evidence that the Plaintiff had revoked the Debtor's rights to the card prior to him making the charges. Thus, the Plaintiff is not entitled to have the debt declared nondischargeable under a theory of false pretenses or representations. See also Bumgarner, 402 B.R. at 380.

**(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 the plain language of the statute and to reward dishonest debtors." In the Matter of Carpenter, 53 B.R. 724, 728-30 (Bankr. N.D. 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 (11<sup>th</sup> 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 deciding 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 evidence indicates the Debtor knew he would be filing for bankruptcy at the time he took the cash advances. The Plaintiff also asserts that the Debtor's Chapter 13 plan, which provided for no distribution to unsecured creditors, evidences that the Debtor did not have the ability to pay the amounts owed. From this, the Plaintiff submits that the Court should conclude that the Debtor did not have the intent to repay the cash advances at the time they were taken. (Tr. p. 34).

Courts 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 (4<sup>th</sup> Cir. 2001); see also Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1286 (9<sup>th</sup> Cir 1996)("the hopeless state of a debtor's financial condition should never become a substitute finding of bad faith"). "The test for nondischargeability is not whether the credit was used in difficult times; the test for nondischargeability is whether the credit was used with the intent not to repay." In re Bower, 2010 WL 3959614 (Bankr.M.D.Fla.)(footnotes omitted).

The Debtor's testimony was credible and candid on all material points, and the Court finds that at the time the Debtor incurred the charges it was his intent to repay the Plaintiff. (Tr. p. 16). The Debtor had an ongoing business relationship with the Plaintiff. It is clear that he wanted to preserve the relationship and continue his business operations. The Debtor's testimony also reflects that until the time he was forced to file bankruptcy, due to the continued decline of the economy, he made every attempt to see that his creditors were timely paid.

Thus, the Plaintiff has failed to 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.

### **Conclusion**

Based on the above, the debts owed by the Debtor to the Plaintiff are dischargeable 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 March, 2011, in Jacksonville, Florida.

**BY THE COURT**

Paul M. Glenn

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Paul M. Glenn  
Chief United States Bankruptcy Judge