

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)	Adversary Proceeding
)	
SHARON GAIL WELLS SYLVESTER)	Number <u>95-2065</u>
(Chapter 7 Case <u>95-20453</u>))	
)	
<i>Debtor</i>)	
)	
)	
WACHOVIA BANK CARD)	
SERVICES, INC.))	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
SHARON GAIL WELLS SYLVESTER)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

_____This action is a complaint to determine the dischargeability of a debt pursuant to Title 11 U.S.C. Section 523(a)(2)(A). Plaintiff, Wachovia Bank Card Services, Inc., claims that it is owed approximately \$2,960.34 as the balance due from the credit card

purchases of Sharon Gail Wells Sylvester (hereinafter "Debtor") and asserts that this obligation is nondischargeable pursuant to the applicable provisions of the Bankruptcy Code. By virtue of 28 U.S.C. Section 157(b)(2)(I), this matter is a core proceeding. Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, this Court held a trial on May 2, 1996, and makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Sharon Gail Wells Sylvester and Terry Joe Wells were divorced in December of 1989. A few years later the parties reconciled and cohabitated from January 1993 through December 1994. Both parties acknowledged that the decision to reunite was due in part to the terminal illness of their daughter. During September of 1994, Debtor applied for a credit card solely in her ex-husband's name, forging his signature. Shortly thereafter, Debtor again forged her ex-husband's name in a letter to the bank requesting a second card for herself as an authorized signer. Debtor testified that she was credit worthy and could have applied for a credit card in her own name; however, Debtor reasoned that, because she quit her job to take care of their child, it was her ex-husband's responsibility to provide the essentials for the household. Neither party disputes that the former husband, Terry J. Wells, had no knowledge of his ex-wife's activity. Debtor later used the credit card without any authorization from him. When Terry J. Wells discovered the existence of the credit card, he wrote to the bank requesting that they remove his name from the card.

Plaintiff alleges that Debtor made a false representation to Wachovia Bank Card Services, Inc., and pursuant to Section 523(a)(2)(A) this debt is nondischargeable. Debtor contends that at the time she believed she was married, in common-law, to her former husband and, therefore, did not possess the requisite intent to defraud the Plaintiff and except this debt from discharge.

CONCLUSIONS OF LAW

In pertinent part, 11 U.S.C. Section 523(a)(2) provides:

(a) A discharge under section 727 . . . 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 burden of proof in non-dischargeability actions is upon the plaintiff excepting a discharge to show by a preponderance of the evidence that a discharge is not warranted. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991).

In order to except a particular debt from discharge because of fraud, a

creditor must prove the following:

- 1) the debtor made a false representation with the purpose and intention of deceiving the creditor;
- 2) the creditor relied upon such representation;
- 3) such reliance by the creditor was justifiable;
- 4) the creditor suffered a loss as a result of that reliance.

In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986); In re Phillips, 804 F.2d 930 (6th Cir. 1986); In re Lacey, 85 B.R. 908 (Bankr. S.D.Fla. 1988). *See also* In re Vann, 67 F.3d 277 (11th Cir. 1995) (reliance must be justifiable); In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985) (plaintiff must demonstrate reliance on the debtor's representations); In re Dobbs, 115 B.R. 258, 265 (Bankr.D.Idaho 1990); Matter of Carpenter, 53 B.R. 724, 729 (Bankr. N.D.Ga. 1985) (actual fraud). In order to be non-dischargeable the objecting creditor must show that property was obtained by fraud in the inception. In re Marazino, 67 B.R. 394 (Bankr.D.Kan. 1986). In other words, the original debt must have been incurred through fraudulent conduct. *See* In re Barney, 186 B.R. 105 (Bankr. N.D.Ohio 1987). The intent to deceive must be present at the time the goods and services are obtained not later. In re Pitt, 121 B.R. 493, 495 (Bankr. E.D.Va. 1990).

The parties have stipulated that all of the requirements of Section

523(a)(2)(A) are present except for the necessary fraudulent intent. Therefore, this Court must only address the issue of whether the Debtor possessed the requisite intent at the time of her actions. When considering Section 523(a)(2)(A), the creditor bears the burden of demonstrating actual fraudulent intent; constructive fraud is insufficient. *See In re Miller*, 39 F.3d 301, 306 (11th Cir. 1994). In the present case, I conclude that Plaintiff has met its burden. Here, in order to receive a credit card secretly, and without her ex-husband's knowledge, Debtor forged his signature on two occasions. Clearly, she intended to mislead Wachovia Bank Card Services, Inc., into extending credit to her without incurring any corresponding liability. Although Debtor contends that at the time she considered herself to be common-law married, this assertion fails to explain why Debtor failed to list her own name on the application. At the very least, Debtor could have co-signed the obligation. Debtor may be unsophisticated in the ways of business; however, Debtor understood how to apply for a credit card in her ex-husband's name and then how to request an additional card in her name from his sole account. Nothing in the marital relationship would authorize her incurring a debt in his name only without his express authorization.

Finally, although Debtor may have honestly believed that her former husband should have provided for the family, her deception places a financial burden on Wachovia Bank Card Services, Inc., and not her former husband. I, therefore, hold that Debtor intentionally deceived Plaintiff, Wachovia Bank Card Services, Inc., and the debt is excepted from discharge.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Debtor, Sharon Gail Wells Sylvester, to Plaintiff, Wachovia Bank Card Services, Inc., in the approximate amount of \$2,960.34 is excepted from discharge.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of June, 1996.