

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	
)	
NICK F. LATARGIA, JR.)	Chapter 7 Case
)	Number <u>95-10558</u>
Debtor)	
_____)	
)	
AMERICAN EXPRESS CENTURION BANK,)	
OPTIMA CARD DIVISION)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>95-01064A</u>
NICK F. LATARGIA, JR.)	
)	
Defendant)	
)	

ORDER

American Express Centurion Bank, Optima Card Division ("American Express") filed this adversary proceeding to determine the dischargeability under 11 U.S.C. §523(a)(2)(A)¹ of credit card

¹11 U.S.C. §523(a)(2) provides in pertinent part:
(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

debt incurred by the Debtor, Nick F. Latargia, Jr. ("Debtor"). The Debtor filed a motion for summary judgment along with an affidavit in which he asserts that he intended to pay for the charges at the time they were incurred. The Debtor insists that American Express cannot rebut this evidence with any testimony to the contrary, and that he is therefore entitled to summary judgment. For the reasons that follow, the motion is denied.

Under the Federal Rule of Civil Procedure 56 made applicable to bankruptcy practice under Federal Rule of Bankruptcy Procedure 7056, summary judgment will be granted only if "... there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of establishing its right to summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See Addickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). The Court has jurisdiction to hear this matter as a core bankruptcy proceeding under 28 U.S.C. §157(b) (2) (I).

The evidence, viewed in a light most favorable to American Express, establishes that the Debtor opened a credit card account

fraud, other than a statement respecting the debtor's or an insider's financial condition;

with American Express in July, 1982. Between December 20, 1994 and January 12, 1995, the Debtor consummated four transactions against this account totaling \$7,043.98. Two of these transactions constituted cash advances totaling \$4,500.00. This one month spending pattern greatly exceed the Debtor's previous charge history. The Debtor filed for relief under Chapter 7 on April 11, 1995. In his schedules, the Debtor listed monthly income of \$1,126.00 and monthly expenses of \$1,130.00. Schedule F revealed that the Debtor owed unsecured creditors \$42,106.07.

Exceptions to discharge are to be construed strictly and the burden rests with the creditor to prove each element justifying the exception. Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986) (citations omitted); Household Fin. Corp. v. Richmond (In re Richmond), 29 B.R. 555 (Bankr. M.D. Fla. 1983). The creditor's burden of proof is by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). To preclude the discharge of a particular debt for false representations, a creditor must prove that:

- (1) the debtor made a false representation with the intent to deceive the creditor;
- (2) the creditor relied upon such representation;
- (3) the reliance was justifiable; and
- (4) the creditor sustained a loss as a result of the representation.

Field v. Mans, ___ U.S. ___, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995).

In analyzing credit card transactions under this test, the issue is whether the debtor made a representation at the time of the transaction. One analysis finds that debtors have no contact with a creditor at the time of the transaction, and therefore do not make any representations on which the creditor may rely. See, G.M. Card v. Cox (In re Cox), 182 B.R. 626, (Bankr. D. Mass. 1995). However, some courts have ruled that by using the credit card, the debtor implicitly represents that 1) he has the ability, and 2) the intention to repay the debt. See, American Bank & Trust Co. v. Lipsey (In re Lipsey), 41 B.R. 255 (Bankr. E.D. Pa. 1984); H.C. Prange Co. v. Schnore (In re Schnore), 13 B.R. 246 (W.D. Wis. 1981). Although the latter approach overcomes the lack of an overt representation, it conflicts with the Bankruptcy Code in three ways. First, to imply these representations runs afoul of the strict construction placed upon §523 by making each credit card user an absolute guarantor of his ability to repay the charged debt. This result contradicts the intent of §523 and ignores the reality of credit card transactions. As many courts have noted, credit card companies expect and encourage customers to use credit cards because they do not have the present ability to pay. Chase Manhattan v. Carpenter (In re Carpenter), 53 B.R. 724, 728 (Bankr. N.D. Ga. 1985); First Nat'l Bank v. Roddenberry, 701 F.2d 927 (11th Cir. 1983)

(Credit card companies assume the risk of non-payment by extending unsecured credit). Second, these inferences give the credit card issuer a preferred position over other unsecured creditors which have to prove each element under §523. Sears Roebuck & Co. v. Faulk (In re Faulk), 69 B.R. 743, 753 (Bankr. N.D. Ind. 1986), citing Carpenter, 53 B.R. at 728. Finally, the implied representations suggest that credit card debts can be excepted from discharge based upon fraud implied by law, a result prohibited by the Bankruptcy Code. Chase Manhattan v. Ford (In re Ford), 186 B.R. 312, 317 (Bankr. N.D. Ga. 1995). Proving insolvency or an inability to pay does not satisfy §523. The creditor must also prove the lack of intent to pay. 3 Collier on Bankruptcy §523.08[4] (15th ed. 1995), citing Montgomery Ward & Co., Inc. v. Blackburn (In re Blackburn), 68 B.R. 870 (Bankr. N.D. Ind. 1987).

The "implied representation" doctrine also contradicts binding precedent of the Fifth and Eleventh Circuit Courts of Appeals.² The Fifth Circuit ruled in a Bankruptcy Act case that a debt is dischargeable despite the debtor's failure to disclose his insolvency if the debtor makes no overt misrepresentations to the creditor. Davison-Paxon Co. v. Caldwell, 115 F. 2d 189 (5th Cir. 1940). In Davison-Paxon Co., the creditor sought an exception to

²Decisions of the Fifth Circuit issued prior to September 30, 1981 are binding precedent upon Eleventh Circuit courts. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

dischargeability alleging that the debtor incurred the debt without the ability or intent to repay the creditor at the time the charges were incurred. However, the debtor made no overt misrepresentations to the creditor about her ability or intent to repay the debt, and the debt was not excepted pursuant to section 17(a)³ of the Bankruptcy Act. Id. at 191. The court rejected the creditor's argument that the debtor made implied representations of ability and intent to repay by failing to disclose her financial condition. Id.

The Eleventh Circuit in another Act case reaffirmed this rationale in the credit card context by finding that a credit card company assumes the risk of nonpayment when issuing credit. First Nat'l Bank v. Roddenberry, 701 F.2d 927 (11th Cir. 1983). In Roddenberry, the creditor issued a credit card to the debtor, but subsequently revoked the credit privileges after the debtor remained delinquent on the account. After this revocation, the debtor continued to use the card despite having knowledge of the revocation. The creditor sought a determination of nondischargeability for the pre- and post-revocation charges to the

³Bankruptcy Act 11 U.S.C. §17(a)(2) provided:

Debts Not Affected by a Discharge.

a. 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....

account, alleging that the debtor did not have the ability to repay the charges at the time they were incurred. The Court held that the creditor assumed the risk of non-payment for any charges prior to the revocation of the card, stating that once a credit company extends credit to a customer, "[o]nly after such clear revocation has been communicated to the cardholder will further use of the card result in liabilities obtained by 'false pretenses or false representations' within the meaning of sections 17a(2)'s exemption from discharge." Id. at 932.

Davison-Paxon Co. and Roddenberry remain binding authority because the language of the current Code §523(a)(2)(A) is substantially similar to Bankruptcy Act §17(a). See, Field v. Mans, ____ U.S. ____, 116 S.Ct. 437, 441, 133 L.Ed.2d 351 (1995); Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474, 1476 (11th Cir. 1985) (case law interpreting Bankruptcy Act §17(a) should serve as a guide for interpreting Code §523(a)(2)(A)). Section 17(a)(2) of the Bankruptcy Act and §523(a)(2)(A) of the current code are substantially similar in all but one respect. Congress has added an additional ground for excepting a debt from discharge, actual fraud. The Roddenberry court acknowledged the addition of this provision, and noted that it may change its holding, but did not address the result under the added provision. 701 F.2d 929 - 930, n. 3.

Remaining for analysis is §523(a)(2)(A) "actual fraud" in

the credit card context. One court defines actual fraud in this context as, if when the debtor incurred the charges, either he had no intention of repaying the debt OR he had no ability to pay and should have known so, then the debt is non-dischargeable for actual fraud under §523(a)(2)(A). Sun Bank, N.A. v. Stokes (In re Stokes), 155 B.R. 785, 787 (Bankr. M.D. Fla. 1993); Citibank (S.D.), N.A. v. Meeks (In re Meeks), 139 B.R. 559, 561 (Bankr. M.D. Fla. 1992); Citibank (S.D.), N.A. v. Gnagey (In re Gnagey), 138 B.R. 1008, 1009 (Bankr. M.D. Fla. 1992). This two pronged test is merely a restatement of the implied representation analysis which is contrary to the rationale of Davison-Paxon Co. and Roddenberry. This analysis allows a determination of nondischargeability based solely upon the debtor's inability to repay the charges without proving fraudulent intent.

Under the guidelines set in Davison-Paxon Co. and Roddenberry, the correct test for determining actual fraud in a credit card transaction is whether the debtor intended to repay the charges at the time they were incurred. See Ford 186 B.R. 312, 320; Carpenter, 53 B.R. 724, 730. Although the debtor's ability to pay is not an alternate test for actual fraud, it is a factor to be considered in determining whether the debtor intended to repay the charges at the time they were incurred. The factors to consider are

- (1) the length of time between the charges made and the bankruptcy;

- (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges are 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 debtor made multiple charges on the same day;
- (7) whether or not the debtor was employed;
- (8) the debtor's prospects for employment;
- (9) whether there was a sudden change in the debtor's buying habits; and
- (10) whether the purchases were made for luxuries or necessities.

Carpenter, 53 B.R. at 730.

Whether the debtor intended to repay the charges at the time they were incurred is a question of fact to be determined at trial. The issue cannot be resolved by merely looking to the Debtor's affidavit and American Express' inability to call a witness with knowledge of the Debtor's state of mind. Instead, I must review all of the evidence presented, observe the demeanor of the witnesses, and determine their credibility. I will then determine whether the Debtor obtained credit by false pretenses or false representations or defrauded American Express based upon all of the

relevant facts and circumstances.

It is therefore ORDERED that the Debtors motion for summary judgment is DENIED.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this _____ day of March, 1996.