UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

GARY J. CRANDELL . CASE NO. 98-62888

Debtor

UNIVERSAL CARD SERVICES CORP.

Plaintiff

vs. ADV. PRO. NO. 98-70896A

GARY J. CRANDELL

Defendant

APPEARANCES:

McNAMEE, LOCHNER, TITUS & WILLIAMS
Attorneys for Plaintiff
75 State Street
P.O. Box 459
Albany, NY 12207-0459

KENNETH L. GELLHAUS, ESQ.
Of Counsel

L. DAVID ZUBE, ESQ.
Attorney for Defendant
59 Court Street, 5th Floor
Binghamton, New York 13901

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

In this adversary proceeding, Universal Card Services Corp. ("Plaintiff") seeks a determination of whether a credit card debt incurred for gambling purposes by Chapter 7 Debtor Gary J. Crandell ("Defendant") is exempted from discharge pursuant to § 523(a)(2)(A) of the

United States Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). Also before the Court is a counterclaim filed by Defendant on January 22, 1999, which seeks an award pursuant to Code § 523(d) of the attorney fees and costs incurred defending this action.

This adversary proceeding was tried in Utica, New York, on December 14, 1998. At the close of Plaintiff's evidence, Defendant moved to dismiss the action for failure of proof. The Court then reserved on Defendant's motion, whereupon Defendant rested his case. In lieu of closing arguments, each party was permitted to submit a post-trial memorandum of law, and the adversary proceeding was submitted for decision on January 22, 1999.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1), and (b)(2)(I).

FINDINGS OF FACT

The facts relevant to this adversary proceeding are for the most part not in dispute. On August 29, 1994, Plaintiff issued Defendant an AT&T Universal Card ("Universal Card") with a line of credit in the amount of $7,000. The rights and responsibilities of each party were memorialized in an industry-standard credit agreement ("Credit Agreement"), under which Defendant "agree[d] to pay such amounts" as were charged on the Universal Card. At the time, Defendant was employed by the County of Broome, New York, earning an annual salary of

approximately $49,000, and enjoyed a personal credit rating well in excess of the minimum required by Plaintiff's credit approval guidelines.

In late 1996 or early 1997, Defendant lost his job with Broome County. Since exhausting his unemployment benefits, Defendant's only source of income has been sporadic work as a substitute teacher for the Binghamton City School District, for which he is paid $70 a day.[1]

During the period of his unemployment, Defendant was a frequent visitor to the Turning Stone Casino in Vernon, New York ("Turning Stone"). On several of these occasions, Defendant obtained funds for his gambling by drawing on a "comcheck," a computerized credit system found in many casinos that operates as the functional equivalent of a cash advance from the drawer's credit or ATM card. Although Defendant testified that he occasionally left Turning Stone with winnings, he appears to have emerged from the casino far more often with losses, which totaled approximately $70,000 over the eighteen months prior to his bankruptcy. During this time, Debtor incurred over $40,000 in charges on his Universal Card account, most of which amount was drawn through comchecks and nearly all of which was spent at the casino.

In spite of his limited income and substantial gambling expenses, Defendant managed to make timely payments on his Universal Card and other obligations until February, 1998. In large part, Defendant paid his gambling debts by drawing down his Merrill Lynch Individual Retirement Account ("I.R.A"), and (to a lesser extent) by drawing on a home equity line of credit. Defendant testified that he had drawn a total of $49,000 out of his I.R.A. account for gambling purposes, and that approximately $23,000 remained in the account when he filed for bankruptcy.

---

[1] Although Defendant testified that he works about twice a week as a substitute teacher, it appears that his total substitute teaching income from 1997 was only $350.

In early February 1998, Defendant made what turned out to be the last withdrawal from his I.R.A. account, and on February 5, 1998, Defendant paid off $5,000 of the approximately $6,922 balance on his Universal Card. On February 7 and February 8, Defendant again gambled at Turning Stone, where he took a total of $4,695.97 in cash advances from his Universal Card. Defendant testified that he had intended to pay back these advances, as well as other debts, with his hoped-for gambling winnings; if these winnings did not materialize, Defendant stated that he was willing to draw down his I.R.A. account yet again. In any case, however, Debtor failed to make his required minimum monthly payment to Plaintiff of $145.00, which was due on February 14, 1998. At the time Debtor filed his bankruptcy petition, a total balance of $6,927.34 remained unpaid on his Universal Card account.[2]

Approximately a month after his February trips to Tuning Stone, Defendant consulted with his brother-in-law, an attorney, about the possibility of restructuring his credit card debt. Defendant stated that he had not previously discussed or considered the idea of filing for bankruptcy. On the advice of his brother-in-law, Defendant met with a bankruptcy attorney sometime in March 1998, and on May 4, 1998, Debtor filed a Chapter 7 petition in this Court. Debtor's schedules listed no non-exempt assets and approximately $ 77,199.00 in liabilities, including $27,979.00 in unsecured non-priority claims. Of these unsecured claims, $6,000 represented a credit debt to Turning Stone, while the remaining amount represented debts owed

---

[2] While Plaintiff's complaint concedes that only the portion of Defendant's debt attributable to the February comcheck advances is in dispute, the final paragraph of the complaint seeks a determination of nondischargeability with respect to the entire $6,927.34 Universal Card balance. Plaintiff has not presented any evidence concerning the circumstances of the other unpaid charges, however, and as such, the Court will treat this matter as a motion to determine the dischargeability only of that part of the debt arising from the February 1998 comcheck transactions.

to different credit card companies, ranging from $2,000.00 to $8,181.00.

DISCUSSION

In arguing that Defendant's February 1998 cash advances should be exempted from discharge, Plaintiff relies exclusively on Code § 523(a)(2)(A), which makes non-dischargeable any debt arising out of an extension of credit obtained, *inter alia*, by "a false representation" or "actual fraud."[3] The exceptions to discharge provided by Code § 523(a)(2) reflect the long-standing Congressional policy that dishonest debtors should not profit from their wrongdoing through the bankruptcy system, *see Collins v. Palm Beach Savings & Loan (In re Collins)*, 946 F.2d 815, 817 (11th Cir. 1991), and that the relief of discharge should be available "only to an honest but unfortunate debtor." *Cohen v. De La Cruz,* 523 U.S. 213, 118 S.Ct. 1212, 1216, 140 L.Ed.2d 341 (1998).

---

[3] In pertinent part, Code § 523(a) provides:

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

(B) use of a statement in writing–

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relies; and

(iv) that the debtor caused to be made or published with intent to deceive.

In drafting Code § 523(a)(2)(A) and its predecessors, Congress did not enumerate the legal elements of the misconduct which would give rise to a non-dischargeable debt, as it had done for the parallel provision of Code § 523(a)(2)(B). Instead, Congress chose to employ common law terms of art, and courts have interpreted those terms according to their standard common law meanings. *See Field v. Mans,* 516 U.S. 59, 116 S.Ct. 437, 443, 133 L.Ed.2d 351 (1995).

In determining whether Defendant's use of his Universal Card was a fraudulent representation for purposes of Code § 523(a)(2)(A), this Court is guided by the elements of the common law torts of deceit and misrepresentation. *See LA Capitol Federal Credit Union v. Melancon (In re Melancon)*, 223 B.R. 300, 307 (Bankr. M.D. La. 1998). Under either of these tort actions, pecuniary liability will arise only if: (1) the defendant made a representation; (2) the representation was false; (3) the defendant knew of the representation's falsity; (4) the defendant made the representation with the actual intent of deceiving or harming the plaintiff; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered an injury proximately caused by the misrepresentation. *See American Express Travel Related Services Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1996); *Pisano v. Verdon (In re Verdon)*, 95 B.R. 877, 884 (Bankr. N.D.N.Y. 1989); RESTATEMENT (SECOND) OF TORTS §§ 525-526 (1977). In the present case, Plaintiff, as the party opposing discharge, bears the burden of proof on each of these elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Because of the absence of any direct communication between the cardholder and the issuing bank, the problem of applying Code § 523(a)(2)(A) to the typical credit card transaction

has proved notoriously difficult. *See Melancon*, 223 B.R. at 318 (citing cases). This Court is among the majority that has adopted an "implied representation" approach, under which the use of a credit card is held to be a representation of the cardholder's present intent to reimburse the issuer for the funds advanced and to otherwise comply with the terms of the credit agreement. *See MBNA America v. Parkhurst (In re Parkhurst)*, 202 B.R. 816, 823 (Bankr. N.D.N.Y. 1996). Use of a credit card does not necessarily imply a representation of present ability to pay, however, although evidence of ability to pay may obviously be considered as indirect, non-determinative evidence of a debtor's subjective intent. *See Chevy Chase Bank FSB v. Kukuk (In re Kukuk)*, 225 B.R. 778 (10th Cir. B.A.P. 1998). As it is undisputed that Defendant incurred the credit card charges presently at issue, the Court accordingly finds that an actionable representation of his intent to pay was made.

In determining whether a credit card user has falsely represented an intent to pay for his charges, the majority of bankruptcy courts have employed a totality-of-the-circumstances test. Under this approach, a court may infer a subjective intent to repay (or lack thereof) by considering a number of objective factors, including: (1) The length of time between the charges made and the filing of bankruptcy; (2) whether or not an attorney had 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) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (10) the 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. *Citibank South Dakota v. Dougherty (In re Dougherty)*, 84 B.R. 653, 657 (9th Cir. B.A.P. 1988).

Applying the preceding factors to the evidence presented at trial, the Court concludes that seven of the twelve *Dougherty* factors (1, 2, 3, 5, 6, 7, and 11) support Defendant's assertion that he intended to repay Plaintiff at the time the charges were incurred. Three of the factors (4, 8, and 12) weigh in favor of Plaintiff's assertion that Defendant acted with fraudulent intent, while the remaining two factors (9 and 10) are unsupported by evidence on either side. In particular, the Court finds that:

(1) Nearly three months separate Defendant's last use of the Universal Card and the filing of his bankruptcy petition. This belies the characterization of Defendant as a debtor who engaged in last-minute "running up" of his credit card and adds plausibility to his assertion that the prospect of bankruptcy was not considered until some time after the events of February 1998.

(2) At trial, Defendant testified that he first sought legal advice on bankruptcy in March 1998. The Court found Defendant's testimony to be credible on this point, which was not in any way controverted by Plaintiff.

(3) Defendant made only two cash advances on his Universal Card during the time period relevant to this discussion.

(4) Defendant's two cash advances totaled $4,695.97, a large sum relative to both his credit limit ($7,000) and his amount of available credit on the Universal Card at the time of the transaction ($5,078).

(5) By February 1998, Defendant's financial condition was rapidly deteriorating, but it was by no means hopeless. At least $23,000 remained in Defendant's I.R.A. account, a sum

more than adequate to cover Defendant's obligations to Plaintiff.[4]

(6) At no time does Defendant appear to have exceeded the credit limit on his Universal Card.

(7) The comcheck or cash advance transactions presently at issue were not taken on the same day.

(8) Defendant was unemployed in February 1998.

(9) Apart from the fact that Defendant had been unemployed for a considerable time prior to February 1998, the Court received no evidence regarding his skills, educational qualifications, areas of expertise, or other factors necessary to make a determination of his prospects for employment.

(10) The Court likewise received no evidence regarding the Defendant's financial sophistication.

(11) Defendant testified that he had gambled and lost a total of $70,000, financed through credit cards, in 1997 and early 1998. Defendant's use of his Universal Card to obtain several thousand dollars of further gambling credit in February 1998 does not appear to represent a significant change in his spending habits.

(12) Defendant testified that the cash advances at issue were obtained for casino gambling, which is indisputably a luxurious rather than a necessary personal expense.

Additionally, the Court notes that for some time prior to the filing of his petition, Defendant engaged in an unusual sort of reverse bankruptcy planning, characterized by the rapid

---

[4] While Defendant's bankruptcy schedules indicate that his total debts as of May 1998, exceeded the value of his I.R.A. account, the Court has been presented with no evidence by which it could conclude that such was also the case in February 1998.

liquidation of exemptible assets in order to pay off unsecured debt. While the wisdom of this behavior may be questioned, it is plainly inconsistent with a long-term plan to abuse the bankruptcy process to the detriment of creditors.

As the party seeking an exception to discharge, Plaintiff bears the burden of establishing Defendant's intent not to repay. On review of all the evidence presented, the Court cannot conclude that this burden has been met. While several of the *Dougherty* factors weigh in favor of Plaintiff's position, the factors as a whole support a finding that Defendant did not take the cash advances with a present intent to defraud Plaintiff. Accordingly, the portion of Defendant's debt to Plaintiff which is attributable to the February 1998 cash advances is not excepted from discharge by Code § 523(a)(2)(A).[5]

Pursuant to Code § 523(d), a defendant who prevails in an adversary proceeding brought under one of the subsections of Code § 523(a)(2) may be awarded reasonable attorney fees if the court concludes that the position of the plaintiff-creditor "was not substantially justified." The purpose of this section is punitive rather than compensatory, as it is designed to dissuade creditors from coercing debtors through unreasonable (though not necessarily frivolous) Code § 523 actions. *See American Savings Bank v. Harvey (In re Harvey)*, 172 B.R. 314, 318 (9th Cir. B.A.P. 1994).

While it is Defendant who ultimately prevails in this adversary proceeding, the Court cannot conclude that Plaintiff's prosecution of this matter was necessarily unreasonable. As discussed above, three of the *Dougherty* factors clearly weighed in support of Plaintiff's position;

---

[5] Because the Court finds that Plaintiff has failed to prove the intent element of his prima facie case, the Court finds it unnecessary to consider whether Plaintiff has met his burden on the other elements, including reliance and damages.

several others presented fairly close questions of fact. Accordingly, the Court concludes that Defendant is not entitled to an award of attorney fees under Code § 523(d).

Based on the foregoing, it is hereby

ORDERED that Defendant's obligation to Plaintiff is not exempted from discharge by Code § 523(a)(2)(A), and it is further

ORDERED that Defendant's counterclaim for fees and costs pursuant to Code § 523(d) is DENIED.

Dated at Utica, New York

this 26th day of April 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge