UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Andrew T. Gregoire,
Case No. 00-11564
Chapter 7

Debtor.

Ayerst Employees Federal Credit Union,

Plaintiff,

-vs-
Adv. Pro. No. 00-90164

Andrew Thomas Gregoire,

Defendant.

Appearances:

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Plattsburgh, New York 12901

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Of Counsel

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

What began as a garden variety dischargeability determination has evolved into a myriad of pleadings including amended complaints, a request for sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011 and a request for attorney's fees. Ayerst Employees Federal Credit Union ("Plaintiff") initiated the current adversary proceeding seeking a nondischargeability determination for a debt owed to it by Debtor Andrew Thomas Gregoire ("Defendant"). The Defendant denies the allegations in the complaint and affirmatively invokes Federal Rule of Bankruptcy Procedure 9011, requesting sanctions for the Plaintiff's filing and pursuit of a Motion to Dismiss the underlying bankruptcy case. He also requests attorney's fees as compensation for having to repeatedly answer the complaints as they were amended.

Jurisdiction

The court has jurisdiction over this core proceeding pursuant to 11 U.S.C. §§157(b)(2)(A) and (I) and 1334(b).

Facts

Based upon the parties' stipulation, the pleadings before it and the evidence produced at trial, the court finds the following:

On February 2, 2000, the Defendant, in an attempt to consolidate his bills, applied for a $5,941.71 loan from the Plaintiff. He used the money to pay off a Key Bank loan, hoping that the savings from the lower interest rate would assist him is making ends meet. The Defendant noted that he was paying off another loan on his application and also indicated that his girlfriend was a co-signor for the Key Bank loan.

On the loan application, the Defendant indicated he paid $350 rent per month. When this amount was calculated with his other debts and assets, the Defendant's debt to income ratio was approximately 40%. Based upon this ratio, along with other factors, the Plaintiff approved the loan. However, on March 24, 2000, the Defendant filed a voluntary Chapter 7 petition listing his monthly rent obligation as $450. If this amount had been utilized in the Plaintiff's calculation, the Defendant's debt to income ratio would have been approximately 49%. The Plaintiff's loan policy dictates that a ratio of 46% or higher is subject to heightened scrutiny. However, based upon this policy, in the years of 1998, 1999, and 2000, the Plaintiff denied less than 1% of the loans requested.

On July 7, 2000, the Plaintiff filed an adversary complaint, alleging that the Defendant used the loan proceeds to pay off his girlfriend's car. The original complaint did not cite the discrepancies in the monthly rent as indicated on the loan application and in the bankruptcy petition. Rather, the Plaintiff relied on 11 U.S.C. § 523(a)(2)(A) and the section 523(a)(2)(C) presumption, asserting that by paying off the car the Defendant conferred a gift to his girlfriend while having no intention of repaying the loan to the Plaintiff. Many of the factual allegations and the conclusions drawn from them in the original complaint were inaccurate.

The Defendant timely answered the complaint and asserted a counterclaim pursuant to 11 U.S.C. § 523(d). Immediately thereafter, the Defendant filed a summary judgment motion. A few days later, the Plaintiff filed an amended complaint. Once the Plaintiff amended the complaint, the Defendant withdrew his summary judgment motion.

On September 8, 2000, the court issued a standard scheduling order allowing amendments to the complaint until October 20, 2000. On that date, the Plaintiff filed a second amended complaint. The Defendant timely answered.

On November 15, 2000, the Plaintiff requested permission to further amend its complaint; the Defendant opposed the motion. After receiving submissions and hearing oral argument, on January 4, 2001, the court granted the Plaintiff's request to further amend the complaint, conditioned upon payment of the Defendant's reasonable attorney fees. The Defendant's attorney has submitted a request for fees in excess of $20,000; Defendant's local counsel requests $695.

While the request to amend the complaint was pending, on December 6, 2000, the Plaintiff made a motion to dismiss the entire bankruptcy proceeding citing the court's *In re Griffieth* decision. In the alternative it requested a court ordered conversion from Chapter 7 to Chapter 13. The motion was summarily denied.

On June 18, 2001, the evidentiary hearing on the adversary proceeding was held. Decision was reserved and a briefing schedule was issued. The Plaintiff was given until August 21, 2001 to submit its post-trial memorandum. The Defendant was given until September 21, 2001 to respond. The Plaintiff submitted a brief on August 7, 2001; the Defendant responded on September 14, 2001. On September 20th, the Plaintiff submitted an additional brief.[1] On December 13, 2001 the Defendant also submitted additional case law.[2]

Argument

The Plaintiff invokes 11 U.S.C. §§ 523(a)(2)(A) and (B), arguing that pursuant to either section the debt is non-dischargeable. The Defendant contends he has not made any oral representations regarding his finances, therefore, he asserts, subdivision (a)(2)(A) is inapplicable and the Plaintiff has failed to establish the elements of subdivision (a)(2)(B).

Discussion

11 U.S.C. § 523(a)(2)(A)

Subdivision (A) of section 523(a)(2) provides, in part:

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[1]Since the Plaintiff's reply memorandum was filed after the court-established deadline, it was not considered.

[2]The case law submitted by the Defendant was filed after his submission deadline, therefore, it was also not considered.

> (a) A discharge under section ... 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;

Courts interpreting this subdivision have concluded that a successful plaintiff needs to demonstrate, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) he knew the representation was false; (3) he intended to deceive the creditor; (4) the creditor relied on the representation; and (5) his reliance was the proximate cause of his damage. *In re Luthra*, 192 B.R. 88 (E.D.N.Y. 1995) (citing *In re Schwartz & Meyers*, 130 B.R. 416 (Bankr. S.D.N.Y. 1991)).

The Plaintiff asserts that when the Defendant signed the loan application, he represented his intention to repay the debt. Since he failed to do so, the representation was false. The Plaintiff further contends the Defendant knew the representation was false and he harbored the requisite intent to deceive. The court disagrees.

When questioned about repaying the loan, the Defendant credibly asserted that he thought he could do so because he had consolidated his credit card debt and when those savings were added to the lower payment to the credit union, he would be able to pay his debts and expenses. (Tr. 43.) This belief, while mistaken, was grounded in objective facts, since he did receive a slight savings from the consolidation and refinancing. Moreover, he was gainfully employed when he obtained the loan and it was to be repaid by wage deduction. Finally, his demeanor, at the evidentiary hearing, convinces the court he did not intend to deceive the Plaintiff. For all of these reasons, the court concludes the Plaintiff has not met its burden pursuant to 11 U.S.C. §523(a)(2)(A).

11 U.S.C. § 523(a)(2)(B)

Subdivision (B) of section 523(a)(2) states its elements and provides, in part:

> (a) A discharge under section ... 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 -
>
> (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 relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive.

Like all exceptions to discharge, the Plaintiff must prove all parts of section 523(a)(2)(B) by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 286-288 (1991). Clearly, the Defendant used a written statement ("statement in writing") regarding his financial condition ("respecting the debtor's...financial condition") to obtain the loan ("for...property") and the Plaintiff reasonably relied ("on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied") on the representation.[3] However, the Plaintiff must also prove the written financial statement was "materially false," and that the

[3]In his papers the Defendant argues that the Plaintiff's reliance was not reasonable. However, the Second Circuit has made it clear that the "reasonableness requirement of section 523(a)(2)(B) is not a rigorous requirement, rather, it is directed at creditors acting in bad faith." *In re Wykes*, Case No. 98-17405, Adv. Pro. No. 99-91179 (November 6, 2000) (citing *In re Bonnanzio*, 91 F.3d 296, 305 (2d Cir. 1996); *In re Martin*, 761 F.2d 1163, 1166 (6^{th} Cir. 1985))." Moreover, at the evidentiary hearing the Defendant testified that, in his opinion, the Plaintiff's reliance on the numbers he provided was fair. (Tr. 198). The court agrees and finds the Plaintiff's reliance was reasonable.

Debtor "caused [the statement] to be made or published with intent to deceive." 11 U.S.C. § 523(a)(2)(B).

Section 523(a)(2)(B)(i): "Materially false"

The Second Circuit has decided that to constitute a materially false statement, substantially inaccurate information alone will not suffice; it must also be information which would have affected the creditor's decision-making process. *In re Furio*, 77 F.3d at 625 (citing *In re Boice*, 149 B.R. 40, 45 (Bankr. S.D.N.Y. 1992)). Thus, a statement is materially false when a creditor would not have made the loan had the debtor's true financial condition been known. *In re Furio*, 77 F.3d at 625 (citing *In re Bogstad,* 779 F.2d 370, 375 (7th Cir. 1985)).

The Plaintiff attempts to demonstrate, by the testimony of several employees, that the loan would have been denied if it had known the actual debt to income ratio. However, contrary to the Plaintiff's characterization, the testimony does not "unequivocally establish" this fact. (Plaintiff's Post-Trial Memorandum of Law p. 10.) Moreover, the Plaintiff's written loan policy indicates, "[a] debt to income ratio of 45%[4] - 55% should be scrutinized by looking at savings habits, attendance record, ability to repay and checking credit report for any charge offs or bankruptcy filings." (Defendant's Ex. 3.) Any testimony contending the loan would have been categorically denied would be in direct conflict with the written policy.

Ultimately, it is telling that in 1998, the Plaintiff granted 564 loans and denied only four loans; not one of these loans was denied solely because of the ratio. (Defendant's Ex. 8.) In 1999, the Plaintiff granted 558 loans and denied five loans. Once again, no loan was denied due

[4]Much was made of a typographical error in the written loan policy. However, this error does not affect this decision.

only to the ratio. (Defendant's Ex. 9.) Finally, in 2000, the Plaintiff granted 510 loans, denied five and not one of them was denied solely due to the ratio. (Defendant's Ex. 10.) Thus, notwithstanding the Plaintiff's employees' testimony, based upon the written loan policy and the raw numbers provided, the court determines that the Plaintiff has not proven, by a preponderance of the evidence, that the loan would not have been granted had the true debt to income ratio been known. At best, the Plaintiff has demonstrated an even toss-up over with respect to whether the loan would have been granted. Under the Supreme Court's analysis, ties go to the debtor. *See Grogan v. Garner*, 498 U.S. at 286-288.

Section 523(a)(2)(B)(iv): Caused to be made or published; intent to deceive

Having determined the Plaintiff has not proven the financial statement was a materially false statement, the court can conclude the burden under section 523(a)(2)(B) has not been met. However, the court will briefly discuss section 523(a)(2)(B)(iv).

When determining whether an "intent to deceive" is present, courts in the Second Circuit may consider the totality of circumstances, including a debtor's reckless disregard of the consequences of her/his acts. *In re Bonnanzio*, 91 F.3d at 301. The Plaintiff urges this court to find the Defendant's actions sufficiently demonstrate this reckless disregard. The court declines that invitation and for all the reasons previously articulated when discussing the Defendant's intent with respect to the 11 U.S.C. § 523(a)(2)(A) cause of action, the court finds that the Defendant did not harbor an intent to deceive.

Under either 11 U.S.C. §§ 523(a)(2)(A) or (a)(2)(B) the facts simply do not support a finding that this Defendant intended to defraud this Plaintiff. When the Defendant applied for the loan he was approximately 22 years old and had worked at various positions at Wyeth Ayerst for several years. (Tr. 183 - 186.) He had attempted to consolidate his mounting bills with Credit Guard and when that arrangement did not have the desired effect he decided to file bankruptcy. He testified that this major decision was a "really quick" one. (Tr. 23.) The Defendant consistently and credibly testified that he indicated his rent as $350 because that was his portion; he was living with his girlfriend and she was, at that time, making contributions to the rent. (Tr. 26 - 27.) Finally, he testified that the application process was brief; he picked up the form, filled it out that night and returned it the next day. (Tr. 191.)

The court finds the Defendant credible and concludes that he was a young and unsophisticated individual attempting to get his finances in order. When he requested a loan from his credit union and was asked about his rent he, naively, listed the amount he actually paid but not the actual amount of the rent. Based upon these facts the court is unable to find that the Defendant acted with reckless disregard or that he caused to be made or published a material misrepresentation with the requisite intent to deceive. For all of these reasons, the court finds the totality of the circumstances weigh in his favor.

Reasonable Attorney's Fees

The procedural quagmire that brought us here does not need to be revisited. However, in the interest of completeness, a brief recitation of the background facts is necessary. As previously noted, at the January 4, 2001 motion term the court granted the Plaintiff's request to amend its complaint. Since this was not the first time the complaint was amended, the court conditioned the granting of leave to amend upon the payment of Defendant's reasonable attorney's fees.

The Defendant's attorney's application for $20,215 in fees is woefully inadequate and would not survive a review pursuant to 11 U.S.C. § 330.[5] The entries are vague, lumped and do not provide sufficient information to determine the work performed. However, the court is very familiar with the facts of this case and the attorney's contributions and, after reviewing the submissions, determines that fees in the amount of $1,800[6] are warranted. Awarding additional fees would not be proper when the Defendant's attorney would, in the ordinary course, have had to perform the services.[7] Finally, the Defendant's local counsel requests a fee award of $695. In his affidavit counsel indicates that computer generated contemporaneous time record were provided. The court file does not contain these records. Therefore, even if the court was inclined to award local counsel attorney's fees there are no time records to analyze; the request for $695.00 is denied.

Rule 9011 Sanctions

Perhaps the most interesting question presented is whether the Plaintiff's Motion to Dismiss the bankruptcy case is sanctionable pursuant to Federal Rule of Bankruptcy Procedure 9011. When the Plaintiff made its motion *In re Griffieth,* 209 B.R. 823 (Bankr. N.D.N.Y. 1996) was the court's most recent written decision on the issue. In *Griffieth*, the debtors had an after-

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[5]This court has conducted a detailed analysis of 11 U.S.C. § 330 and the case law interpreting its requirements in the case *In re Lawrence Agency Corp.,* Case No. 97-11300 (July 8, 1998). Familiarity with that case is presumed.

[6]This amount consists of the following: November 27, 2000 - 2.5 hours for research and the drafting of the opposition to the Plaintiff's motion to amend; November 28, 2000 - 5 hours for work on the brief submitted with the opposition; and on November 29, 2000 - 1.5 hours for the motion for the protective order that this court granted. This totals 9 hours which the court has multiplied by $200/hr.

[7]The court limits reimbursement to this amount because the Plaintiff continued to pursue its claim under 11 U.S.C. § 523(a)(2)(A), and therefore, all the other costs and expenses would have been incurred whether or not the final amendment was allowed.

tax monthly income of $14,168.48 and monthly expenses totaling $9,805, leaving discretionary income of $4,363. The debtors owned real property in California, which they planned to reaffirm, and they rented residential property in a suburb of Albany, New York. They were making payments on two cars and their children were enrolled in private school. *Id*. at 826-827. In addition, the Griffieth's had exorbitant monthly expenses, including: $2,100 in tithes and $1,910 in the private school tuition. *Id.* The court found these expenses to be unreasonable. The court further found other monthly expenses, including: clothing expenses ($750), renters insurance ($199), life insurance ($350), health insurance ($450), and disability insurance ($790), to be inflated.

In stark contrast, the Defendant has no discretionary income; his after-tax monthly income is $1,785.66 and his monthly expenses total $1,945. In addition, while there was a question of whether his monthly rent was $450 or $350, this and all other expenses appear ordinary and reasonable. Finally, the Defendant is seeking to discharge various unsecured debts, rather than one large tax debt.

In light of these factual discrepancies, it was questionable for the Plaintiff's attorney to bring the Motion to Dismiss. Moreover, pursuant to 11 U.S.C. § 706(c) the request for conversion was wholly inappropriate. It is clear in this circuit that Rule 11, and by incorporation Bankruptcy Rule 9011, is violated when, "[it] is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands..." *In re Who's Who Worldwide Registry, Inc*., 232 B.R. 28 (E.D.N.Y. 1999) (citations omitted). The court might be comfortable, based upon all the papers and its knowledge of the case, deciding whether sanctions are appropriate. However, this motion was not addressed at the evidentiary hearing. Therefore, to allow the parties to develop a record and to alleviate any due process concerns, the court will conduct a hearing to determine whether to assess sanctions against the Plaintiff's attorney. A separate show cause will be issued setting a hearing on this matter.

Conclusion

For all these reasons, the court find that the Plaintiff has not met its burden pursuant to 11 U.S.C. §§ 523(a)(2)(A) or (B), and therefore, the debt is discharged. Moreover, the Defendant's attorney is awarded $1,800 in fees for work done in connection with the final amendment to the complaint. Finally, a date for a hearing on the propriety of 9011 sanctions will be contained in a separate order.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge