UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

LISA A. HOALCRAFT — CASE NO. 94-62146

Debtor — Chapter 7

CHEVY CHASE FSB,

Plaintiff

vs. — ADV. PRO. NO. 94-70177A

LISA A. HOALCRAFT,

Defendant

APPEARANCES:

ROBERT S. COOPER, ESQ.
Attorney for Chevy Chase FSB
2425 Clover Street
Rochester, New York 14618

MARK D. ROMANO, ESQ.
Attorney for Debtor
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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

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

The Court considers herein the adversary proceeding commenced on November 25, 1994, by Chevy Chase FSB ("Chevy Chase") seeking a denial of dischargeability of a debt incurred by Lisa A. Hoalcraft ("Debtor") pursuant to Code §523(a)(2)(A) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"). Chevy Chase also requests an award of attorney's fees, costs and interest pursuant to its credit card agreement with Debtor. Issue was joined by

service of an answer on behalf of Debtor on December 21, 1994, denying Chevy Chase's allegations and seeking attorney's fees and costs.[1]

A trial of this proceeding was held at Utica, New York on April 11, 1995. Although the parties were afforded an opportunity to file post-trial memoranda of law, neither party did so and the matter was submitted for decision on May 5, 1995.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§1334(b) and 157(a), (b)(1) and (b)(2)(I).

FACTS

Debtor filed a voluntary petition ("Petition") for relief under Chapter 7 of the Code on August 10, 1994. The total amount of debt listed in Debtor's Petition is $41,569.03. See Chevy Chase's Exhibit "2". Debtor's liabilities are primarily unsecured non-priority debts in the amount of $37,470.07. Id. Among the scheduled unsecured non-priority liabilities is a credit card ("Mastercard") debt owed to Chevy Chase in the amount of $2,271.81. Id. Chevy Chase's complaint, however,requests that $2,380.01 plus interest, attorney's fees and costs be held nondischargeable

[1] The Court presumes that Debtor requests attorney's fees and costs pursuant to Code §523(d).

pursuant to Code §523(a)(2)(A).

The present matter is distinguished from traditional credit card nondischargeability cases in that Debtor alleges that a third party, her ex-fiance Jim Kerr ("Kerr"), incurred the majority of the Mastercard charges. Debtor, the only witness called by either party, testified on Chevy Chase's direct examination that she met Kerr on or about July 1993. Debtor and Kerr were living together and engaged to be married by October 1993.

Debtor testified that when they began living together she and Kerr shared expenses. Debtor explained that up until December 1993 Kerr would deposit his entire pay check into her checking account. Thereafter, Kerr continued to make contributions towards the couples' expenses, albeit not his entire pay check. Debtor testified that Kerr continued to make these contributions until he lost his job on or about February 1994. Debtor's relationship with Kerr allegedly ended in August 1994 at which time he moved out of her residence. Debtor testified that prior to meeting Kerr she always paid her bills on time and had "excellent, superior credit."

On or about January 1994 Debtor received an unsolicited Mastercard from Chevy Chase with a $2,000 pre-approved line of credit. Although Kerr was not an authorized signatory on the Mastercard, Debtor gave him permission to use the same. Debtor testified that she and Kerr agreed that, "...he could use my credit card [Mastercard] as long as he was going to pay for it." Debtor alleges that although she had numerous credit cards, Kerr only had authority to use the Mastercard.

At the time Debtor received the Chevy Chase Mastercard in January 1994 she was employed as an Employee Benefits Coordinator at the Young Agency, an insurance agency in Syracuse, New York. Her monthly net income was approximately $1,300 and her monthly expenses were approximately $2,230. See Chevy Chase's Exhibit "4", Interrogatory 14 and 22. Debtor testified that she had a gross income of approximately $23,000 in 1993 and $21,000 in 1994.[2]

There were numerous charges made on the Mastercard account beginning in January and ending in February 1994.[3] Debtor admitted that the account summaries reflected multiple purchases on the same day from various retail stores in Carousel Mall in Syracuse, New York. Debtor also admitted that there is an outstanding balance of over $2,000 on her Mastercard and that she has not made any payments to Chevy Chase on the account.

Debtor testified that she did not make any cash advances on the Mastercard and that she recognized only one purchase on the account summaries as her own. The purchase she recognized was a $210.77 charge on January 24, 1994, for clothing from the Limited Too store in Syracuse, New York. Although Debtor was not sure whether she made any other charges, she alleged that Kerr made numerous purchases on the Mastercard. Debtor testified that Kerr used the Mastercard to purchase clothing and gifts for his other girlfriends. Debtor further testified that she could not recall whether she received any Mastercard account summaries in January or

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[2] Debtor's Statement of Financial Affairs in her Petition states that her 1993 income was $35,000.

[3] Although the Mastercard account summaries were used to refresh Debtor's memory, they were not offered into evidence.

February of 1994 because Kerr often threw away her mail.

The Court, without objection, received into evidence Debtor's Verified Answer to Interrogatories and Second Document Request, dated January 20, 1995 ("Interrogatories"). See Chevy Chase's Exhibit "4". In response to Chevy Chase's Interrogatory 1(b), which requested Debtor to specify any inaccuracy in her Mastercard account summaries, Debtor responded, "Most of the clothing purchased by myself, other items I never saw and have no idea about them..." Id. In response to Interrogatory 6, Debtor stated that as of January 24, 1994, she owed a total of approximately $35,000 to "credit card lenders, store card lenders, bank loans or lines of credit."

Copies of Debtor's check book register from December 1993 to January 10, 1995, were also received into evidence. See Chevy Chase's Exhibit "6" and "7". Debtor's check book register contains, among other notations, two entries indicating deposits of checks provided by Chevy Chase for $20 and $100 respectively. See Chevy Chase's Exhibit "6". The entries are dated January 29 and January 31, 1994. Id. Although she admitted that the handwriting above and below these two entries was hers, Debtor testified that she could not be certain that she had entered the $20 and the $100 deposits into her check book register.

Under direct examination by her own attorney, Debtor testified that she first consulted Barry Hill, Esq., ("Hill") on March 7, 1994, regarding debt consolidation.[4] She testified that

[4] Pursuant to a Consent to Change Attorney dated December 6, 1994, Mark D. Romano, Esq., was substituted as Debtor's attorney in place of Hill.

although Hill encouraged her to file bankruptcy she did not want to do so. Debtor also testified that she did not intend to defraud Chevy Chase as she had always made timely payments on her bills and her mother, a bank manager, had impressed on her the importance of a good credit history.

Debtor testified that she attended Onondaga Community College and received an Associates degree in business from Bryant and Stratton in 1989. Debtor's education also includes classes in macro and micro economics. See Chevy Chase's Exhibit "4", Interrogatory 19. Debtor also testified that she has been employed in the insurance industry throughout her career.

DISCUSSION

In order to effectuate the fresh start purpose of the Code, exceptions to discharge are to be strictly construed in favor of the debtor and against the creditor. In re Nichols, Ch.7 Case No. 91-01134, Adv. No. 91-60170A, slip op. at 6 (N.D.N.Y. Nov. 30, 1992) (citations omitted); In re Landrin, 173 B.R. 307, 310 (S.D.N.Y 1994). The burden is on the petitioning creditor to establish by a preponderance of the evidence that the particular debt should be discharged. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

As a preliminary matter, the creditor must establish that a debt was owed to it by the debtor at the time the petition was filed. See In re Ladouceur, Ch. 7 Case No. 94-60226, Adv. No. 94-70066, slip op. at 10 (Bankr. N.D.N.Y January 18, 1995) (citing

Holly v. Ziff, 1993 WL 669427 at *3 (N.D.Tex. 1993)). Pursuant to its complaint, Chevy Chase seeks to recover $2,380.01 plus interest, attorney's fees and costs. At trial, however, Chevy Chase did not provide any evidence that the balance on the Mastercard account as of the Petition date, was $2,380.01 or that it is entitled to interest, attorney's fees and costs pursuant to the Mastercard agreement.[5] However, Debtor's Petition lists Chevy Chase as an unsecured creditor with an undisputed claim of $2,271.81. As Debtor has acknowledged her liability to Chevy Chase, the Court concludes that a debt in the amount of $2,271.81 is owed to Chevy Chase. Id.

In order for this debt to be declared nondischargeable pursuant to Code §523(a)(2)(A), Chevy Chase must establish that (1) Debtor made false representations; (2) at the time made, Debtor knew the representations were false; (3) the representations were made with the intention and purpose of deceiving Chevy Chase; (4) Chevy Chase relied on the representations; and, (5) Chevy Chase sustained the alleged injury as a proximate result of the representations made by Debtor. See In re Verdon, 95 B.R. 877, 884 (Bankr. N.D.N.Y. 1989) (citations omitted).

When credit card debt is involved the courts often modify this approach because of the nature of the credit transaction, i.e. it is the cardholder and merchant who are directly involved at the time of the actual purchase, rather than the cardholder and the issuer of the card. See id.; In re Hinman, 120 B.R. 1018, 1021

[5] Plaintiff did not introduce into evidence Debtor's account summaries or the Mastercard agreement.

(Bankr. D.N.D. 1990); see also In re Preece, 125 B.R. 474, 477 (Bankr. W.D.Tx. 1991). Referred to as the "implied representation doctrine," this approach has been adopted by this Court and others. See e.g. In re Nichols, supra, slip op. at 7 (citing In re Vermillion, 136 B.R. 225 (Bankr. W.D.Mo. 1992)); In re Cameron, Case No. 92-62959, Adv. No. 92-70243, slip op. at 6 (Bankr. N.D.N.Y. December 9, 1993); In re Dougherty, 143 B.R. 23, 25 (Bankr. E.D.N.Y. 1992). Under this test, the pivotal question is whether the debtor had the intent to repay the debt and reasonably believed in his or her ability to do so. See In re Nichols, supra, slip op. at 7.

There was testimony by Debtor that she did not intend to defraud Chevy Chase. In support of this contention, Debtor points to her credit history and her prior practice of making timely payments on charges incurred by her. Unfortunately, an intent to repay is not sufficient. It is also necessary that a debtor have a reasonable belief in her ability to pay. Id. If a debtor "knew he was unable to repay or incurred the debt with reckless disregard as to reasonable belief that he could pay, then fraud has been proven." In re Vermillion, supra, 136 B.R. at 227.

Factors to be considered in determining whether Debtor intended to deceive Chevy Chase include: (1) the length of time between the charges made and the petition filing; (2) whether or not an attorney was consulted about filing bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of charges; (5) the financial condition of the debtor when the charges were made; (6) whether the charges exceeded the line of

credit; (7) whether multiple charges were made in one day; (8) whether or not the debtor was employed; (9) the financial sophistication of the debtor; (10) whether there were sudden changes in buying habits and; (11) whether luxury items or necessities were purchased. See In re Nichols, supra, slip op. at 8; In re Dougherty, supra, 143 B.R. at 25. After applying these factors to the facts of the instant adversary proceeding, it appears to this Court that Debtor's conduct was fraudulent.

In the case sub judice, the Mastercard charges were made between January and February of 1994. The credit activity occurred almost immediately after Debtor received the Mastercard and six months prior to filing her Petition on August 10, 1994. According to Debtor's testimony she did not contact an attorney until March 7, 1994, which, admittedly, was subsequent to the time the Mastercard debt was incurred.

There was, however, substantial credit activity within a one month period with multiple purchases made on the same day. The charges exceeded the line of credit available on the Mastercard and Debtor never made any payments on the account. Furthermore, it can be adduced from Debtor's testimony that the purchases were for luxury items and not for necessities. For example, Debtor admits purchasing over $200 worth of clothing on January 24, 1994, from the Limited Too retail store in Syracuse, New York. In addition, Debtor admits in her answer to Interrogatory 1(b) that, "Most of the clothing [was] purchased by myself..." (emphasis added).

The Court also notes that Debtor is financially sophisticated as she has a varied educational background including

classes in macro and micro economics and an Associates degree in business. Juxtaposing this with the fact that at the time the Mastercard charges were incurred Debtor already owed approximately $35,000 to "credit card lenders, store card lenders, bank loans, or lines of credit," further supports a finding of fraud. See Chevy Chase's Exhibit "4", Interrogatory 6. In addition, when the Mastercard charges were incurred Debtor's expenses were approximately $2,230 per month and her monthly net income was approximately $1,300. Id.

Lastly, the Court notes that a key factor in evaluating the totality of circumstances is witness credibility. The observance of variations in witness demeanor, tone of voice, and an overall evaluation of testimony in light of its rationality or internal consistency aids the Court in its determination of whether the debtor had the requisite intent to defraud the creditor. See In re Karrat, Ch. 7 Case No. 93-63660, Adv. No. 94-70028, slip op. at 11 (Bankr. N.D.N.Y. May 12, 1995) (citations omitted).

In the instant case, the Court did not find Debtor to be a credible witness. Debtor, for example, testified that she could not determine whether she had made two handwritten entries in her check book register which indicated deposits of checks provided by Plaintiff. The checks, which were for $20 and $100, effectively allowed Debtor to obtain cash advances on her Mastercard account. Although Debtor admitted that the handwriting above and below these two entries in the check book register was hers, she was uncertain as to whether she had made the $20 and the $100 deposit entries. The Court finds this testimony incredible as the deposit entries

look identical to the other notations in her check book register.

Debtor's testimony at trial also contradicted her answers given in response to Chevy Chase's interrogatories. For example, Debtor testified that she recognized only one purchase on the Mastercard account summaries as her own. Debtor's answers to the interrogatories, however, indicate that she had made most of the clothing purchases on the Mastercard account herself. See Chevy Chase's Exhibit "4".

The Court now turns to the crux of Debtor's testimony. Debtor attempts to rebut Chevy Chase's case by alleging that it was Kerr, her ex-fiance, who incurred most of the Mastercard charges. Debtor testified that although Kerr was not an authorized signatory on the Mastercard, she gave him permission to use the same. Debtor testified that she and Kerr had an agreement that "he could use my credit card as long as he was going to pay for it."

The Second Circuit has stated that courts must rely on principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. Tower World Airways v. PHH Aviation Systems, 933 F.2d 174, 176-177 (2d Cir. 1991) (Truth-in-Lending Act 15 U.S.C. §1602 et seq. (1988)); see also In re Talbot, 16 B.R. 50, 54 (Bankr. M.D.La. 1981) (court found debt to be dischargeable but plaintiff's burden of proof was clear and convincing standard). This Court has previously held that in the context of bankruptcy, "The agent's fraud will be imputed to the principal if the principal knew or should have known of the agent's fraud or will be inferred in the case of the principal's reckless indifference to his agent's acts."

In re Verdon, supra, 95 B.R. at 882 (Bankr. N.D.N.Y. 1989) (Court relied on clear and convincing standard) (citations omitted).

In the matter sub judice, Debtor admits that she voluntarily relinquished her Mastercard to Kerr. Thus, Debtor created an agency relationship with Kerr by expressly authorizing his use of the Mastercard. See Tower World Airways v. PHH Aviation Systems, supra, 933 F.2d at 177 (citing Restatement (Second) of Agency §7 (1958)).

Assuming arguendo that Kerr made charges on the Mastercard, the Court finds that Debtor acted with reckless indifference. Debtor gave Kerr authority to use her Mastercard at a time when she owed approximately $35,000 to other creditors. See Chevy Chase's Exhibit "4", Interrogatory 6. Debtor also admitted that Kerr contributed money towards their expenses until February 1994. Debtor, however, did not make any payments on her account and did not reduce her balance below the assigned line of credit. Finally, the Court notes that even if Kerr did not make any payments to Debtor for the Mastercard charges, she acted with reckless indifference by sitting idly by and neither repossessing the Mastercard from Kerr nor, if unable to regain possession, canceling the card.

Based on the foregoing, it is

ORDERED that Debtor's obligation to Chevy Chase in the amount of $2,271.81 is nondischargeable pursuant to Code §523(a)(2)(A), and it is further

ORDERED that Chevy Chase's request for interest, attorney's fees, and costs is denied, and it is further

ORDERED that Debtor's counterclaim seeking costs and attorney's fees pursuant to Code §523(d) is denied.

Dated at Utica, New York
this day of 1995

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge