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JUDGE: M. A. Mahoney
PARTIES: Mary Teresa Wacker Slaton, Universal Bank, Universal Card Services
CHAPTER: 7
ATTORNEYS: H. D. Padgett, W. M. Halcomb
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

MARY TERESA WACKER SLATON — Case No. 00-10108-MAM-7

Debtor.

UNIVERSAL BANK dba
UNIVERSAL CARD SERVICES,

Plaintiff, — Adv. No. 00-1050

v.

MARY TERESA WACKER SLATON,

Defendant.

ORDER AND JUDGEMENT DETERMINING THE CREDIT CARD DEBT OWED TO UNIVERSAL BANK dba UNIVERSAL CARD SERVICES TO BE NONDISCHARGEABLE

Herman D. Padgett, Mobile, Alabama, Attorney for the Debtor
W. McCollum Halcomb, Mobile, Alabama, Attorney for Universal Card Services

This matter is before the Court on the complaint of Universal Bank dba Universal Card Services ("Universal") to determine dischargeability of credit card debt. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the credit card debt owed to Universal Bank dba Universal Card Services in the amount of $4,967.60 is nondischargeable.

FACTS

Debtor opened a credit card account with Universal in January 1999. The credit limit for Debtor's account was $5,000 and this remained the same throughout the history of the account. Debtor maintained a zero balance on the account until June 1999. The charges and payments for the account were:

Bill Date	Purchases	Cash	Balance Transfers	Minimum Payment	Payment
6/24/99	26.70 --	--	10.00	--	
7/24/99	59.46 --	--	10.00	--	
8/24/99	787.07	200.00 --	24.00	--	
9/24/99	450.88 --	--	32.00	64.00	
10/24/99	--	--	4,820.00	107.00	1,390.00
11/24/99	21.30 --	--	103.00	176.24	

After the November bill, no further charges or payments were made on the account. The account balance at the time of filing bankruptcy, January 12, 2000, was $4,967.60. Debtor did not attend the hearing on this matter and Debtor's attorney offered no testimony (other than his cross of Universal's bankruptcy manager) to dispute the allegations of Universal. Debtor's defense focused on the fact that, according to Debtor's Statement of Financial Affairs, Debtor had a substantial drop in income that year.

LAW

Under § 523(a)(2)(A), a debt is excepted from discharge if the debt is "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." Universal cannot support a claim that Debtor obtained credit by "false pretenses" or "false representation." The Eleventh Circuit Court of appeals held in *First Nat'l Bank of Mobile v. Roddenberry*, 701 F.2d 927 (11th Cir.1983) that a

credit card company voluntarily assumes the risk of loss until it revokes the right of the cardholder to further possession and use of the card. Universal at no time prior to Debtor's bankruptcy petition revoked Debtor's rights to possess or use the card. However, *Roddenberry* was decided under § 17a(2) of the Bankruptcy Act and the *Roddenberry* court noted that a decision under the new Bankruptcy Act of 1978 might be different because of the addition of the phrase "actual fraud."[1]

For a creditor to prevail in a § 523(a)(2)(A) case, the creditor must establish by a preponderance of the evidence all five elements of traditional common law fraud. *See Field v. Mans*, 516 U.S. 59, 68-70 (1995); *Grogan v. Garner*, 498 U.S. 279 (1991); *Fuller v. Johannessen (In re Johannessen)*, 76 F.3d 347, 350 (11th Cir. 1996); *American Express Travel Related Services Co., Inc. v. McKinnon (Matter of McKinnon)*, 192 B.R. 768 (Bankr. N.D. Ala.1996). The elements of common law fraud are the following:

(1) The debtor made representations;
(2) knowing the representations were false at the time they were made;
(3) with the intent to deceive the creditor;
(4) the creditor justifiably relied on the representations; and
(5) the creditor's loss was the proximate result of the misrepresentation having been made.

Field, 516 U.S. at 74-76. The court will discuss each element.

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[1]Judge Benjamin Cohen has ruled that *Roddenberry* is good law for cases based upon actual fraud under Bankruptcy Code §523(a)(2)(A) as well. *In re Gilmore,* 221 B.R. 864 (Bankr. N.D. Ala. 1998). This Court has never taken that position and need not determine for this ruling whether that case or other cases in the Eleventh Circuit which hold otherwise is correct. *See American Express Travel Related Servs. Co., Inc. v. Tabar (In re Tabar),* 220 B.R. 701 (Bankr. M.D. Fla. 1998); *AT&T Universal Card Servs. Co., Inc. v. Reynolds (In re Reynolds),* 221 B.R. 828 (Bankr. N.D. Ala. 1998); *American Express Travel Related Servs. v. Rusu (Matter of Rusu),* 188 B.R. 325 (Bankr. N.D. Ga.1995). The debtor loses on either theory.

1. AND 2.

By opening the Universal account, Debtor represented that she intended to pay for any charges she made on the account. The RESTATEMENT (SECOND) OF TORTS defines "misrepresentation":

> to denote not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth. Thus, words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist.

Debtor by opening the account and subsequently making charges on the Universal account represented that she intended to pay for those charges, when in fact she did not. Furthermore, Debtor engaged in "credit card kiting," as discussed later, creating a facade that all her accounts were in good standing, when in fact she was unable and not intending to pay. Courts have held that a debtor who conceals his fraudulent contentions by creating such a facade has the duty to disclose his intentions. *See Citibank (S.D.), N.A.V. v. Eashai (In re Eashai*), 87 F.3d 1082 (9th Cir. 1996).

3.

The Eleventh circuit held in *Chase Manhattan Bank v. Carpenter (Matter of Carpenter)*, 53 B.R. 724 (Bankr. N.D. Ga. 1985) that element three, an intent to deceive the debtor, may be shown by demonstrating the debtor used the credit card with no present intention to repay. *See also American Express Travel Related Services, Inc. v. Hearn (In re Hearn)*, 211 B.R. 774 (Bankr. N.D. Ga. 1997); *American Express Travel Related Servs. Co., Inc. v. McKinnon (Matter of McKinnon)*, 192 B.R. 768 (Bankr. N.D. Ala. 1996). In the instant case, Debtor did not make any charges on the account until six months before filing bankruptcy. The balance on the

account remained relatively small until October 1999, only three months before the bankruptcy petition. The debtor did not make even the minimum payments through October 1999.

The majority of the debt consists of balance transfers from other credit cards. In October 1999, Debtor transferred $4,820.00 of other credit card debt to her Universal card. She paid almost $1,400 on her Universal card from another card in October 1999 too. Clearly she was moving her credit card debt around. The only evidence the Court has as to her 1999 income is her Statement of Affairs which shows it was $20,000 gross income per year or $1,667 per month.[2] Universal proved that Debtor's monthly payments on approximately $24,000 of credit card debt was approximately $450 - $500. These facts coupled with the shifting of her debt between accounts, is sufficient evidence to show no present intent to repay the debt and no ability to do so. Without Debtor in court to testify to other facts about her decline in income in 1999, the Court must find that on $20,000 of income she had to know, or should have known, that she could not pay $24,000 of credit card debt at $450 - $500 in minimum charges each month when she incurred the Universal charges. Those charges were too close to the date of her bankruptcy. If she had left the balances on her other cards, the result might have been different. If those charges were older, her knowledge and intent at the time she incurred the charges may have been different.

There are cases which refer to Debtor's balance shifting as "credit card kiting." The most prominent case on "credit card kiting" is *Citibank (S.D.), N.A.V. v. Eashai (In re Eashai*), 87 F.3d 1082 (9th Cir.1996). *Eashai* held that credit card kiting clearly fell within the "actual

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[2]Debtor listed in her schedules thirteen credit cards that had balances. The only other debts for more than $80.00 are the loan for Debtor's car and some appliances financed through Sears all of which Debtor has reaffirmed.

fraud" exception to discharge. *Id*. at 1088. A debtor who participates in credit card kiting makes a false representation "1) by creating the facade that all of his accounts are in good standing; and 2) by failing to disclose to the creditor his intent not to pay his credit card debt." *Id*. This facade gives the debtor the appearance of an honest debtor, who is servicing his credit card debt. *Id.* Thus, the kiting scheme enables a dishonest debtor to engage in a spending spree which results in increasing amounts of credit card debt. Debtor's debt to Universal fits this pattern and the court concludes she had no intention to repay on this ground also. Debtor did not even make payments on the account until the balance reached a level that might have raised flags and resulted in revocation of her privileges had she not begun paying.

4.

The United States Supreme Court held in *Field* that the "reliance" element should be "justifiable reliance" which it described as less demanding than "reasonable reliance." A debtor's silence or omission regarding a material fact can constitute a false representation which is actionable under § 523(a)(2)(A). *Eashai* at 1089. The *Eashai* court determined that a credit card kiter has the duty to disclose his intention not to pay because he previously represented to the card issuer his intention to pay. *Id.* at 1089. Universal justifiably relied on Debtor's representations when she opened the account that she would pay for charges incurred on the card. When Debtor's intentions changed, she should have informed Universal or discontinued use of the card. Had Universal known Debtor's true intentions, it would have revoked Debtor's right to possess or use the card. The Debtor's actions raised no "red flags" which Universal should have discovered in its monitoring of the account until it was too late. Debtor's activity on her Universal account was not suspicious until three months before bankruptcy.

5.

The debtor did not repay the charges to Universal prior to bankruptcy. Universal is still owed $4,967.50. This fulfills element five of the proof.

CONCLUSION

Had the Debtor appeared at the hearing on this matter, perhaps she could have offered testimony that would have refuted the conclusions of this court. If Debtor had merely offered her own statement that she intended to pay for the charges incurred on the account, this could have persuaded the court to reach a different conclusion. However, there was no such testimony and Debtor's absence makes it difficult for her to be awarded a judgment in her favor. Her mental state cannot be gleaned from the records. The Court concludes that Universal proved all five elements necessary to obtain nondischargeability of this debt.

Universal has asked that attorney's fees be awarded for this matter. However, this Court is aware of no Code section that would provide for attorney's fees in this matter and no proof has been offered as to attorney's fees.

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The credit card debt owed to Universal Bank dba Universal Card Services in the amount of $4,967.60 is nondischargeable.

2. No attorney's fees are awarded for this action.

Dated: August 30, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE