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JUDGE: M. A. Mahoney

PARTIES: Marsha Louise Robichaux, AT&T Universal Card Services

CHAPTER: 7

ATTORNEYS:

DATE: 11/22/96

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

MARSHA LOUISE ROBICHAUX

Case No. 94-13640

Debtor.

AT&T UNIVERSAL CARD SERVICES

Plaintiff,

vs.

Adv. No. 96-1085

MARSHA LOUISE ROBICHAUX

Defendant.

ORDER AND JUDGMENT

W. McCollum Halcomb, Birmingham, Alabama, for AT&T Universal Card Services.
Frank L. Thiemonge, III, Mobile, Alabama, for Marsha Louise Robichaux.

This matter came before the Court on the complaint of AT&T Universal Card Services (AT&T) to determine the dischargeability of debt pursuant to 11 U.S.C. § 523(a)(2)(a). The parties submitted stipulations and briefs. No testimony was offered. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court concludes that the debt is dischargeable.

FACTS

Marsha Louise Robichaux (debtor) is employed as a teacher with the Mobile School Board. Her income was \$28,390 in 1993, \$30,416 in 1994, and \$29,718 in 1995. The debtor's average monthly expenses exceed her average monthly take home pay. The debtor admits to a "serious gambling problem" and has incurred \$40,000 worth of gambling losses since 1991.

Debtor is the holder of a credit card issued by AT&T. From July 11, 1995 to August 23, 1995, the debtor charged \$20.50 for the purchase of goods and received cash advances totaling \$2,992.58. The debtor obtained a cash advance in the amount of \$2,300 on July 11, 1995. The money was used to pay a credit card debt to Mobile Educators Credit Union. On June 22, 1995, the debtor obtained a cash advance in the amount of \$300. The withdrawal was made from a casino.

The debtor contacted an attorney in order to discuss filing a bankruptcy petition in November 1995. On December 29, 1995, the debtor filed a Chapter 7 petition. The total unsecured debt listed in the debtor's bankruptcy schedules is \$39,744. All of the \$39,744 debt was incurred in 1995 on eight credit card accounts.

AT&T contends that at the times the debtor used her AT&T credit card, she had no intention of repaying the debt or had reckless disregard of her ability to repay the debt. AT&T is requesting that the debt be found nondischargeable.

LAW

The fundamental importance of discharge and fresh start in the bankruptcy process dictates that exceptions to dischargeability be strictly or narrowly construed. *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986). However, courts are loathe to reward a debtor who attempts to take advantage of the bankruptcy process to avoid the consequences of his misdeeds; only the honest but unfortunate debtor is generally afforded relief from his obligations. *TranSouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505, 1508 (11th Cir. 1991).

Section 523(a)(2)(A) excepts from discharge a debt for money, property, or services obtained by false pretenses, a false representation, or actual fraud. The plaintiff is required to show that the debtor obtained money, property, services, or credit. Further, the Eleventh Circuit

has ruled that in order to have a particular debt excepted from discharge on the basis of fraud, the plaintiff must prove that: (1) the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) the creditor relied on the representation; and (3) the creditor sustained a loss as a result of the representation. *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986). The plaintiff must also prove that its reliance on the debtor's false representation was justifiable. *Field v. Mans*, 116 S.Ct. 437 (1995); *In re Vann*, 67 F.3d 277 (11th Cir. 1995). Each element must be proved by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

The use of a credit card is a representation concerning the user's intent to perform an act in the future. That representation is fraudulent only when made without the present intention to perform. In other words, the debtor must not have intended to pay the charges when he or she made them. The debtor's intent is to be determined by all the facts and circumstances.

Matter of McKinnon, 192 B.R. 768 (Bankr. N.D. Ala. 1996), *citing*, *In re Murphy*, 190 B.R. 327 (Bankr. N.D. Ill. 1995). When the debtor used the credit card issued by AT&T she made representations that she intended to repay the debt. AT&T justifiably relied on the representations. Justifiable reliance permits a person to rely on a representation of fact unless it is "apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived . . ." W. Prosser, *Law of Torts* § 108, p. 718 (4th ed. 1971); accord, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 108, p. 752 (5th ed. 1984) (Prosser & Keeton). AT&T sustained losses as a result of the representations. The debtor received the goods and cash corresponding with the charges, and AT&T has not been compensated.

The issue here is whether the debtor intended to deceive AT&T about her intention to repay the charges. If she did, then debtor made a false representation when she used the card and

the debt to AT&T is not dischargeable. AT&T contends that the facts show that the debtor intended to deceive AT&T. At the time the charges were made on the AT&T credit card, the debtor already owed several thousand dollars of credit card debt. The cash advances received were used to pay another credit card and for gambling. The charges were made less than two months before the debtor contacted an attorney about filing a bankruptcy petition. The debtor's monthly expenses exceed her monthly income, and she had a gambling problem.

However, these facts, without more, do not establish an intention not to repay which is the burden of AT&T. There is at best evidence in equipoise. There is no question that there is a large amount of debt and a debtor with a problem. However, there is also proof that debtor earned about \$30,000. There is no proof that her problem was not being cured or that she could not and did not intend to cut her expenses to allow her to pay her debts after she incurred them. Without the ability to observe and gauge the credibility of a debtor, it is impossible for this Court to find that a debtor had no subjective intention to repay the debt. The absence of this testimony, due to the burden of proof on AT&T, aids the debtor's case. This Court finds that the stipulated facts do not constitute enough "badges of falsity" to meet the test of section 523(a)(2)(A). On an income of \$30,000 per year, Ms. Robichaux, at least on paper, had the means to repay the debt over a period of years if her expenses were reduced. The main use of the AT&T card was to pay the debt owed on another credit card. This did not cause an additional debt, only a refinancing of current debt. Ms. Robichaux incurred the debt well before she spoke to an attorney about filing bankruptcy.

Therefore, it is ORDERED and ADJUDGED that the debt due and owing by debtor to AT&T Universal Card is DISCHARGEABLE.

Dated: November 22, 1996

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE