

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:

DORIS PAULINE REED,

Debtor.

Case No.: 09-11772-MAM

LOIS BROOKS ASBERRY,

Plaintiff,

Adv. Proc. No.: 09-01093

v.

DORIS PAULINE REED,

Defendant.

**ORDER GRANTING ASBERRY'S OBJECTION TO THE
DISCHARGEABILITY OF ASBERRY'S DEBT**

William C. Poole, Attorney for Debtor
Russell S. Terry, Attorney for Plaintiff

This matter is before the Court on Lois Brooks Asberry's Objection to Discharge of her debt in the case of Debtor Doris Pauline Reed. 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)(1), and the Court has authority to enter a final order. For the following reasons, Asberry's objection to discharge of Reed's debt to Asberry is due to be GRANTED.

FACTS

Lois Asberry, Pauline Reed, and Brenda Coleman are sisters. In October of 2006, Lois Asberry's daughter, Brenda Weaver, was killed in an accident and Asberry received \$150,000.00

as beneficiary of her daughter's life insurance policy which she deposited in her checking account. Ms. Asberry did not discuss the life insurance policy or proceeds with anyone. Around the time of Weaver's death, Ms. Asberry and Ms. Reed spoke regularly on the telephone.

In fall of 2007, Ms. Reed told Ms. Asberry that her health insurance was going to increase to \$700 per month, and that Reed could not afford it. Asberry testified that she warned Reed about the risk involved in letting her health insurance lapse. At some time in mid-December Asberry mailed Reed a check for \$2,100.00 dated December 10, 2007. Asberry testified that the check was intended to cover Reed's health insurance for 3 months. Reed cashed the check and it cleared on December 19, 2007. The memo line of the check states that it is for "insurance." Asberry testified that Reed called her to thank her and offered to pay Asberry back in March of 2008.

In February of 2008, Ms. Asberry wrote three more checks to Ms. Reed. The first check (#1796) was dated February 4, 2008, and was for \$6,900.00. The second check (#1797) was dated February 7, 2008, and was for \$9,000.00. The third check (#1798) was dated February 11, 2008, and was for \$9,000.00. Reed cashed each of the checks. The memo space on these three checks was blank. Combined with the first check for insurance, Asberry wrote Reed checks totaling \$27,000.00.

Ms. Asberry testified that checks #1796, #1797, and #1798 were an interest-free loan to Ms. Reed to help her get out from under high-interest credit card debt. Ms. Asberry testified that Ms. Reed was to pay her \$500.00 on the fifth day of each month beginning March 5, 2008. Asberry further testified that Reed gave her a box of post-dated checks, dated for the fifth of each month, each made out for \$500.00. Ms. Asberry cashed the first check from the box and it

cleared on March 10, 2008. Reed, on the other hand, testified that Asberry gave Reed the checks in order to deplete her bank account so Asberry could qualify for/retain Medicare and government subsidized low-income housing.

At some point in March of 2008, Ms. Reed again approached Ms. Asberry and told her that Reed's friend "Lenore" wanted to borrow \$20,000 through Reed. Reed told Asberry that Lenore would make payments to Reed who would then forward them to Asberry, paying Asberry a total of \$4,000 interest on the \$20,000 loan. Asberry wrote three more checks to Reed. The first check (#1831) was dated March 25, 2008 and was for \$9,000.00. The second check (#1832) was dated March 25, 2008 and was for \$6,000.00. The third check (#1833) was dated March 28, 2008, and was for \$5,000.00. Reed cashed each of the three checks. Ms. Asberry testified that Reed was to make \$500.00 payments on the second loan, due on the 27th of each month. Reed again provided Asberry with a box of post-dated checks, with the first post-dated check made out for \$500.00 payable on April 27, 2008. Reed testified at trial that she had never discussed the second loan with Lenore, that Lenore was not the intended recipient of the money, and that Lenore in fact did not ever get any money from the second loan from Asberry to Reed.

When Asberry went to deposit the second post-dated check on the first loan (dated April 5, 2008) she found that the box of checks was missing. Shortly after finding the checks were missing, Asberry was to have doctor's appointments in Mobile, Alabama (in April of 2008). Reed drove from Mobile to Monroeville, Alabama, to take Asberry to her appointments. At the time Reed picked Asberry up, Reed gave her \$1000 in cash and told her it was the April payment on the first loan (due April 5) and the second loan (due April 27). Asberry offered to tear up the post-dated check dated April 27, 2008, because she was paid in cash for that payment. Asberry

remained in Mobile for approximately two weeks. Asberry testified that before returning to Monroeville, Reed paid Asberry \$500 in cash as the May 5, 2008, payment on the first loan.

Reed's account of the night before driving Asberry back to Monroeville differs dramatically from Asberry's account. Reed admitted at trial that she had testified in a prior hearing that she repaid all money due to Asberry the night before Asberry's return to Monroeville. At trial before this Court, Reed instead testified that she repaid all money due to Asberry as of May 1, 2008.

When Asberry returned to Monroeville after her appointments in Mobile, she discovered that the second box of post-dated checks was also missing. Asberry testified that she told Reed that the post-dated checks on the second loan were missing, and Reed sent Asberry two checks. The first check (#2190) was for \$500.00, post-dated for May 27, 2008, and was apparently intended as payment on the second loan. In the memo line, Reed wrote "Lost Check on Loan + Interest." Asberry cashed the first check from Reed and it cleared on May 29, 2008. The second check (#2191) was post-dated June 3, 2008, was made out to Asberry for \$500.00, and was apparently intended as repayment on the first (interest-free) loan. In the memo line of the second check, Reed wrote "Lost Check on Loan." Reed stopped the payment on the check post-dated for June 3, 2008.¹ Excluding the check that did not clear, Asberry testified that Reed repaid her a total of \$2,500.00 on a total of \$51,000 (\$47,000 principal plus \$4,000 interest). Given the plain evidence that Reed sent Asberry two replacement checks (dated May 29 and June 3, 2008) that clearly stated they were intended as repayment on the two loans, the Court cannot believe Reed's testimony that she repaid Asberry in full as of May 1, 2008.

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Reed's testimony as to why she stopped payment on the June 3 check to Asberry was contradictory. Reed first testified that she stopped payment because she had already paid Asberry back, then testified that she stopped payment because she anticipated getting more money from Asberry, and finally testified that she did not know why she stopped payment on the check.

Asberry testified that she was concerned about being repaid by Reed and consulted with attorney J. Milton Coxwell, Jr. Mr. Coxwell drew up a promissory note² in late May of 2008, indicating that Reed was to repay Asberry \$48,000³ (inclusive of interest) with \$500.00 due on the 5th and \$500.00 due on the 27th of each month. Reed refused to sign and return the promissory note.

Brenda Coleman, sister of Reed and Asberry, testified that she had a conversation with Reed shortly after Reed received the letter and promissory note from Coxwell. Coleman testified that Reed told Coleman she had given Asberry post-dated checks in exchange for the money, that Reed said she was trying to help Asberry hide money from the government, and that Reed said she would have to file bankruptcy if she could not get someone to testify that she didn't owe Asberry any money.

On July 14, 2008, Asberry filed a complaint in Monroe County, Alabama, and obtained a judgment in the amount of \$48,500.00 against Reed on March 25, 2009. Reed filed for bankruptcy under chapter 13 on April 20, 2009. Asberry filed a proof of claim in her case and initiated this adversary proceeding on September 10, 2009. This Court held a hearing on Asberry's objection to Dischargeability on April 23, 2010 and took the matter under advisement.

LAW

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Mr. Coxwell originally sent Ms. Reed a letter and promissory note on May 23, 2008, requesting Reed sign the note for the amount of \$49,000. Mr. Coxwell sent a corrected promissory note and second letter on May 29, 2008, to Ms. Reed stating the amount should have been \$48,000 instead.³

The corrected letter and promissory note were drawn up by Mr. Coxwell before Reed stopped payment on the check to Asberry dated June 3, 2008. Because payment had not yet been stopped when Coxwell drafted the promissory note, Coxwell credited Reed with having paid a total of \$3,000 instead of \$2,500. The correct amount of money due to Asberry is \$48,500.

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Asberry objects to the Dischargeability of the debt owed by Reed under 11 U.S.C. § 523(a)(2)(A) and (B). 11 U.S.C. § 523(a)(2)(A) and (B) in relevant part state that an individual debtor is not discharged from any debt:

for money, property, services . . . 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; (B) use of a statement in writing – (i) that is materially false; (ii) respecting the debtor’s . . . financial condition; (iii) on which the creditor to whom the debtor is liable. . . reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive.

The plaintiff must prove each element by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 11 S.Ct. 654, 112 L.Ed.2d 755 (1991).

I. § 523(a)(2)(A)

Under 11 U.S.C. § 523(a)(2)(A), a debtor is not entitled to discharge for any debt for money, property, or services obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition. Courts have generally interpreted § 523(a)(2)(A) to require the traditional elements of common law fraud. *In re Bilzerian*, 153 F.3d 1278, 1281 (11th Cir. 1998). To prevail on a claim of nondischargeability under this section, the plaintiff must prove by a preponderance of the evidence: (1) the debtor made a representation, (2) that was knowingly false, (3) made with the intent to deceive the plaintiff, (4) the plaintiff actually and justifiably relied on it, and (5) the plaintiff sustained a loss as a proximate result of its reliance. *In re Wood*, 362 B.R. 503, 505 (N.D. Ala. 2007). Objections to discharge of a debt are to be strictly construed against the creditor and liberally in favor of the debtor. *In re Shusteric*, 380 B.R. 58, 63 (Bankr. M.D. Fla. 2007).

Asberry argues that Reed's debt to her is nondischargeable because Reed knowingly made false representations about how she intended to use the loan proceeds, her intention to repay the loans, and the manner in which she intended to repay the loans. The first and second elements that Asberry must prove under § 523(a)(2)(A) are that Reed: (1) made a representation (2) that was knowingly false when the representation was made.

Reed made representations to Asberry with respect to the two loans. Testimony taken at trial indicates that Reed represented to Asberry that the first loan was to be used to pay for medical insurance and to pay off high-interest credit card bills. Evidence of record also indicates that Reed represented to Asberry that she would repay the interest-free loan from Asberry in full by making monthly payments of \$500. The evidence of record, including testimony and exhibits, shows that Reed did make those representations, and that Reed knew her representations were false at the time they were made.

Additionally, Reed represented that the second loan would be made to Lenore through Reed, that Lenore would repay Asberry through Reed at monthly intervals, and that Lenore would pay \$4,000.00 interest on the \$20,000 loan. Reed testified at trial that she never discussed the loan with Lenore, that Lenore was never the intended recipient of the money, and that Lenore in fact did not receive the money. By Reed's own admission, her statement was a knowingly false representation at the time it was made.

The third element of a claim for nondischargeability under § 523(a)(2)(A) is that debtor made the representation with the intent to deceive the plaintiff. In determining the third element - whether the debtor possessed the actual intent to deceive - the Court can consider circumstantial evidence. *In re Bullock*, 317 B.R. 885, 890 (Bankr. M.D. Ala. 2004). Here,

considering the totality of the circumstances and evidence, the Court finds that Reed's representations were calculated to intentionally deceive Asberry. Not only were Reed's statements about repayment and the purpose of the loans knowingly false, the testimony and evidence from trial show that Reed intended for Asberry to rely on her statements in making the loans, suggesting intent to deceive. Further, at one point during the trial Reed stated that she stopped payment on the second replacement check to Asberry (check #2191, dated June 3, 2008) in anticipation of getting more money from Asberry. This is additional evidence that Reed was engaging in an ongoing scheme to obtain further loans from Asberry without intending to repay her. Given the totality of the evidence, Asberry has proven beyond a preponderance of the evidence that Reed knew she made a false representation that was designed to deceive Asberry into making her loans. The Court found the testimony of the third sister, Brenda Coleman, particularly convincing because she was not involved with the loans. Ms. Asberry was more credible than Ms. Reed as well. Ms. Reed's story changed during her testimony. Ms. Asberry told a very consistent story.

The fourth element for a claim of nondischargeability under § 523(a)(2)(A) is that the plaintiff actually and justifiably relied on the knowingly false representation. The plaintiff's reliance only has to be justifiable and need not rise to the level of being "reasonable." *Field v. Mans*, 516 U.S. 59, 74-75, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995). In the present case, Reed made representations about how the loan money would be used and how she would repay all of it plus interest. The evidence shows that based on these statements, as well as the familial relationship between Reed and Asberry, Asberry agreed to made loans to Reed. Therefore, Asberry actually relied on Reed's representations and by a preponderance of the evidence that reliance was justifiable.

The final element for a claim of nondischargeability under § 523(a)(2)(A) is that the plaintiff sustained a loss as a proximate result of its reliance. Here, this element is met by a preponderance of the evidence. Asberry presented testimony and written evidence showing that she made loans to Reed and that Reed only repaid her \$2,500.00. As a proximate result of Reed's knowingly false representation that was designed to induce Asberry to make loans, and Asberry's justifiable reliance on Reed's representation, Asberry has suffered a loss. The evidence shows that Reed obtained money by false pretenses or false representation, therefore a declaration on nondischargeability of the debt from Reed to Asberry is appropriate under § 523(a)(2)(A).

II. § 523(a)(2)(B)

For a debt to be dischargeable pursuant to § 523(a)(2)(B), the debtor must have used a false financial statement to induce the creditor into providing money, property, services, or an extension, renewal or refinancing of credit. *See First National Bank v. Shelley*, 2005 WL 2456925, at *4 (Bankr. N.D. Fla. Apr. 25, 2005). If any of the elements of this section are not met, the debt is dischargeable as to this section. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994).

Asberry argues in her complaint that Reed delivered to Asberry a series of post-dated checks that constituted a series of statements in writing respecting Reed's financial condition that were materially false, that Reed caused such statements to be made with the intent to deceive Asberry, and that Asberry reasonably relied on those statements. Asberry fails to meet the requirements of § 523(a)(2)(B). This Court cannot find that a post-dated check is a financial statement within the meaning of the section. A post-dated check is nothing more than a promise

to pay in the future. *Tuttle's Design Build, Inc. v. Flora-Tec Nursery Supply, Inc.*, 2001 WL 874739, at *4 (Bankr. S.D. Fla.) (citing *In re New York City Shoes, Inc.*, 880 F.2d 679 (3rd Cir. 1989)). Because Asberry has failed to meet the first required showing under § 523(a)(2)(B), Reed's debt to Asberry cannot be declared nondischargeable under § 523(a)(2)(B).

III.

Even without a successful claim under § 523(a)(2)(B), Asberry has succeeded in proving her claims under § 523(a)(2)(A) and is entitled to a declaration that the debt owed by Reed to Asberry is nondischargeable. Therefore, IT IS ORDERED that Asberry's Objection to Discharge of her debt is GRANTED and judgment is to be entered on her behalf.

Dated: May 10, 2010


MARGARET A. MAHONEY
CHIEF U.S. BANKRUPTCY JUDGE