DOCKET NUMBER: 96-10832
ADV. NUMBER: 96-1116, 96-1136, 96-1122
JUDGE: M. A. Mahoney
PARTIES: Hien Duc Le, Avco Financial Services of Alabama, Inc., First Family Financial Services, First North American National Bank, Circuit City Stores, Inc.
CHAPTER:
ATTORNEYS: D. L. Ratcliffe, G. B. McAtee, B. A. Friedman
DATE: 11/14/96
KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

HIEN DUC LE
Debtor.

Case No. 96-10832

AVCO FINANCIAL SERVICES
OF ALABAMA, INC.

Plaintiff,

v.

Adv. No. 96-1116

HIEN DUC LE

Defendant.

FIRST FAMILY FINANCIAL SERVICES

Plaintiff,

v.

Adv. No. 96 -1136

HIEN DUC LE,

Defendant.

FIRST NORTH AMERICAN NATIONAL
BANK AND CIRCUIT CITY STORES, INC.

Plaintiffs,

v.

Adv. No. 96-1122

HIEN DUC LE

Defendant.

ORDER

David L. Ratcliffe, Mobile, Alabama, for Hien Duc Le.
Gregory B. McAtee, Mobile, Alabama, for Avco Financial Services, First North American National Bank, and Circuit City Stores, Inc.
Barry A. Friedman, Mobile, Alabama, for First Family Financial Services.

This matter came before the Court on the consolidated complaints of Avco Financial Services of Alabama (Avco), First Family Financial Services (First Family), First North American

National Bank (North American) and Circuit City Stores, Inc. (Circuit City) to determine the dischargeability of debts owed by Hien Duc Le (debtor). 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 debts fall within the exceptions to discharge as provided in 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(B).

FACTS

The debtor lives in Bayou La Batre and is employed as a shrimper with Southern Aire Seafood (Southern Aire). His income from Southern Aire was $9,000 in 1994, and $6,000 in 1995. Although not disclosed in the debtor's Statement of Financial Affairs, he testified that in 1994 and 1995, he worked a second job as an assistant manager at Pacific Gulf Seafood (Pacific Gulf). He stated that his average gross income from Pacific Gulf was $3,000 per month. The debtor is Vietnamese and has lived in the United States for approximately twelve years. He testified that his English skills are poor. He can understand, speak, and read only the most basic English words. An interpreter was used during the trial.

In 1995, the debtor was engaged to marry a woman named Sandra To. During the year, the debtor incurred between $40,000 to $50,000 in bank loans and credit card charges. According to the debtor, he seldom used his credit cards prior to 1995, because he was not thinking about marriage at that time. He felt he had to purchase many items for To and To's family. To interpreted anything the debtor could not read and when she said to sign, he did, because he trusted her.

For approximately six months, To lived with the debtor and the debtor's roommate, Hoi Minh Doan. To and the debtor traveled to Houston to visit To's family in late 1995. Shortly after returning from their trip, To apparently decided to end the relationship. The debtor went to work

and returned home to find To and everything he had purchased gone. The debtor searched for To, but to no avail. He believes that To is now living somewhere in California. Things then went from bad to worse. After To's departure, the debtor was laid off and three weeks later he was fired from his second job at Pacific Gulf. The debtor filed bankruptcy March 11, 1996.

The plaintiffs contend that the debtor incurred the debts in question without any intention of making payments, and continued to amass additional debts in an effort to defraud his creditors. Plaintiffs are requesting that the amounts loaned plus accrued interest be found nondischargeable. The plaintiffs are also requesting attorneys' fees. The debtor claims that it had been his intention to pay for everything. However, he could not read the bills without To's help, and he had no money to pay the bills once he was laid off.

Avco's claim of nondischargeability is based on the debtor's purchase of a Rolex watch. The watch was obtained from Friedman's Jewelers on December 4, 1995, for $5,068.50. Avco financed $3,500.00 of the purchase price and the debtor used one of his credit cards to pay the down payment of $1,568.50. In order to obtain financing from Avco, the debtor completed a credit application on November 28. See Avco Exh. 1. Avco alleges that the debtor made material misrepresentations on the application.

The credit application was filled out by an employee of Friedman's Jewelers with information provided by the debtor, then the debtor signed it. The debtor also furnished a letter from his bank, AmSouth, to verify his checking account. To was with the debtor at Friedman's Jewelers.

The completed credit application indicates that the debtor is employed as an assistant manager at Pacific Gulf and earns a gross income of $3,100 per month. A block is checked that shows that the debtor owns, rather than rents, his home. A section of the application asks for credit references. It states:

> CREDIT REFERENCES: List Banks, Finance Companies, Department Stores & Major Credit Cards (Open or Closed within last 2 years).

The application provides three spaces in which to list creditors. Two of the debtor's credit cards are listed: American Express and Visa. The AmSouth letter is dated November 30. It states that the debtor has had a checking account at the bank since December 1990, with an average twelve month balance of $957.00. The letter also states that the debtor's balance, as of November 30, is $4,129.78.

Jack Hann, an employee of Avco, reviewed the credit application and the letter from AmSouth. Admittedly, he was not present at the time the application was completed. Hann testified that he relied on the application and the AmSouth letter to approve the credit.

Avco contends that the debtor was not an assistant manager at Pacific Seafood (a crab processing shop), but simply an employee in charge of the crab pot. The debtor testified that his responsibilities included cooking crab and watching the other employees.

Avco alleges that the debtor was earning substantially less than the $3,100 per month shown on the application. The debtor testified that, at the time the application was completed, he was earning between $30,000 to $40,000 per year. He testified that the information in his Statement of Financial Affairs which indicates that his income was $9,000 in 1994, and $6,000 in 1995 is inaccurate. He explained that his lawyer had given him forms to complete and return. He took the forms along with his income tax records to a friend. The friend helped the debtor fill out the forms. The debtor did not detect the omission of his employment at Pacific Gulf or the failure to list his total income, because he was unfamiliar with the forms, couldn't read English well, and was busy looking for To.

Avco alleges that the debtor did not own his home. The debtor testified that he did own his mobile home when the application was completed in November. He stated that he purchased his mobile home for $6,000 approximately three years ago, and he paid off the mortgage prior to

November. The debtor further explained that he borrowed $2,000 from his roommate, Hoi Minh Doan, in order to finance his trip with To. In December, he sold his mobile home to Doan for the release of the $2,000 debt and $500 cash. The debtor still lives in the mobile home.

Avco alleges that the debtor did not list all of his liabilities, i.e. banks, finance companies, department stores and major credit cards. The debtor testified that he provided only two credit cards because To did not request more. The debtor also contends that the application did not require him to list all his liabilities.

Hann testified that when he approved the credit he was unaware of the source of the money in the debtor's checking account ($4,129.78) or how the debtor planned to make the down payment on the watch. Hann said that both of these things would have made a difference in his decision to extend credit. The debtor's bank records indicate that he deposited $3,500 into his checking account on November 29. See Avco Exh. 1. The debtor testified that $1,500 came from an AmSouth bank loan and $2,000 came from gambling. The debtor used a credit card to make the down payment on the watch.

The debtor has made no payments on the Rolex watch. He testified that he sold the watch to Steven Dang in lieu of two monthly car payments.

First Family's claim of nondischargeability is based on the debtor's purchase of a Zodiac Seawolf watch. The watch was obtained from Leon Wildberger (a jeweler) on November 29, 1995. First Family financed the purchase price of $1,629.55. See First Family Exh. 2. In order to obtain financing from First Family, the debtor completed a credit application on November 28. See First Family Exh. 1. The debtor testified that the application was filled out by To and he signed it. First Family alleges that the debtor made material misrepresentations on the application.

The completed credit application indicates that the debtor is employed as an assistant manager at Pacific Gulf and earns a yearly salary of $35,000 to $40,000 per year. A check mark shows that the debtor owns, rather than rents, his home. In response to a request for the current value of the property, $7,000 is written down. A section of the application asks for "No. of Credit Cards." The number "3" is entered in the section. The application also has a section that reads "Finance Companies Owed" and provides spaces where either "yes" or "no" can be checked. Neither "yes" nor "no" is checked.

Timothy Jones, an employee of First Family, reviewed the credit application. He was not at Leon Wildberger when the application was filled out. Jones testified that he relied on the application to approve the credit. He stated that he had no reason to doubt applications received from Leon Wildberger because the merchant was thorough.

First Family alleges that the debtor responded untruthfully to questions about his (1) job title, (2) salary, and (3) home ownership. The debtor's responses on the First Family application were in line with the responses provided on the Avco application.

First Family alleges that the value of the debtor's mobile home was not $7,000. The debtor testified that he indicated on the application that the mobile home was worth $7,000, because that was the amount of insurance on the property. First Family also alleges that the debtor owned more than three credit cards. The debtor testified that To filled out the application and he simply gave her the information she requested.

The debtor has made no payments on the Zodiac Seawolf watch. He testified that To took the watch when she left.

North American's claim of nondischargeability is based on the debtor's use of his North American credit card. The debtor used his credit card for the first time on October 8, 1995. He

made one payment on the account in the amount of $50.00 on November 22. From November 29 to December 1, 1995, the debtor charged $1,434.37 for the purchase of goods and received a $600.00 cash advance. See North American Exh. 1. Included in the goods purchased is a $380.25 payment to Lee Michaels Fine Jewelry (Lee Michaels). The debtor used his North American credit card to put a cash down payment on a Cartier watch. Lee Michaels sold the debtor the watch on November 29 for a total sales price of $1,880.25 (American General financed $1,500). See Avco Exh. 2.

Circuit City's claim of nondischargeability is based on the debtor's use of his Circuit City credit card. The debtor obtained the credit card in November 1994, and made modest charges on the account until November 1995. The debtor's last payment on the account was made in November 1995. From November 29 to December 4, 1995, the debtor charged $4,030.51 for the purchase of goods. See Circuit City Exh. 1. The goods included a refrigerator, a cordless phone, and two camcorders.

North American and Circuit City allege that the number of large debts incurred by the debtor in November and December of 1995, clearly evidences the debtor's intent not to make payments. The debtor testified that the purchases were made in anticipation of his trip to Houston. He stated that in November 1995 he had seven to eight credit cards. He realized when he used the credit cards that his balances were increasing and he often thought about how he was going to pay the bills. He knew he purchased a lot in November and December, but he was not aware of the total amount of debt incurred.

The record indicates that in 1995 the debtor had ten credit cards, four loans, and one credit charge. The record also indicates that in November and December of 1995, the following debts, totaling $26,184, were incurred:

Creditor	Amount of Purchase
Avco Financial Service	$3,500
American General	$1,500
First Bank Card Center	$3,134
First Family Financial Services	$1,629
First North American National Bank	$2,034
First North American National Bank (Circuit City)	$4,030
Krogers Card Center	$5,186
Parisian	$502
Zales	$4,669

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 loath rewarding a debtor who attempts to take advantage of the bankruptcy process to avoid the consequences of his misdeeds; only the honest, unfortunate debtor is generally afforded relief from his obligations. *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505, 1508 (11th Cir. 1991).

A debt is nondischargeable under § 523(a)(2)(B) where it was obtained by a writing: (1) that is materially false; (2) respecting the debtor's or an insider's financial condition; (3) on which the creditor to whom the debt is liable for such money, property, services, or credit reasonably relied; and (4) that the debtor caused to be made or published with the intent to deceive. The plaintiff has

the burden of proving each of these elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

In reference to the Avco debt and the First Family debt, all of the elements for denying discharge were shown. (1) The credit applications furnished to Avco and First Family are materially false. Both applications untruthfully suggest that the debtor had few financial liabilities. The applications misrepresent information of a type which would normally affect a financing company's decision to extend credit. *Matter of Norris*, 70 F.3d 27, 29 at n. 10 (5th Cir. 1995). The Avco credit application required that the debtor list banks, finance companies, department stores, and major credit cards open within the last two years. The debtor listed only two credit cards. The First Family credit application required the debtor to disclose the number of credit cards he owned. The debtor indicated that he owned three. In fact, the debtor had ten credit cards at the time the applications were submitted. (2) The credit applications constituted statements respecting the debtor's financial condition. Each application requested information on the debtor's employment, salary, home ownership and liabilities. (3) Avco's and First Family's reliance on the credit applications was reasonable in light of the circumstances at the time of the transactions, standard business practices of the finance companies, and the standards and customs of the industry. *In re Robinson*, 192 B.R. 569, 577 (Bankr. N.D. Ala. 1996). Hann testified that he relied on the Avco credit application and the AmSouth letter. Jones testified that he relied on the First Family credit application. Jones further testified that he had no reason to doubt applications received from Leon Wildberger. (4) The debtor acted with the requisite intent to deceive. Intent to deceive is determined by looking at the totality of the circumstances, including the recklessness of the debtor's actions. "Reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation may combine to produce the inference of intent [to

deceive]." *In re Miller*, 39 F.3d 301, 305 (11th Cir. 1994). The debtor did not list all of his credit cards on the Avco credit application because To only requested two. The First Family credit application indicates that the debtor owned only three credit cards because To filled out the application. The debtor's explanations are not credible. He cannot simply avoid liability by blaming everything on To. The false information coupled with the number of purchases being made on the credit cards in a relatively short period of time plainly demonstrates the debtor's intent to deceive the finance companies.

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).

In reference to the North American debt and the Circuit City debt, all of the elements for denying discharge were shown. (1) The debtor made false representations with the purpose and intention of deceiving North American and Circuit City.

> 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). Considering all of the circumstances, the Court believes that at the time the debtor used the credit cards he did not intend to pay the charges. There was a sudden change in the debtor's buying habits in 1995. He had seldom used his credit cards prior to then. The debtor made numerous charges in November and December of 1995. The liabilities incurred in November and December approximately equaled the debtor's alleged yearly income. On November 28, the debtor completed three credit applications in order to purchase expensive watches: Friedman's Jewelers (Rolex watch purchased for $5,068), Leon Wildberger (Zodiac Seawolf watch purchased for $1,629), and Lee Michaels (Cartier watch purchased for $1,880). None of the evidence suggested that any of the debtor's liabilities were incurred for necessities. No payments were made and no property was returned. (2) North American and Circuit City relied on the debtor's representations. Admittedly, the debtor received the goods and cash corresponding with the charges on his credit card statements. (3) North American and Circuit City sustained losses as a result of the representations. Plaintiffs relinquished possession of goods and cash, and have not been compensated.

North American and Circuit City justifiably relied on the debtor's 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).

Therefore, the debts owed to Avco, First Family, North American and Circuit City are nondischargeable pursuant to 11 U.S.C. §§ 523 (a)(2)(A) and 523 (a)(2)(B). The plaintiffs may

recover attorneys' fees under 11 U.S.C. Section 523(d) if the contract agreements between them and the debtor provide for such fees and are enforceable. See *Transouth Financial Corp. v. Johnson*, 931 F.2d 1505 (11th Cir. 1991). Within fifteen days the plaintiffs' attorneys must file affidavits which include the contract agreements. Within fifteen days thereafter, the debtor's attorney must respond.

Because of the above findings, it is not necessary for the Court to reach a decision on whether the debts are nondischargeable pursuant to § 523(a)(6).

Dated: November 14, 1996

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE