

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

CONSTANCE W. WALTON,

CASE NO. 98-10979-WSS

Debtor.

Chapter 7

AVCO FINANCIAL SERVICES OF
ALABAMA, INC.

Plaintiff,

v.

ADV. PROC. NO. 98-1100

CONSTANCE W. WALTON,

Defendant/Debtor.

**ORDER DETERMINING DISCHARGEABILITY OF
DEBT TO AVCO FINANCIAL SERVICES OF ALABAMA, INC.**

This matter came on for hearing on the complaint of Avco Financial Services of Alabama, Inc. (hereinafter “Avco Financial”) to determine dischargeability of debt. Melissa Wetzel appeared for the Debtor, and Greg McAtee appeared for Avco Financial. 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 matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2). After due consideration of the testimony, evidence and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Debtor, Constance W. Walton (hereinafter “Walton”), applied for a loan with Avco Financial Services of Alabama, Inc. (hereinafter “Avco Financial”) in October 1997. Walton spoke with Avco Financial’s representative, Jack Hann (hereinafter “Hann”), two or three times and gave him her financial information. Hann later listed the information on a computerized application form.

Walton's application included the following debts: mortgage payment- \$715.00; car payment- \$267.00; Target (revolving charge account)- \$23.00. It also contained her income of \$1,166.00 in wages and \$1,666.00 in social security benefits for a total income of \$2,832.00 per month. When Walton met with Hann to finalize the loan agreement on October 15, 1997, he asked her to complete a form entitled "Statement of Indebtedness." The form asked for information as to all of Walton's debts, including real estate contracts and mortgages, tax liens, disputed claims, other debts with Avco Financial, debts owed to friends and relatives, co-signed debts, credit union debts and medical bills. The form also contained an all-inclusive phrase, stating "list of all other debts of all kinds including tax liens, judgments, debts in another name and disputed claims." Walton listed her mortgage payment and her car payment on the "Statement of Indebtedness." She also signed and dated the form.

Avco Financial loaned Walton \$8,668.82. This amount included an extra amount for disability or life insurance Walton requested and later decided not to purchase. Walton used the loan proceeds to pay for braces and other medications for her younger daughter. She also made improvements to her home, including pool maintenance and repair, new carpet and painting.

At trial, Walton testified that she had other debts that were not listed on the "Statement of Indebtedness", including some magazine subscriptions, a \$2,000.00 debt to the Internal Revenue Service related to her 1995 tax return, a \$200-300.00 debt to Mobile Gas, and a \$280.00 debt to Southern Leisure Pools. Avco Financial maintains that Walton did not include a \$1,000.00 debt to her daughter. Walton testified that the \$1,000.00 was a gift from her daughter, and not a debt. However, Walton paid her daughter \$1,000.00 after receiving the loan funds from Avco Financial. Walton stated that she decided to give her daughter the \$1,000.00 after receiving the extra money from Avco Financial. In addition to these debts, Walton did not reveal that she was one month behind on both her mortgage and car payment at the time that she completed the statement of indebtedness. Walton made

only one full payment and a partial payment on the loan. She stated that she had difficulty making the loan payments because her employer reduced her work hours and she was not making as much money.

Walton testified that she did not remember the omitted debts because she did not have any records or documents before her as she completed the form. She did not list the debt to the IRS because it was not a tax lien. She simply made monthly payments to the IRS. Finally, she did not include being behind on her mortgage and car payment because the form did not request this information.

Jack Hann, Avco Financial's representative, stated that he would not have made the loan to Walton if he had known that did not have room in her budget to make the loan payments. Before making the loan to Walton, he ran a credit report on Walton, which did not show the IRS debt. Hann testified that he did not get an appraisal of Walton's home, but he did drive by the residence. On October 15, 1997, the day that the "Statement of Indebtedness" was completed, Hann had already prepared the loan documents for Walton based on the information that he had previously received from her.

Walton filed a chapter 7 petition in this Court on March 17, 1998. Avco Financial filed this adversary proceeding pursuant to 11 U.S.C. §523(a)(2) and (6) on May 13, 1998.

CONCLUSIONS OF LAW

Section 523(a)(2)(B) of Title 11 provides an exception to discharge for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; . . .

Each of these elements must be proved by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991).

Avco Financial alleged in its complaint that Walton misrepresented her financial condition in the Statement of Indebtedness that she completed on October 15, 1997. The first consideration is whether Walton's omissions were materially false. A representation or omission is "materially false" for purposes of §523(a)(2)(B) "if [it] contains substantially untruthful information of a type which normally would bear on the [financial institution's] credit making decision." In re Robinson, 192 B.R. 569, 576 (Bankr. N.D. Ala. 1996), citing Matter of Norris, 70 F.3d 27, 30 at n. 10. Hann testified that he would not have made the loan to Walton if he had known the full extent of her debt. Walton clearly omitted some smaller debts and two larger ones, the \$2,000.00 debt to the IRS and the \$1,000.00 debt to her daughter. The magazine subscriptions and smaller debts alone may not have been crucial to Hann's decision to extend the loan. However, the IRS debt and the debt to her daughter could have had an impact on Walton's ability to service more debt, and therefore may have been significant factor in Hann's decision to extend the loan. The Court finds Walton's omissions regarding the IRS debt and the debt to her daughter to be materially false. The parties do not dispute that the writing concerned the debtor's financial condition under the second element of §523(a)(2)(B).

The third criteria of §523(a)(2)(B) is whether Avco Financial reasonably relied on Walton's statement of indebtedness when extending the loan in question. To prove a debt to be nondischargeable under §523(a)(2)(B), the plaintiff must show actual and reasonable reliance. See Robinson, 192 B.R. at 576. "Actual reliance is reliance in fact." Id. "Reasonable reliance" is

determined by examination of several factors including “the circumstances at the time of the transaction, the creditor’s standard business practices, the standards and customs of the industry, and the duty to investigate.” Id. at 577. Hann testified that he relied on Walton’s statement of indebtedness when deciding to extend the loan. His statements indicate that he actually relied on the information provided in the statement of indebtedness to make the loan to Walton. As to whether Hann’s reliance on the statement of indebtedness was reasonable, he testified that he met with Walton two or three times before executing the loan documents and took the information for the credit application. He ran a credit report on Walton, which did not show the IRS debt. Hann testified that he did not get an appraisal of Walton’s home, but he did drive by the residence before making the loan. Hann’s actions appear to be reasonable.

The final inquiry under §523(a)(2)(B) is the debtor’s intent to deceive. “A bankruptcy court may look to the totality of the circumstances, including the recklessness of a debtor’s behavior, to infer whether a debtor submitted a statement with intent to deceive.” In re Miller, 39 F.3d 301, 305 (11th Cir. 1994). The smaller debts that Walton omitted are not a concern since they may have been overlooked, and, in any event, were not material to Avco Financial’s decision to loan the funds. The IRS debt and the debt to Walton’s daughter are a different matter. Walton was clearly aware of the IRS debt because she made monthly payments on it. Her explanation that she did not list the debt because it was not a tax lien is not plausible in light of the language on the form stating “list of all other debts of all kinds including tax liens, judgments, debts in another name and disputed claims.” It is clear that the form requested information regarding all debts, not only tax liens. Walton’s testimony regarding the \$1,000.00 loan to her daughter is also suspect. It is obvious from Walton’s decision to repay the money that she regarded the \$1,000.00 as a debt. Likewise, it was clearly on her mind when she took out the loan since she repaid the debt from the borrowed funds. Based on these facts, the

Court finds that Walton omitted the \$2,000.00 debt to the IRS and the \$1,000.00 debt to her daughter from the statement of indebtedness with intent to deceive Avco Financial.

The nondischargeability provisions of §523 are liberally construed in favor of the “honest, but unfortunate debtor.” Robinson, 192 B.R. at 575. The bankruptcy court’s primary role as a court of equity compel this Court to find that Walton’s debt to Avco Financial is nondischargeable in the amount of \$3,000.00, the sum of her debt to the IRS and to her daughter. Based on the foregoing it is hereby

ORDERED that the relief sought in the complaint of the Plaintiff, Avco Financial Services of Alabama, Inc., is **GRANTED**; and it is further

ORDERED that the debt owed by the Debtor, Constance Walton, to the Plaintiff, Avco Financial Services of Alabama, Inc., is **NONDISCHARGEABLE** in the amount of \$3,000.00.

DATED: October ____, 1998

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE