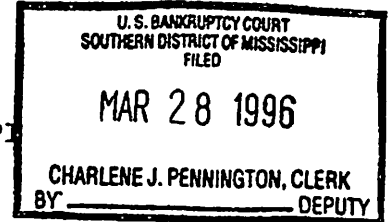


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE: RHONDA D. CARLISLE

CASE NO. 95-00792JEE

AMERICAN EXPRESS TRAVEL RELATED
SERVICES COMPANY, INC.

PLAINTIFF

VS.

ADVERSARY NO. 95-0118JEE

RHONDA D. CARLISLE

DEFENDANT

Eileen Shaffer Bailey
401 East Capitol Street
Suite 316
Jackson, MS 39201

Attorney for Plaintiff

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding is before the Court on the Motion for Summary Judgment filed by the Plaintiff, American Express Travel Related Services Company, Inc. American Express is seeking a judgment of nondischargeability against the Debtor, Rhonda D. Carlisle, pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(C)¹. After considering the motion, the Plaintiff's statement of uncontested facts, the Plaintiff's memorandum brief in

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

support of the motion and the Debtor's response thereto along with the pleadings filed in this adversary proceeding, the Court holds that the motion of American Express for summary judgment is well taken and should be granted. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On March 9, 1995, the Debtor, Rhonda D. Carlisle, filed a petition for relief under Chapter 7 of the Bankruptcy Code. American Express subsequently commenced this adversary proceeding against the Debtor seeking a determination that certain charges made on the Debtor's card account are nondischargeable under § 523(a)(2)(A) and § 523(a)(2)(C) of the Bankruptcy Code.

In its complaint, American Express alleges that between December 3, 1994, and January 11, 1995, the Debtor used her American Express card in 63 transactions, charging a total of \$10,130.33 to her account. At the time the Debtor filed her petition for relief, on March 9, 1995, the outstanding balance on the Debtor's account was \$10,338.27. American Express further alleges that at the time the transactions were made the Debtor knew that she was unable to repay the charges and, in fact, the Debtor did not intend to repay the charges. Therefore, the charges were made with false pretenses, false representations or actual fraud. American Express also alleges that pursuant to the terms of the card account agreement it is entitled to attorney fees in the

amount of fifteen percent of the account balance along with costs of collection.

In her Answer, the Debtor does not dispute the amount due American Express as of the date of her bankruptcy filing or that the account agreement provides for attorney fees in the amount of fifteen percent of the unpaid balance along with costs of collection. However, the Debtor denies that the charges were made with false pretenses, false representation or actual fraud and affirmatively states that the majority of the charges were made by the Debtor's boyfriend.

American Express then filed the present motion for summary judgment, stating that on August 4, 1995, American Express served the Debtor and her attorney with Plaintiff's First Set of Interrogatories, Plaintiff's First Request for Production of Documents and Plaintiff's First Request for Admissions. The Debtor has not responded to the above listed discovery requests. American Express asserts that pursuant to Rule 7036 of the Federal Rules of Bankruptcy Procedure the following admissions are deemed admitted:

1. The Defendant made or authorized another to make each purchase, received or authorized another to receive each cash advance, signed or negotiated each check and/or used or authorized another to use the Defendant's Personal Identification Number to make each cash withdrawal or credit transaction on an automated teller machine. (Request for Admission #1)

2. At the time the Defendant incurred all or a significant portion of the charges to her credit account, she did not have the ability to pay the required payment or the balance under the terms of the account contract. (Request for Admission #2)

3. At the time the Defendant incurred all or a significant portion of the charges to her credit account, she did not intend to repay the charges. (Request for Admission #3)

4. By signing the individual charge slips, cash advance slips, and/or by using her Personal Identification Number to make a cash withdrawal or credit transaction on an automated teller, the Defendant was representing or impliedly representing to Plaintiff that they had the intent and financial ability to repay the amount incurred on the account. (Request for Admission #4)

5. The Defendant made or authorized another to make the cash advance. (Request for Admission #5)

6. The Defendant or someone she authorized actually received the merchandise, entertainment, travel, services, cash advance, travellers checks, or proceeds of a check. (Request for Admission #6)

7. The account contract between the Defendant and American Express calls for the payment of attorneys fees and costs of collection of her account. (Request for Admission #7)

8. The monthly statements attached to the Complaint to Determine Dischargeability of Debt, are genuine. (Request for Admission #7B1)

9. The card member agreement attached to Plaintiff's First Set of Interrogatories, Plaintiff's First Request for Admissions and Plaintiff's First Request for Production of Documents, is genuine. (Request for Admission #7B2)

Finally, American Express alleges that based on the fact that the above listed Requests for Admissions are deemed admitted, there exist no genuine issues of material fact, and American Express is entitled to a judgment of nondischargeability as a matter of law.

The Debtor's response to the motion for summary judgment contains one paragraph wherein the Debtor denies that American Express is entitled to summary judgment but confesses judgment if the charges fall within the forty day period² prior to filing for luxury goods or constitute cash withdrawals of more than \$1,000.00 within 20 days prior to filing.

CONCLUSIONS OF LAW

In order for American Express to prevail on its § 523 nondischargeability claim, it must prove its case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991). The issue of whether a particular debt is nondischargeable under the Bankruptcy Code is a matter of federal law. Id.; Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992).

American Express asserts that its claim against the Debtor is nondischargeable because the Debtor obtained the extension of credit under false pretenses, made false representations, or committed fraud within the meaning of § 523(a)(2)(A) and § 523(a)(2)(C) which provide in relevant part as follows:

11 USC § 523

§ 523. Exceptions to discharge.

² The Court notes that effective for all cases commenced after October 22, 1994, which includes the present case, § 523(a)(2)(C) was amended to extend the reach back period for luxury goods from 40 days to 60 days prior to filing and cash advances from 20 days to 60 days prior to filing.

(a) A discharge under section 727, ... of this title does not discharge an individual debtor from any debt-

....

(2) 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;

....

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than \$1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than \$1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act

Under § 523(a)(2)(A), American Express must prove its claim by showing either false pretenses or false representations or by showing actual fraud. Actual fraud requires a showing of actual fraudulent intent. Recoveredge v. Pentecost, 44 F.3d 1284, 1292-3 (5th Cir. 1995). In order to prove false pretenses or false representations under § 523(a)(2)(A), American Express must show

that the Debtor made a misrepresentation that was a knowing and fraudulent falsehood describing past or current facts that was relied upon by American Express. Id. at 1293; Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992).

In nondischargeability cases involving charges made to a credit card account, the use of a credit card amounts to an implied representation that the cardholder has the present intent and the ability to pay for the charges. First Tier Bank v. Rush (In re Rush), 136 B.R. 999 (Bankr. W.D. Tex. 1992); First Deposit Credit Services Corp. v. Preece (In re Preece), 125 B.R. 474, 477 (Bankr. W.D. Tex. 1991); Ranier Bank v. Poteet (In re Poteet), 12 B.R. 565, 567 (Bankr. N.D. Tex. 1981).

Regarding the element of reliance, the United States Supreme Court has recently held that only the lesser standard of justifiable reliance need be shown. Field v. Mans, 116 S.Ct. 437, 444, 64 U.S.L.W. 4015 (1995). In § 523(a)(2)(A) dischargeability cases involving the use of credit cards "[t]he credit card issuer's reliance on the borrower's good faith compliance with its contractual terms is grounded in its issuance of the card to the borrower" Eashai v. Citibank South Dakota, N.A. (In re Eashai), 167 B.R. 181, 185 (9th Cir. B.A.P. 1994). "Credit card cases involve reimbursement to a third-party merchant by the card company. This attenuated credit relationship leads courts to infer reliance from mere use of the card. ITT Financial Services v. Hulbert (In re Hulbert), 150 B.R. 169, 172 (Bankr. S.D. Tex. 1993).

See also Ranier Bank v. Poteet (In re Poteet), 12 B.R. 565, 567 (Bankr. N.D. Tex. 1981).

Having stated the applicable law and the elements that American Express must prove in order to prevail under § 523(a)(2)(A), the Court next turns to American Express's motion for summary judgment.

Rule 56 of the Federal Rules of Civil Procedure as made applicable by Rule 7056(e) of the Federal Rules of Bankruptcy Procedure provides that in order for this Court to sustain a motion for summary judgment, the Court must find that "[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-34, 106 S.Ct. 2548, 2552-58, 91 L.Ed.2d 265 (1986). Additionally, the Court must view the available evidence in the light most favorable to the nonmoving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986).

In support of its motion for summary judgment, American Express offers a set of Requests for Admissions to which the Debtor never responded. Rule 7036 of the Federal Rules of Bankruptcy Procedure provides in relevant part:

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless within 30 days after service of the request, or within such shorter

or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

....

(b) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

Pursuant to Rule 7036 of the Federal Rules of Bankruptcy Procedure, this Court holds that the Requests for Admissions propounded by American Express to the Debtor are deemed admitted. Therefore, the Debtor has admitted as to each charge and cash advance in question that she either made the charge or authorized someone else to make the charge, that at the time of each charge or cash advance she knew that she did not have the ability to repay the debt and also that she did not intend to repay the debt.

In response to the facts presented by American Express, the Debtor has offered nothing other than a one paragraph denial that American Express is entitled to summary judgment. Rule 7056(e) provides in relevant part as follows:

Rule 56. Summary Judgment.

....

(e) Form of Affidavits; Further Testimony; Defense Required. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing

that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

This Court holds that based on the evidence presented to the Court, there exist no genuine issues of material fact. The Court further holds that as a matter of law, American Express has shown that the charges made to the Debtor's account amounted to knowing and fraudulent falsehoods regarding her present ability and intent to pay American Express upon which American Express relied.

Based on the foregoing, this Court holds that American Express has met its burden of proof under § 523(a)(2)(A). The Court will enter summary judgment in favor of American Express pursuant to § 523(a)(2)(A) of the Bankruptcy Code. Since the Court holds that summary judgment will be entered based on § 523(a)(2)(A), the Court makes no findings regarding American Express's request for a judgment pursuant to § 523(a)(2)(C).

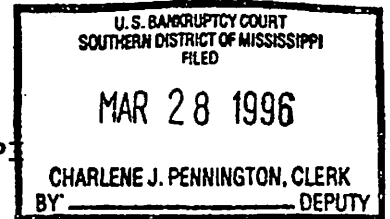
Regarding attorney fees, the Debtor also has admitted that the account contract is genuine and that it provides for attorneys fees in the amount of 15% of the unpaid balance along with costs of collection. The Fifth Circuit Court of Appeals has held that where a creditor is entitled to contractual attorney's fees under state law, attorney's fees incurred in litigating the adversary proceeding are part of the nondischargeable debt. Luce vs. First Equipment Leasing Corp. (Matter of Luce), 960 F.2d 1277, 1286 (5th Cir. 1992); Jordan vs. Southeast National Bank (Matter of Jordan), 927 F.2d 221, 227 (5th Cir. 1991).

In accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure and pursuant to § 523(a)(2)(A) of the Bankruptcy Code, a separate nondischargeable judgment will be entered in the amount of \$ 10,338.27 plus an attorney fee of \$ 1,550.74, together with all costs of court.

This the 28th day of March, 1996.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE: RHONDA D. CARLISLE

CASE NO. 95-00792JEE

AMERICAN EXPRESS TRAVEL RELATED
SERVICES COMPANY, INC.

PLAINTIFF

VS.

ADVERSARY NO. 95-0118JEE

RHONDA D. CARLISLE

DEFENDANT

FINAL JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that:

1. Judgment shall be, and hereby is, granted against the Debtor, Rhonda D. Carlisle, in favor of American Express Travel Related Services Company, Inc. in the amount of \$ 10,338.27 plus an attorney fee of \$ 1,550.74 for a total of \$ 11,889.01, together with all cost of court;

2. Said judgment shall be, and hereby is, excepted from discharge in bankruptcy pursuant to 11 U.S.C. § 523(a)(2)(A).

3. This judgment is a final judgment for the purposes of Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

SO ORDERED this the 28TH day of March, 1996.


UNITED STATES BANKRUPTCY JUDGE