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UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re MILO K. ROCHA and DANIELLE N. ROCHA, Debtors.	Chapter 7 No. B-99-02342-PHX-GBN
CITIBANK (SOUTH DAKOTA), N.A., Plaintiff, vs. MILO K. ROCHA and DANIELLE N. ROCHA, husband and wife, Defendants.	Adversary No. 99-432-GBN ORDER

Plaintiff's complaint seeking to determine the dischargeability of its claim was heard as a bench trial before this Court on September 26 and October 19, 2000.

The Court has considered the pleadings, the declarations and testimony of witnesses, admitted exhibits, and the facts and circumstances of this case. The following findings and conclusions are entered:

Findings of Fact

1. In June of 1998, Debtors applied for a "pre-approved" credit card, based on a solicitation from plaintiff Citibank (South Dakota) ("plaintiff" or "Citibank"). Exhibit three. The account was opened the following month with a charge and cash advance limit of $4,500.

2. Debtors' first activity was two July 10, 1998 balance transfers of $514.14 and $1,420.19 respectively to pay off charges on two pre-existing credit cards, described as a Visa and a First USA Visa. July 21, 1998 account statement, Exhibit four. Debtors made a first payment of $40 on August 3, 1998. August 19, 1998 statement supra. Debtors made monthly payments of between $40 and $220 between August and December 1998. Direct testimony of Linda Reece. No retail charges were made on the card from July 10, 1998 until November 5 and 6, 1998, when $109.94 in retail charges and an $800 cash advance were made. November 18, 1998 statement, Exhibit four. A $100 payment was made on November 10, leaving a balance of $2,682.49. Supra.

3. On December 3, 1998 Debtors made an electronic transfer payment of $2,649.96 on the account, nearly paying off the balance. Reece direct testimony; December 18, 1998 statement, Exhibit four. However, Debtors also made additional retail charges for the period November 25 through December 16, 1998 totaling $2,331.35. Statement of December 18, 1998. Accordingly, even after the large December 3 payment, the card had a balance of $2,362.81. Supra.

4. This large December payment did not directly come from Debtors' resources. It was made through a balance transfer on an AT&T Universal Mastercard. Exhibit 26 at November/December 1998 statement; Reece direct testimony; redirect testimony of defendant Danielle N. Rocha of October 19, 2000. Ms. Rocha does not deny the AT&T balance transfer, but has no recollection of making it. She cannot recall obtaining the card or making any payments on it. Direct testimony of September 26 and redirect, Supra.

It is clear that Debtors made no payments on the AT&T card. Exhibit 26. Also see Debtors' bankruptcy schedule F, listing the AT&T claim at $5,163.78, the same amount listed in the final bill in Exhibit 26. This exceeds the $5,000 limit on the card. Redirect of Ms. Rocha.

5. Debtors received a $1,700 cash advance on the Citibank credit card account on December 18, 1998. Exhibit four at January 20, 1999 statement. That advance is the subject of this litigation. Ms. Rocha cannot recall if she or her husband obtained the cash advance. She has no recollection how the cash proceeds were spent. Likewise, Mr. Rocha has no recollection who obtained the cash advance or how it was used. Deposition of Milo K. Rocha of January 21, 2000 at Page 5. Additional retail charge purchases of $486.42 were made on plaintiff's card between December 17, 1998 and January 14, 1999, creating an unpaid balance of $4,583.70. January 20 statement, supra. Since this exceeded the card's $4,500 credit limit, Debtors had no available cash or credit line at this time. Supra.

6. Had Debtors not made the $2,649.96 AT&T balance transfer payment, which was not repaid, plaintiff's card would have had an unpaid balance of $5,013.84. Since this exceeds the card's charge limit of $4,500.00, plaintiff would not have allowed the $1,700 cash advance. Reece direct testimony. Besides this advance, Debtors made retail purchase charges of $2,331.35 between November 25 and December 18, 1998. Debtors did not make the January payment or any other payments on the card thereafter.[1] Debtors made no attempt to contact plaintiff and discuss the nonpayment. Direct testimony of Ms. Rocha.

7. Debtors filed a voluntary Chapter 7 bankruptcy case within the District of Arizona on March 4, 1999. Debtor Milo Rocha first discussed bankruptcy with an attorney on January 21, 1999. Debtors' Motion for Summary Judgment, docket 17.

8. On June 11, 1999 plaintiff filed this litigation contending that debtors obtained the December 18, 1998 cash advance in violation of 11 U.S.C. §523(a)(2)(A) and that the $1,700 debt should not be discharged.

9. During her testimony on September 26 and October 19, 2000 Ms. Rocha could not state who took the cash advance or what was its purpose. She could not recall obtaining the AT&T card or using it to make the balance transfer payment to

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1 Ms. Reece testified Debtors made no payments after the December 3 electronic transfer. However, plaintiff's January 20, 1999 statement lists a payment or credit of $80.93 on an unknown date. Exhibit four.

plaintiff's card. In an affidavit filed with the Court, she incorrectly stated she had filled out the application to obtain the card from plaintiff. c.f. Exhibit 12 with Exhibit 3 and defendant's testimony of September 26, 2000. She cannot recall what any of the December retail charges were for, or state definitively whether they were Christmas gifts or birthday gifts for her son, Peter. She is unable to state the source of a $1,300 deposit into the family checking account on December 18, 1998. Bank statement of January 13, 1999, Exhibit 23. Eighty checks and cash withdrawals were made from the family checking account from December 16, 1998 to January 13, 1999 totaling $5,905.93. Supra. In addition, $4,998.63 was charged in cash advances on the AT&T Mastercard on December 1, 1998. November 18-December 17, 1998 statement, Exhibit 26. Finally, as to plaintiff's charge card, $2,331.35 in purchases and cash advances were made on the account between November 25 and December 16. December 18, 1998 statement, Exhibit four. An additional $2,186.42 in charges or cash advances on the Citibank card were made between December 17 and January 14. Statement of January 20, 1999.

These expenditures were made by a family of four with a 1998 gross income of $53,008 or $4,417.33 a month. Exhibit 11. Ms. Rocha's specific inability to identify the reasons for these massive, late 1998 expenditures, along with her generally vague testimony and inability to recollect, did not make her a credible witness in the eyes of the fact finder.

10. To the extent any of the following conclusions of law should instead be considered findings of fact, they are hereby incorporated by reference.

Conclusions of Law

1. To the extent any of the above findings of fact should instead be considered conclusions of law, they are hereby incorporated by reference.

2. Pursuant to 28 U.S.C. §1334(b), jurisdiction of this adversary proceeding is vested in the United States District Court for the District of Arizona. That Court has referred, under 28 U.S.C. §157(a), all cases under Title 11 and all adversary proceedings arising under Title 11 or related to a bankruptcy case to this Court. Amended General Order of May 20, 1985. This adversary having been appropriately referred, this Court has jurisdiction to enter a final Order and judgment determining dischargeability. 28 U.S.C. §157(b)(2)(I).

3. In interpreting actual fraud, courts look to the common law concept of actual fraud. To establish a debt's non-dischargeability under 11 U.S.C. §523(a)(2)(A), plaintiff must establish:

(1) Debtors made a representation that the debt would be paid. (2) At the time the representation was made, they knew it was false. (3) The representation was made with the intention and purpose of deceiving the creditor. (4) The creditor relied on the representation and (5) sustained damage as the proximate result. Household Credit Services, Inc. v Ettell (In Re Ettell)

188 F.3d. 1141, 1144 (9th Cir. 1999). Plaintiff has established all these elements.

Plaintiff must prove actual fraud by a preponderance of the evidence. Id. It has done so in this case.

4. The principal issue is intent. Whether debtors made the charge card cash advance with the intent and purpose of deceiving Citibank is the relevant inquiry. Id. Establishing credit card fraud is often difficult. Normally, the transaction is between debtor and a third party vendor. A debtor rarely makes a repayment representation directly to the credit card creditor itself. Id. However, in the case of a cash advance, as here, the representation is directly made to the creditor.

5. To identify intent from a fact pattern, the Ninth Circuit has adopted an analysis that allows inference of fraudulent intent from the totality of the circumstances. Id. Twelve non-exclusive factors are considered. None is dispositive, nor must debtor's conduct satisfy a minimum number in order to establish fraudulent intent. When, on balance, the evidence supports a finding of fraudulent intent, plaintiff has satisfied this element. Id.

The non-exclusive factors are as follows:

1) The length of time between the date the charges were made and the filing of bankruptcy.

2) Whether an attorney was consulted concerning bankruptcy before the charges were made.

3) The number of charges.

4) The amount of the charges.

5) The financial condition of debtors at the time the charges were made.

6) Whether the charges were above the credit limit of the account.

7) Whether debtor made multiple charges on the same day.

8) Whether debtors were employed.

9) Debtors' prospects for employment.

10) The financial sophistication of debtors.

11) Whether there was a sudden change in debtors' buying habits, and

12) Whether the purchases were made for luxuries or necessities.

188 F.3d at 1144, f.2.

6. Here approximately 76 days elapsed between the December 18, 1998 cash advance and the March 4, 1999 bankruptcy filing. Thus, plaintiff does not gain the presumption of nondischargeability arising from 60 days or less between the debt and filing. 11 U.S.C. §523(a)(2)(c). Normally this factor would favor debtors. However, there is an additional factual circumstance. Debtor Milo K. Rocha first met with his present bankruptcy counsel on January 21, 1999, 33 days after the date of the cash advance. Affidavit of Milo K. Rocha of January 28, 2000, attached to defendants' statement of facts, adversary docket item 18. The cash advance was not due for repayment until February 11, 1999, well <u>after</u> the January meeting with bankruptcy

counsel. Statement of January 20, 1999, Exhibit four. This circumstance favors plaintiff.

7. As to whether bankruptcy counsel was consulted prior to the advance, clearly this did not occur. But, c.f. conclusion of law six, supra.

8. As to the number of charges made, there is just one transaction on which liability is sought. However, the Court is charged with assessing the "totality of the circumstances." 188 F.3d at 1144. Accordingly, a review of Debtors' financial practices in the same time frame should be reviewed. In the two weeks following the December 3 "payment" through use of the AT&T balance transfer, Debtors made approximately 25 retail charges on the Citibank card, contemporaneously with the $1,700 questioned cash advance of December 18. Citibank billing statements of December 18, 1998 and January 20, 1999, Exhibit four.

In addition to the activity on the Citibank card, factual findings two-six, less than a month before the cash advance Debtors charged $922.14 on a Mervyn's charge card between November 21 and 25, 1998. Exhibit 22 at December 1998 billing statement.[2] This five-day activity exceeded that card's $800 limit. Supra. No payments were ever made on this card. Id. at January 1999 through August, 2000 statements. Debtors scheduled this claim in their bankruptcy at $819.17. Schedule F at P.2, Exhibit five.

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2 The statement includes a credit return of $117.44, leaving a net balance of $804.70, which still exceeds the card's limit.

During the time of the questioned cash advance, Debtors owed $5,082.15 on the AT&T card, which exceeded its $5,000 limit. Account statements of November/December 1998 and December 1998/January 1999, Exhibit 26. These charges came from Debtors' execution of three "convenience checks" (i.e., cash advances) on December 1, 1998 totaling $4,998.63. Supra. See, Bankruptcy Schedule F at P.1, Exhibit five.

The Court concludes that under the totality of circumstances, the number of credit charges made beyond the challenged cash advance is a factor that is to be considered. This circumstance favors plaintiff.

9. As to the amount of charges, the $1,700 cash advance of December 18, 1998, is a significant proportion of Debtors' gross monthly income of $4,417.33. See, finding of fact nine, supra. Further, Debtors cannot explain why they took this advance or what use was made of the money. Further considering the totality of circumstances, additional charges were made contemporaneously, such as $2,331.35 on plaintiff's card, not counting the cash advance[3]; $5,163.78 on the AT&T card; and an earlier five day charging spree in late November, 1988 of $922.14, exceeding the $800 limit on the Mervyn's card. This additional behavior of debtors favors plaintiff.

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3 Covering the period November 25 through December 16, 1998. Supra. An additional $486.42 was charged on plaintiff's card between December 17, 1998 and January 14, 1999. Findings of fact five and nine.

10. As to the Debtors' financial condition, both were employed at the time, but there were clouds on the horizon. Ms. Rocha's prospects should have been bright. She had recently obtained a substitute teaching certificate and was employed by the Maricopa County School System. However, she was unable to work over the December 21 through January 4 holiday recess, as originally promised by her principal. Thereafter, her work and earnings as a substitute teacher were not steady. Direct testimony of September 26, 2000.

On July 11, 1998, defendant Milo K. Rocha was arrested by the Phoenix Police Department for driving his motor vehicle while under the influence of intoxicating liquor. Exhibit 17 at implied consent affidavit; Exhibit 20. Following a September 29, 1998, Department of Transportation administrative hearing, his driver's license was suspended for 90 days beginning October 29, 1998. Exhibit 17 at Administrative Law Judge Decision of October 1, 1998. Debtor's license was not to be reinstated until he met all reinstatement requirements after January 27, 1999. Id.

At the time, Mr. Rocha was employed by Ross Swiss Dairy as a Class A route driver. Exhibit 21. Suspension of his driver's license did not cause Mr. Rocha to lose his job. However, he was transferred into the warehouse from driving a route. Redirect testimony of Danielle N. Rocha on October 19, 2000. While driving, Mr. Rocha would earn between $140 to $150 a day plus sales commissions. Direct testimony of Milo K. Rocha. His employer kept Mr. Rocha employed in a non-driving capacity

during the suspension period. However, he did not earn commissions during this time. Id.

The suspension disrupted Mr. Rocha's job and affected his income. Cross examination. Debtors knew in December that Mr. Rocha was facing a January criminal trial arising from the same incident. The oncoming trial was looming large before them at the time. Cross examination of Ms. Rocha.

Nonetheless, both Debtors claim to have been confident in December that the criminal trial would be won, based on assurances from their criminal counsel. Counsel did not testify. In fact, Debtor husband was convicted of one of the two criminal charges. Regardless of their alleged confidence as to the criminal trial, they certainly knew in December 1998 that the July arrest and September civil license revocation had immediate impact on the husband's earnings at work. This element favors plaintiff.

11. The next factor is whether the questioned financial transaction was above the account's credit limit. Deducting the electronic balance transfer "payment" (which Debtors never repaid), the cash advance coupled with retail charges exceeded the card's credit limit. See, finding of fact five. This factor favors creditor.

12. Since plaintiff only questions a single cash advance, the element of multiple charges on a single day is not relevant.

13. The factors of Debtors' employment and prospects for employment favor plaintiff. See, conclusion of law ten.

14. As to Debtors' financial sophistication, Ms. Rocha has a 1997 University of Arizona Bachelor's degree. She denied any training in budgets or financial matters, but was on the Dean's list for three semesters. Exhibit 18 at employment application, page two. Interestingly, she was employed previously in the Bank One credit card fraud, lost and stolen department starting on January 15, 1998. She worked at this position at least through September 8, 1998. Corrective action, Exhibit 18. She believes she was laid off in October 1998, two months before the advance was taken. Her duties, she testified on cross examination, included answering the telephone, verifying names and addresses and placing notes in files. She denies having any decision-making power or receiving any legal training.

Given her academic background, prior work in a bank, and her present employment as an educator, she appears to this fact finder to possess at least average consumer knowledge.

Mr. Rocha has one year of college and at the time of his October testimony was employed as a salesman. He appears to the fact finder to possess at least average consumer knowledge. The Court concludes that the financial sophistication factor is neutral.

15. The final Ettell elements consider whether there was a sudden change in Debtors' buying habits and whether the purchases were made for luxuries or necessities. As previously noted, Debtors' inability to explain or justify the use of the cash proceeds does not advance their defense.

Debtors applied for plaintiff's card in June 1998 and obtained it the following month with a $4,500 credit limit. They immediately transferred a $1,943.33 balance from other charge cards. Factual findings one and two. For the next four months, there appears to be no card usage and minimal payments. Factual finding two. Apart from the initial balance transfers, Debtors made only two charges totaling $109.94 from the time the account was opened until December 3 and one cash advance of $800. Id. and Exhibit four. Given this account history, the December cash advance did represent a fairly sudden change in the Debtors' financial habits.

Debtors' bankruptcy Schedules I and J, filed on March 16, 1999, a few months after the questioned transaction, lists household income of $3,744.55 and monthly expenses of $3,671.28. Exhibits six and seven. Debtors' 1998 tax return reports a gross income of $53,008, which averages $4,417.33 a month. Exhibit 11; October 19, 2000 redirect testimony of Ms. Rocha. Accordingly, the $1,700 cash advance was a significant financial liability.

Although Debtors could not explain the use of the advance proceeds as constituting luxuries or necessities, it is noted that the advance was taken in December, a traditional gift giving time and the month of Debtors' son's birthday.

The Court concludes these elements favor plaintiff.

16. Viewing the totality of the circumstances and judging the credibility of witnesses, the fact finder concludes plaintiff has proven by a preponderance of the evidence that at

the time Debtors made the cash advance payment representation, they knew it was false, it was made with the intention and purpose of deceiving plaintiff, who relied on the representation and thereby sustained damage as a proximate result.

Order

Plaintiffs will promptly serve and lodge a proposed judgment. Defendants will have five days from the service date to file and serve objections to the form of the proposed judgment.

DATED this 11th day of December, 2000.

George B. Nielsen, Jr.
Chief U.S. Bankruptcy Judge

Copy mailed the 11th day of December, 2000, to:

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