



IT IS ORDERED as set forth below:

Date: August 27, 2008

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

| | | |
|----------------------------------|---|------------------------|
| IN RE: | : | CASE NUMBERS |
| | : | |
| JIMMIE LUE SMITH, | : | BANKRUPTCY CASE NUMBER |
| | : | 07-62481-MGD |
| Debtor. | : | |
| _____ | : | |
| WELLS FARGO AUTO FINANCE, | : | ADVERSARY CASE NUMBER |
| | : | 07-06242-MGD |
| Plaintiff, | : | |
| v. | : | CHAPTER 7 |
| | : | |
| JIMMIE LUE SMITH, | : | |
| | : | |
| Defendant. | : | |
| _____ | : | |

MEMORANDUM OPINION

This case is before the Court after a trial held on June 2, 2008. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052(a)(1), incorporating Federal Rule of Civil Procedure 52(a)(1). This is a core proceeding and the Bankruptcy Court is authorized to enter a final order.

The case concerns the Complaint to Determine Dischargeability of a Debt filed by Wells Fargo Auto Finance (“Plaintiff”) against Jimmie Lue Smith (“Debtor”). Debtor answered the complaint and denied her liability. (Docket No. 6). Plaintiff announced at trial that the only grounds for non-dischargeability that it would pursue was its claim under 11 U.S.C. §523(a)(2)(A). At the opening of the trial, the court denied Plaintiff’s Motion in Limine orally on the record, reserving to Plaintiff the right to raise its objections to evidence as it was tendered or offered at trial.

The undisputed facts are as follows: Debtor and Reginald Walker, Debtor’s god-son, executed a Retail Installment Contract and Security Agreement (“Contract”) on February 20, 2006 for the purchase of a 2006 Chrysler 300 (“car”). The Contract was entered into with Atlanta D/C/J, LLC. The Contract was subsequently assigned to Plaintiff, and Plaintiff holds a first lien and security interest. No payments have been made on the car, and with accrued interest, Plaintiff’s claim totals \$59,351.17. Plaintiff has not recovered the car.

FINDINGS OF FACT

At trial, the Court heard testimony from Debtor and from Craig Delsini. Mr. Delsini is a branch manager for Plaintiff. All of Plaintiff’s exhibits were admitted into evidence without objection. Debtor and Mr. Walker were co-signers on the Contract and co-makers on the note for financing in the principal amount of \$42,551.16. (Plaintiff’s Exhibit 1). Debtor and Mr. Walker are listed as owners on the car’s certificate of title (Plaintiff’s Exhibit 3); Debtor and Mr. Walker are each listed as customers in the odometer disclosure statement (Plaintiff’s Exhibit 8); and Debtor and Mr. Walker are listed as co-owners on the Title/Tag application. (Plaintiff’s Exhibit 9).

Debtor and Mr. Walker were listed as joint applicants on the credit application (Plaintiff's Exhibit 2). The application signed by Debtor indicated accurately that her monthly income was \$1,600; she had been employed with Ace Maintenance for eight years as a cleaning tech; and that she owned a home valued at \$70,000 with a mortgage balance of \$63,000. Mr. Walker's monthly income was reported as \$6,100 per month; he stated he had been field manager with TNI Investment for five years; and he had no rent or mortgage payment. The monthly car payment was \$953.73. (Plaintiff's Exhibit 1).

Debtor testified that she arrived at the car dealership on February 20, 2006 after Mr. Walker and the sales person had selected the vehicle, filled out the Contract and associated paperwork, and that she simply signed where directed. Debtor testified that Mr. Walker's friend was present when she arrived, and that he drove the car off the dealer's lot. Debtor testified that she never drove the car and had never bought a car before. Debtor explained that Mr. Walker assured her that he would take care of the car costs, and that she would not have any obligation. Debtor testified that Mr. Walker's friend paid the insurance, and that she maintained "some for herself" for a period of time. Plaintiff's Exhibit 4 shows that Debtor had six months of insurance coverage on the car, beginning with the purchase date.

On cross-examination, Debtor clarified her relationship with Mr. Walker. He is her godson, and he lived with her at the time of this transaction. Mr. Walker lived with Debtor for a total of eight to nine months. Debtor stated that she explained to Mr. Walker that she could not make any car payment, and that he assured her that he would take care of the costs. As part of Plaintiff's questions regarding who would pay for the car, Plaintiff provided Debtor's May 14, 2007 deposition testimony. Although Plaintiff attempted to demonstrate contradictory testimony by Debtor, the Court finds that the deposition testimony was unclear and that Debtor adequately

explained her answer. Debtor stated that Mr. Walker, with the help of his friend, would make the payments. Debtor repeatedly stated that she could not make the payments. In response to Plaintiff's questioning regarding what she thought would happen if Mr. Walker failed to pay, Debtor stated that she "hadn't thought about that."

Mr. Delsini, a Wells Fargo branch manager for four years, testified that he oversees daily sales operations and loan closings. He testified that sellers rely on a buyer's compliance with the "Ownership and Duties Towards Property" in the contract terms, and that it is Plaintiff's policy to rely on a signed Contract. Under cross-examination, Mr. Delsini stated that Wells Fargo was not a party to the transaction and that he did not know who the sales person or manager overseeing the transaction was. Mr. Delsini stated that he had no knowledge of a credit check in this case. He also stated that the credit application did not include an address of employment or credit reference. Mr. Delsini asserted that stated income "could be enough" for a seller to make a determination on a buyer's ability to pay.

Debtor moved for a directed verdict at the close of Plaintiff's case under O.C.G.A. § 44-12-24, asserting that fraud claims cannot be assigned. The Court reserved its ruling based on the absence of a jury and heard Debtor's case and closing arguments by both parties.

CONCLUSIONS OF LAW

There is a presumption that all debts owed by a debtor are dischargeable unless the party contending otherwise proves, by competent evidence, nondischargeability. The burden is on the creditor to prove the exception. *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 680 (11th Cir. 1993). Courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301 (11th Cir. 1994); *In re St. Laurent*, 991 F.2d at 680. The standard of proof required for exceptions to discharge

under section 523 is a preponderance of the evidence standard. *Grogan v. Garner*, 498 U.S. 279 (1991).

Section 523(a)(2)(A) excepts from discharge debt:

(a)(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 conditional.

The elements of a claim for fraudulent misrepresentation under §523(a)(2)(A) are: (1) a representation of fact by the debtor, (2) that was material, (3) that the debtor knew at the time to be false, (4) that the debtor made with the intention of deceiving the creditor, (5) upon which the creditor relied, (6) that the creditor's reliance was justifiable, and (7) that damage proximately resulted from the misrepresentation. *Covert v. Harrington*, 876 F.2d 751 (9th Cir. 1989) (citing *In re Pascucci*, 90 B.R. 438, 444 (Bankr. C.D. Cal. 1988)); *Field v. Mans*, 516 U.S. 59, 74-75 (1995) (clarifying that § 523(a)(2)(A) requires justifiable, but not reasonable, reliance).

For the reasons set forth below, the Court finds that Plaintiff failed to meet its burden of proof regarding Debtor's intent to deceive and seller's justifiable reliance. The Eleventh Circuit, in *Miller*, found that "intent to deceive" was a fact-specific inquiry, and a bankruptcy court should look to the totality of the circumstances to make a determination of intent to deceive. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301.

Plaintiff argues that the debt should be nondischargeable based on Debtor's false representations in signing the Contract, which included "Ownership and Duties Towards Property." Specifically, Plaintiff asserts Debtor made false representations when entering into the contract because Debtor had no intention to comply with the following: (D) You will keep

the property in your possession and in good condition and repair; (E) You will not attempt to sell the property or otherwise transfer any rights in the property without written consent; and (F) You will pay all taxes and assessments on the property as they become due. Plaintiff asserts that because Debtor never intended to comply with the terms of the Contract, she acted with an intent to deceive. Debtor did testify that she never intended to drive or pay for the car. However, these statements by Debtor are insufficient to establish the requisite intent element of a nondischargeability action under § 523(a)(2)(A). Further, the Court finds Debtor's statement that "she didn't think about" what would happen if Mr. Walker failed to pay for the car credible and convincing evidence that Debtor lacked an intent to deceive.

Plaintiff objected to Debtor's testimony regarding Mr. Walker's promise to pay under the Parol Evidence Rule. The Court overruled Plaintiff's objections at trial. Debtor's statements regarding her agreement with her co-borrower were not considered to modify Debtor's obligations under the Contract or to challenge the existence of the Contract. Instead, the Court's consideration of these statements is keenly relevant to making the fact-specific inquiry of a debtor's intent to deceive. Here, the Court finds Debtor's statements credible. The Court does not contest that Debtor acted imprudently as she entered into a Contract without an ability to pay, but, under the totality of the circumstances, her actions do not rise to the level of defrauding Plaintiff.

Plaintiff also failed to establish the reliance element under § 523(a)(2)(A). The plaintiff must demonstrate justifiable reliance, and it is a comparatively more lenient standard that does not bring with it a duty to investigate. *See Fields v. Mans*, 516 U.S. 59 (1995). Justifiable reliance is determined by the particular circumstances of the transaction and not an objective standard. *Id.* Plaintiff has the burden of proving that at the time of the alleged false

representation that the original seller, Atlanta D/C/J, LLC, relied on Debtor's representations when extending funds. *In re Dobek*, 278 B.R. 496, 508 (Bankr. N.D. Ill. 2002). Plaintiff's reliance at the time of the assignment is irrelevant. Section 523(a)(2)'s language, "obtained by" indicates that the inquiry should focus on the inception of the debt. *McClellan v. Cantrell*, 217 F.3d 890, 896 (7th Cir. 2000). As assignee, Plaintiff steps into the shoes of Atlanta D/C/J, LLC, and reliance must be proved when the debt was incurred. Plaintiff presented no evidence at trial regarding Atlanta D/C/J, LLC's reliance on Debtor's alleged false representations.

The Court has difficulty understanding how Debtor's accurately stated gross monthly income of \$1,600 per month could independently satisfy the reliance requirement of the statute. Mr. Walker's income was reported at \$6,100 per month, and the car payment was \$953 per month. Without evidence, the Court is left to surmise that Atlanta D/C/J, LLC did not justifiably rely on Debtor's income alone in extending credit to Debtor and Mr. Walker. The testimony of Mr. Delsini does not provide any evidence as to Atlanta D/C/J, LLC's reliance at the time of the transaction. He merely supplied testimony regarding a typical transaction and Plaintiff's practices in acquiring contracts.

Plaintiff asserts that Atlanta D/C/J, LLC justifiably relied on Debtor's representations that she would possess the car and not transfer rights to the car. However, Plaintiff failed to present any evidence of this theory at trial as well. Without evidence, the Court cannot assume that Atlanta D/C/J, LLC's reliance at the time of the transaction was based on Debtor's independent and sole possession of the car. Debtor's uncontroverted testimony establishes that Mr. Walker's friend drove the car off the lot and that she arrived at the dealership after the Contract and associated paperwork were completed by Atlanta D/C/J, LLC's sales person and Mr. Walker. Plaintiff's exhibits establish that Mr. Walker and Debtor were both parties to the

Contract and owners under title. These facts in evidence cut against Plaintiff's unsupported theory of Atlanta D/C/J, LLC's justifiable reliance on Debtor's representations of sole possession and control.

Plaintiff asserts that the nondischargeability holdings in *In re Dobek*, 278 B.R. 496 (Bankr. N.D. Ill. 2002) and *Cent. Credit Union v. Logan (In re Logan)*, 327 B.R. 907 (Bankr. N.D. Ill. 2005) support the same finding here. These cases are distinguishable. In *In re Dobek*, the debtor financed the purchase of a motorcycle for her boyfriend. She had no license and never drove. The debtor's debt was determined to be nondischargeable. *In re Dobek*, 278 B.R. 496. The key distinguishing facts in *Dobek* are that the debtor was the sole maker on the note and the debtor was aware of her boyfriend's bad credit and inability to obtain financing to purchase a motorcycle on his own. *Id.* at 501-02. In *Dobek*, the debtor's intent to deceive was based on debtor's knowledge of her boyfriend's credit, explicit representations that she would retain the motorcycle, and the debtor's lack of intent to make payments. *Id.* at 508. Mr. Walker and Debtor are co-makers, co-borrowers, and co-owners. Debtor's knowledge of a co-owner possessing and paying for the car is distinct from the debtor in *Dobek* giving the financed collateral to a party outside of the contract. Additionally, the debtor in *Dobek* obtained the motorcycle solely based on her credit. Atlanta D/C/J, LLC presumably extended credit based on Debtor and Mr. Walker's combined income and joint representations of possession and payment.

The facts in *In re Logan* are distinct from the facts before the Court as well. In *Logan*, the debtor obtained financing from a credit union for the purchase of specified collateral, either failed to register collateral with the secretary of state or failed to purchase the collateral, and the purported purchase occurred in a suspect and concealed insider transaction. *In re Logan*, 327 B.R. 907. The debt was deemed nondischargeable based on the debtor's false representations.

Id. at 917. Here, the facts demonstrate that Debtor and Mr. Walker obtained financing to purchase the car and did not use the funds for any other purpose.

Based on Debtor's testimony and the facts in evidence, Plaintiff has failed to prove that Debtor acted with an intent to deceive and that there was justifiable reliance at the time of the transaction. For the reasons set forth above, judgment is awarded to Debtor.

The Clerk's Office shall mail a copy of this Memorandum Opinion to Plaintiff, Plaintiff's counsel, Debtor, and Debtor's counsel.

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