UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
EMILY C.N. SCOTT a/k/a	)	
EMILY Y. C. SCOTT a/k/a	)	
EMILY N. SCOTT a/k/a	)	
EMILY SCOTTFELDER	)	CASE NO. 00-76464-MHM
	)	
Debtor	)	
	)	
AMERICAN EXPRESS TRAVEL	)	
RELATED SERVICES COMPANY, INC.	)	
	)	
Plaintiff	)	
v.	)	**ADVERSARY PROCEEDING**
	)	**NO. 01-6117**
EMILY C. SCOTT	)	
	)	**O R D E R**
Defendant	)	

This adversary proceeding is before the court following trial. The parties present various issues. Plaintiff asserts that its claim, a credit card debt, is nondischargeable pursuant to §523(a)(2)(A) and (C). Plaintiff also objects to Defendant's discharge pursuant to §727(a) (2), (4)(A) and (5). Defendant asserts Plaintiff is liable for several violations of the Truth-in-Lending Act, for violation of the automatic stay, and for violation of the Georgia Fair Business Practices Act. Defendant also contends she has no liability on the account which is the subject of Plaintiff's complaint because it was intended as a corporate account, not an account for which Plaintiff was personally liable.

FINDINGS OF FACT

In or around 1984 or 1985, Defendant and her new husband formed a company known as G & E Realty Company ("G&E"). In or around 1988 and thereafter, Plaintiff issued credit cards to G&E and to Defendant and her husband personally. On all those credit card accounts, Defendant was personally responsible for all the charges on both the corporate cards and the personal cards based upon her status as an officer of the corporation and on her credit rating.

In 1998, Plaintiff issued the card which is the subject of this adversary proceeding, account number 3713-822759-32005 ("32005"). Much of the controversy in this adversary proceeding centers on Defendant's contention that 32005 was a corporate credit card account and that, therefore, Plaintiff must look to G&E as its obligor. The evidence presented by Plaintiff, and the lack of evidence presented by Defendant, however, do not support Defendant's contention. The card for 32005 was issued in Defendant's name, the address on the account was Defendant's home address and Plaintiff's records reflect that Plaintiff issued the card to Defendant personally and that Defendant used the card to obtain goods and services for her personal use. Alternatively, when confronted with the inconsistencies of her allegations, Defendant contends her relatives used the 32005 credit card without her permission. Defendant's testimony on these issues is not credible. Most of the goods and services purchased by using the card during the 60 days immediately preceding the filing of Defendant's bankruptcy petition are clearly not goods and services intended for use by the corporation.

Defendant lives with her daughter in a house acquired by Defendant but transferred to her daughter prepetition. Plaintiff showed that Defendant purchased computer equipment, video equipment, housewares and other merchandise with Plaintiff's credit card immediately prepetition, but, although Defendant listed in her Statement of Financial Affairs no gifts or other

transfers and although Defendant's bankruptcy schedules shows over $190,000 in unsecured debt, when questioned in detail about the information contained in her bankruptcy schedules, Defendant testified that she owns nothing of value.

Plaintiff showed that during the 60 days immediately before Defendant filed her bankruptcy petition, Defendant used the 32005 credit card to purchase luxury goods and services. Specifically, Defendant incurred charges of $5,100 for car repairs to a vehicle apparently owned and driven by her son, who is a college student; she incurred 13 charges totaling $3,027.21 from ToysRUs, Michaels, Costco, Sears, Kennesaw Sporting Goods, and Brookstone for toys, housewares and arts and crafts; she incurred a charge of $1,934.50 for tuition, apparently for one of her children, at Morris Brown College; she incurred charges from CompUSA totaling $631.26 for the purchase of computer equipment; and she incurred a charge from J.C. Penney of $597.04 for video equipment described as "TV & Combination." These charges total $11,290.01.

When questioned about these charges, Defendant had little specific memory but her explanations suggested that most of these charges were by or for her children. Apparently, when Defendant and her husband separated shortly before Defendant filed her bankruptcy petition,[1] they agreed that the children's expenses would be paid by G&E. Thus, Defendant explains, everything purchased with the 32005 credit card is a corporate obligation and that Defendant should not be personally liable. Defendant's explanation reflects the misconception, or misconstruction of the law without any understanding of this complex area of law. An individual cannot shield herself from personal liability merely by filtering income and expenses through a

[1] Defendant testified that although she and her husband have separated, no divorce proceeding has been filed, and that although they have a separation agreement, no separation proceeding has been filed and the separation agreement has not been accorded any imprimatur by any court. Defendant did not produce the separation agreement. The parties' youngest child, aged 5, is in the custody of Defendant's husband.

corporation. Additionally, merely alleging an expense item is a corporate obligation is insufficient to establish the allegation as a fact. Corporate officers and employees are expected to observe corporate formalities and to adequately document both the income and expenses of the corporation. Defendant offered no evidence apart from her own contradictory and self-serving testimony to establish any of the charges on the 32005 account as corporate obligations. Accordingly, Defendant's testimony on these issues is not credible.

Plaintiff also showed several transfers of real property to Defendant's husband and/or an entity known as the Collette Scott Family Limited Partnership. Defendant lives in a house with her daughter that is apparently the marital residence and is apparently now owned by the Scott Family Limited Partnership.[2] Defendant transferred the property by quitclaim deed to her husband less than 12 months prepetition. The transfer by Defendant's husband to the Scott Family Limited Partnership occurred postpetition. Defendant asserts that, although the real estate was originally titled in her name alone, the property actually belonged to her husband and her children, and that her husband owes all the debt on the property.[3] These transfers evidence that Defendant may have engaged in a pattern of divesting herself, by transfer or gift, of any title to real or personal property.

Defendant's counterclaims against Plaintiff include allegations that Plaintiff sent credit cards to Defendant without Defendant's request or application, that Plaintiff failed to send account statements to Defendant, and that Plaintiff failed to disclose to Defendant the terms of the credit agreement regarding imposition of finance charges, calculation of balances, interest rates

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[2] The real estate records regarding Defendant's real estate transfers is somewhat muddled, as all the documents were apparently prepared, executed and recorded without the aid of an attorney.

[3] A satisfaction of deed to secure debt held by Advocate National Bank was recorded in September before Debtor's bankruptcy petition was filed.

and other charges. Such accusations are easily made and difficult to defend against. Plaintiff, however, presented testimony of Paul Carey, its Credit Supervisor, who had familiarity with Defendant's account and with Plaintiff's business practices and records. Mr. Carey testified regarding Plaintiff's standard business practices regarding the acquisition of new accounts and about Plaintiff's practice regarding sending copies of the credit agreement to customers. Mr. Carey also testified that the account which is the subject of this adversary proceeding was solicited by Plaintiff but was created at Defendant's acceptance and request. Mr. Carey testified that Defendant was provided with account statements and was provided with full disclosure of the terms of the credit agreement with Plaintiff. Defendant presented no credible evidence to suggest that Plaintiff deviated from its standard practice with regard to any account Defendant had with Plaintiff. Mr. Carey's testimony was credible on these issues.

Defendant also asserted that Plaintiff willfully violated the automatic stay by attempting to collect its debt postpetition by means of letters and telephone calls. Defendant testified regarding harassing telephone calls and provided a long distance telephone number from which she stated those calls supposedly originated. Mr. Carey did not recognize that telephone number as one used by Plaintiff's collection department; Defendant did not produce any telephone records in support of her allegation, and such records should have been easily obtainable to corroborate her testimony. The letters which Defendant produced were clearly not attempts to collect the debt but were sales solicitation letters.

Defendant also claims Plaintiff violated the Georgia Fair Business Practices Act by certain allegations made by Plaintiff during the trial in this adversary proceeding. Such claims are groundless.

CONCLUSIONS OF LAW

Plaintiff asserts its claim against Defendant is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A). Proof of fraud under §523(a)(2)(A) requires a showing that a false representation was made with the intent of deceiving a creditor, upon which false representation the creditor justifiably relied, and that as a result of the false representation, the creditor sustained damage. Only an affirmative misrepresentation can render a debtor's credit card debt nondischargeable. An implied representation can never serve as the basis for the claim. *Citibank (South Dakato) NA v. Kim,* Adv. Proc. No. 01-6088 (Bankr. N.D. Ga., December 26, 2001), *affirmed* Civil Action No. 1:02-CV-0314-JOF (N.D. Ga., April 1, 2003), relying on *First National Bank of Mobile v. Roddenberry,* 701 F. 2d 927 (11th Cir. 1983). In the *Kim* opinion, both the bankruptcy court and the district court concluded that the addition of "actual fraud" to §523(a)(2)(A) under the Code did not abrogate the necessity of showing an actual false representation, and that the use of a credit card does not constitute an implied representation of anything and thus could not constitute a false representation. This court agrees with the conclusions in *Kim* and in *Roddenberry.* Therefore, Plaintiff's claim under §523(a)(2)(A) is without merit.

Plaintiff also asserts that a portion of its claim against Defendant is nondischargeable under §523(a)(2)(C), which provides that

> ...consumer debts owed to a single creditor and aggregating more than $1,075[4] for "luxury goods or services" incurred 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....

[4] At time of filing, the statutory floor under §523(a)(2)(C) was $1075. The floor has since been raised to $1150.

The evidence adduced at trial shows that, during the 60 days immediately preceding the date Defendant filed her bankruptcy petition, she used the 32005 credit card to purchase luxury goods and services totaling $11,290.01. Defendant's attempts to characterize these expenses as corporate expenses were not credible and are without legal foundation. Therefore, Plaintiff's claim up to and including $11,290.01 is nondischargeable pursuant to §523(a)(2)(C).

Plaintiff also objects to Defendant's discharge under §727(a) (2), (4)(A) and (5). Pursuant to 11 U.S.C. §727(a)(2), (4) and (5), a debtor's discharge may be denied if:

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed--
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
> (B) property of the estate, after the date of the filing of the petition;...
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case--
>
> (A) made a false oath or account;...
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

The statutory provisions regarding discharge are to be construed liberally in favor of the debtor and strictly against an objecting creditor. *Heidkamp v. Whitehead,* 278 B.R. 589 (Bankr. M.D. Fla. 2002); *Baker v. Mereshian,* 200 B.R. 342 (9th Cir. BAP 1996); *First Beverly Bank v. Adeeb,* 787 F. 2d 1339 (9th Cir. 1986).

> Denial of a discharge in bankruptcy is a creditor's remedy of such sharply punitive permanence that it is reserved for the truly pernicious debtor. Only where there is a preconceived scheme to thwart the rights of creditors and the process of this court, or such a cavalier disregard of duty as to constitute the legal equivalent of those motives, is the discharge withheld.

In re Brame, 23 B.R. 196, 200 (Bankr. W.D. Ky. 1982).

The party objecting to a debtor's discharge has the burden of proof on all issues. *Chalik v. Moorefield,* 748 F. 2d 616 (11th Cir. 1984). *But see, Hawley v. Cement Industries, Inc.,* 51 F. 3d 246 (11th Cir. 1995)(Once creditor shows loss of assets, b/p shifts to D to satisfactorily explain the loss.) In objections to discharge based upon §727(a)(2) and (4), the party objecting to a debtor's discharge must show the debtor's conduct was motivated by actual fraudulent intent. *Future Time, Inc. v. Yates,* 26 B.R. 1006 (M.D. Ga. 1983). Such intent may be inferred from the facts and circumstances surrounding the debtor's conduct. *Id.* A deliberate, material omission will support a denial of discharge just as will an explicitly false statement. *Chalik v. Moorefield,* 748 F. 2d 616, 618 (11th Cir. 1984).

Actual fraudulent intent may be inferred from persuasive and convincing evidence. *F.D.I.C. v. Ligon*, 55 B.R. 250 (Bankr. M.D. Tenn. 1985)(J. Lundin). The requisite intent may be shown by cumulative effect of falsehoods which displays a reckless and cavalier disregard for the truth. *F.D.I.C. v. Ligon*, 55 B.R. 250 (Bankr. M.D. Tenn. 1985)(J. Lundin). A false oath or account is "knowingly" false if the debtor knew the information omitted from the schedules should have been included but, for whatever reason, was not. *In re Shebel*, 54 B.R. 199 (Bankr. D. Vt. 1985). An inadvertent omission or an omission resulting from an honest but erroneous belief that the information need not be disclosed is not a knowing omission. *Id.*

Plaintiff has shown that Defendant purchased merchandise, including durable goods, i.e. computer equipment and video equipment, during the 60 days immediately before she filed her bankruptcy petition, but Defendant denied having any household goods and denied having made any gifts or transfers or having suffered any loss of property. Defendant's testimony regarding this property was evasive, appeared to be fabricated, and was not credible.

Plaintiff showed that deeds transferring to her husband real property titled in her name, real property at which she still resides with her daughter, were executed during the year preceding the filing of her bankruptcy petition. Those transfers were not disclosed and Defendant's explanations of those transfers were unconvincing. That Defendant could have accumulated more than $190,000 in unsecured debt and yet possesses no valuable property permit the inference that Defendant has intentionally concealed the existence of such property or has intentionally concealed the transfer of such property. At the very least, Defendant has failed to adequately explain the disposition of assets she purchased with the 32005 credit card. Therefore, Defendant's discharge should be denied.

Defendant's counterclaims against Plaintiff are unsupported by credible evidence. Accordingly, it is hereby

ORDERED that ***Defendant's discharge is denied.***

IT IS SO ORDERED, this the 30th day of September, 2004.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE