



IT IS ORDERED as set forth below:

Date: January 15, 2015

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

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

IN RE:	:	CASE NUMBER: 13-52220-PWB
	:	
CHRISTY NICOLE ALLEN,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
	:	
	:	
AMERICAN EXPRESS CENTURION	:	ADVERSARY PROCEEDING
BANK,	:	NO. 13-5176
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CHRISTY NICOLE ALLEN,	:	
	:	
Defendant.	:	

**FINDINGS OF FACT, PARTIAL CONCLUSIONS OF
LAW, AND BRIEFING SCHEDULE**

Christy Allen filed her Chapter 7 petition on February 4, 2013. American Express Centurion Bank (“American Express”) timely filed a complaint for a determination that certain debts she incurred between July 16 and September 9, 2012,¹ on a credit card it issued are excepted from discharge under 11 U.S.C.A. § 523(a)(2). American Express contends that Ms. Allen obtained credit through actual fraud because she incurred the charges without intending to pay for them.

A debtor who incurs a debt without intending to pay it commits fraud against the creditor, and 11 U.S.C.A. § 523(a)(2) excepts such debts from a chapter 7 discharge. *E.g., In re Alam*, 314 B.R. 834, 841 (Bankr. N.D. Ga. 2004). To prove actual fraud, a creditor must prove sufficient facts from which the court can draw an inference of the debtor’s actual, subjective fraudulent intent. *Id.* at 843.

This Order constitutes the Court’s findings of fact and partial conclusions of law pursuant to Fed. R. Civ. P. 52(a), *applicable under* Fed. R. Bankr. P. 7052.² As set forth below, the Court is reserving ruling on a legal issue to provide the parties an opportunity to submit briefs.

Findings of Fact

Ms. Allen received a degree in accounting in 2005 and held a number of jobs as a general ledger accountant at various salary levels.

In June 2007, Ms. Allen obtained a charge card from American Express. Her agreement

¹ Three of the charges are for dates after September 9. One charge of \$317.88 is for a car she rented from September 6 through September 9. The posting for this charge occurred on Monday, September 10. A rental car protection charge was processed and posted on September 11. Both of these charges relate to the rental of the car on September 6. Accordingly, the Court treats the charges as being incurred within the period ending on September 9.

² This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) over which the District Court has jurisdiction under 28 U.S.C. § 1334(b)(1) and that the District Court has referred to this Court pursuant to 28 U.S.C. § 157(a) and LR 83.7, NDGa. This Court has authority to hear and determine it pursuant to 28 U.S.C. § 157(b)(1).

included a “pay over time” feature that permitted her to pay certain charges over time instead of in full with each statement. (Exhibit (“Ex.”)³ 4 at 5).

At the time of filing, Ms. Allen was married to a self-employed barber. They had three daughters together, ages 2, 3, and 10. Her husband had a daughter, age 14. (Ex. 5 at 28).

In 2010, Ms. Allen was employed by Cabot Corporation as a general ledger accountant at an annual salary of \$60,000. Ms. Allen lost this job in January 2011.

For the calendar year 2011, Ms. Allen had income of \$4,585.

For the calendar year 2012, Ms. Allen reported earned taxable income of \$4,419 on her tax return. (Ex. 7 at 66).⁴ She earned \$3,958.64 through work for Simmons Bedding Company as an employee of Roth Staffing Companies in June and July. (Ex. 7 at 70-77). She learned that this employment would end on July 16 or 17, and her last day of work on this job was July 19, 2012.

Ms. Allen also worked in 2012 as a part-time employee for Kohl’s Department Stores. (Ex. 7 at 80-107). She earned about \$1,029 on this job, consisting of taxable wages of \$460.83 and pre-tax contributions for health insurance of \$569. (Ex. 7 at 80). After deductions, her net pay in July and August was zero.

Other sources of support for Ms. Allen and her household included food stamps, unemployment compensation, and her husband’s income. Her Schedule I shows that, at the time of filing, she was unemployed and that she received unemployment compensation of \$272.79 per month and food stamps of \$500. (Schedule I, Ex. 5 at 28). Ms. Allen reported that her husband’s monthly income was \$1,732. (Schedule I, Ex. 5 at 28). The family’s monthly net income as

³ The parties introduced the same exhibits, all of which the Court admitted without objection.

⁴ The transcript for Ms. Allen’s 2012 tax return indicates “adjusted gross income per computer” of \$10,591. This may reflect her receipt of unemployment compensation during the year, which she testified she received.

reported fell \$116.21 short of being enough to meet monthly expenditures. (Schedule J, Ex. 5 at 29).

In 2011, Ms. Allen withdrew about \$10,000 from her § 401(k) account to pay household expenses. In 2012, she withdrew about \$5,000. At the time of filing her bankruptcy case in February 2013, she had about \$4,000 in the account. (Ex. 5 at 16).

Ms. Allen listed unsecured debts of approximately \$42,917. Her debts include a student loan of approximately \$16,138, a debt of \$13,953 to American Express, \$11,859 in other credit card debts, and \$965 in medical debts.

Ms. Allen listed a car worth \$4,975 with a debt of \$1,531 and a home worth about \$107,000 with a mortgage of about \$178,000. (Schedules A, B, and D, Ex. 5 at 14, 17, 20). She indicated that she intended to reaffirm both debts and retain her car and home. (Statement of Intention, Ex. 5 at 31).

From February through August 9, 2012, Ms. Allen paid all of the amounts she charged on her American Express card. The statements show the following charges:

Exhibit 3 Page No.	Due Date	Amount of New Charges
1	2/28/12	\$1,213.64
11	3/30/12	\$ 773.99
24	4/29/12	\$ 709.12
32	5/30/12	\$ 921.19
41	7/9/12	\$ 919.94
56	8/9/12	\$2,129.55

Ms. Allen paid all of these amounts through the statement due May 30, 2012 when due except for the February 28 statement. By March 25, she was again current.

On the statement due July 9, 2012, \$180.43 of the new charges were “pay over time” charges, for which the minimum payment due was \$35.00. The amount due was, therefore, \$35 plus the balance of the “pay in full” charges of \$739.51, for a total minimum payment due of \$774.51. Ms. Allen timely paid this amount.

On the statement due August 9 (Ex. 3 at 56), the total debt was \$2,353.22:

New charges of “pay in full” portion	\$1,885.71	
New charges of “pay over time” portion	<u>243.84</u>	
Total new charges		\$2,129.55
Previous balance of “pay over time” portion ⁵		124.80
Annual fee		95.00
Interest		<u>3.87</u>
Total		<u>\$2, 353.22</u>

The minimum payment due on August 9 was \$2,015.71: a \$35 minimum payment for the “pay over time” portion and \$1,980.71 for the entire amount of the “pay in full portion”

⁵ Previous balance of \$159.80 less \$35.00 minimum payment.

(\$1,885.71) and the annual fee (\$95).

Two credits reduced the minimum amount due to \$1,962.20. (Ex. 3 at 70).⁶ On August 9, 2012, Ms. Allen paid \$1,962.20. As of August 9, 2012, therefore, her American Express account was current.

The dispute here involves charges Ms. Allen made on and after July 14, 2012, which appear on her statements due on September 9 (Ex. 3 at 68) and October 9, 2012 (Ex. 3 at 82). Ms. Allen made no payments on these statements. The Court refers to the billing period for the September 9 statement, July 14 through August 15, as the “First Period” and the billing period for the October 9 statement as the “Second Period.”

During the First Period (July 14, 2012 through August 15, 2012), Ms. Allen made new charges in the amount of \$2,195.44. The charges included: \$179.05 for a rental car; \$300.78 for clothes; \$77.38 for cosmetics; \$276.45 for gas; \$273.52 for the purchase of hair and hair-products for a sew-in weave; \$238.30 for an insurance payment; \$54.88 for job-search expenses; \$141.42 for restaurant meals; \$261.44 for recreation and entertainment; and \$392.22 for purchases at Wal-Mart, which is where she purchased groceries and household supplies.

The statement with regard to these charges was due on September 9, 2012. (Ex. 3 at 68).

The total debt was \$2,544.13:

New charges of “pay in full” portion	\$1,164.75	
New charges of “pay over time” portion	<u>1,030.69</u>	
Total new charges		\$2,195.44
Previous balance of “pay over time” portion ⁷		337.51
Interest		<u>11.19</u>
Total		<u>\$2,544.14</u>

⁶ The two credits appear on the statement due September 9. Ms. Allen paid \$1,962.20. (Ex. 3 at 70).

⁷ Previous balance of \$372.51 less \$35.00 minimum payment.

The minimum payment due on September 9 was \$1,199.75: a \$35 minimum payment for the “pay over time” portion and \$1,164.75 for the entire amount of the “pay in full portion.”

Ms. Allen did not make any payment on the statement due September 9 or thereafter. In the meantime, from August 15 through September 9 (the Second Period), she made additional charges in the total amount of \$10,838.18. “Pay over time charges” were \$9,032.16, and “pay in full charges” were \$1,806.02.

The new charges of \$10,838.18 during the Second Period were almost ten times the average of the monthly charges during the preceding six months. They were over 160 percent of the amount of the total charges in the preceding six months.

Over a four-day period beginning on Thursday, September 6, and ending on Sunday, September 9, Ms. Allen incurred charges on her card of \$7,974.45.⁸

On September 6, she charged \$156.00 at Polished Nail Salon and \$325.00 at Family Hair Design. The \$325 charged at Family Hair Design included payment in advance for two visits. On that day, she also paid for two restaurant meals (\$13.15 and \$25.39) and charged \$67.17 at a QuickTrip store. She charged \$295.72 at Big Apple Automotive. She charged another \$55.00 at Polished Nail Salon on September 7. The total of these charges on September 6 and 7 is \$937.43.

On September 6, Ms. Allen rented a car for a trip to Myrtle Beach, South Carolina, with her children. Details of her bill for lodging reflect an arrival date of Friday, September 7, and a departure date of Sunday, September 9. (Ex. 3 at 88).

⁸ Three charges on the statement reflect dates after September 9. One charge of \$317.88 is for the car she rented from September 6 through September 9. The posting for this charge occurred on Monday, September 10. A rental car protection charge was processed and posted on September 11. Both of these charges relate to the rental of the car on September 6 and are thus included in the analysis of charges from September 6 through 9.

A third charge at Wal-mart of \$19.25 was posted on September 12. The court concludes from Ms. Allen’s testimony and the posting of a \$19.25 credit at Wal-Mart on September 12 (PX-3 at 84) that this was an exchange and not a new purchase.

Charges associated with the Myrtle Beach trip are for lodging (\$221.32); gas (\$54.00 and \$52.02); the rental car (\$317.88) and insurance (\$24.95); four restaurant meals (\$84.13, \$16.37, \$60.54, and \$40.48); tickets for an amusement park (\$50.00); and parking (\$4.55). In addition, Ms. Allen charged \$872.42 (\$552.97 and \$319.45) at a Walmart store in Myrtle Beach for beach and other vacation-related items. The total charges in connection with the Myrtle Beach trip were \$1,798.66.

The departure date from Myrtle Beach was Sunday, September 9. On that date, upon her return, Ms. Allen charged purchases that totaled \$5,238.36: \$2,745.13 for purchases at Macy's Department Store for clothing for her husband, her children, and herself and other personal items; \$1,937.62 for a bunk bed for her daughters at Haverty's furniture store; and \$555.61 for hair care products.

In summary, Ms. Allen made the following charges in the last four days that she effectively used her American Express card:

September 6-7	Miscellaneous charges ⁹	\$ 401.43
September 6-9	Hair and nails	1,091.61
September 7-9	Myrtle Beach trip	1,798.66
September 9	Purchases at Macy's and Haverty's	<u>4,682.75</u>
	Total	<u>\$ 7,974.45</u>

The factual question the Court must determine is Ms. Allen's intent at the times she made the charges from July 16 through September 9.

Upon losing her job at Simmons in July, Ms. Allen began looking for another job. She

⁹ As previous text shows, the total charged on September 6 and 7 was \$937.43. Of this amount, three charges of \$156.00, \$325.00, and \$55.00 (a total of \$536.00) are included here in the hair and nails group.

contacted a number of several employment recruiters and utilized internet job search tools, and sent out over 100 resumes in her search for a new position. She had numerous in-person and telephone interviews. Copies of e-mail exchanges confirm her diligence in seeking employment. (Ex. 7 at 119-149).

In mid-August, she travelled to Mississippi for an interview for a position with an annual salary range of \$75,000 to \$80,000. Ms. Allen thought that her interview went well, and she was optimistic that she would get this or a similar position.

Ms. Allen testified that she had every intent to pay for all of the charges that she made on her American Express card and that she made the charges to get over a temporary “rough patch” that would end when she obtained employment, which she fully expected in the near term.

Ms. Allen further explained that she was always concerned about what she could afford and that she did not purchase “luxury items.” She explained that she obtained inexpensive lodging in Myrtle Beach about four and a half miles from the beach rather than staying at an expensive hotel on the beach.

Ms. Allen testified that the purchases at Macy’s were necessary because she had not been shopping for a while. Her children needed clothes for school; her husband needed better clothing to attract more clients in his barbershop business; and many of her clothes did not fit properly because she had lost weight and needed much smaller sizes so that she would make a good impression in job interviews. The bunk bed was necessary because one of her daughters was sleeping on a mattress on the floor.

With regard to her purchases relating to her hair, Ms. Allen testified that her hair care was a necessity, based on a medical condition diagnosed by her dermatologist and the existence of a bald spot. Her sew-in weave requires regular appointments and upkeep.

Although Ms. Allen's testimony is that she intended to pay for everything she charged, a number of the facts discussed above support an inference that Ms. Allen did not intend to pay for the charges she made from July 14 forward.

During the First Period (July 14 to August 15), the total new charges of \$2,195.44 were somewhat more than the monthly charges during previous periods, and her purchases included non-essential items such as clothing, restaurant meals, and recreation and entertainment. As noted above, the quantity and nature of her charges during the Second Period (August 16 to September 9) are more extraordinary. One would expect a prudent cardholder without current employment to cut back on discretionary spending and limit the use of a credit card, not increase the charges and incur debt for discretionary items such as, in particular, a vacation trip, a large amount of department store purchases, and a bunk bed.

Nevertheless, the issue is not whether Ms. Allen was prudent or reckless or whether she made wise decisions. Rather, the critical question is whether she had the actual, subjective intent not to pay for the items she charged when she made them.

With regard to charges during the First Period, the Court finds that American Express has not shown, by a preponderance of the evidence, that Ms. Allen did not intend to pay the debts she incurred. Of the total new charges of \$2,195.44 during the First Period, almost all of them, \$1,751.17, occurred prior to August 9, 2012, when she timely paid the amount then due. Although the total amount charged during the First Period is higher than her historical pattern, it is not so out of line that the Court can make an inference that she did not intend to pay them. Moreover, the fact that Ms. Allen made the payment due on August 9 negates the inference that she did not intend to pay for the charges she made in the First Period.

The Court similarly finds that American Express has not shown, by a preponderance of the

evidence, that Ms. Allen did not intend to pay the debts she incurred during the portion of the Second Period ending on September 5, 2012. The amount she charged through September 5, 2012, was \$2,844.48. The charges during this time included \$568.21 for the mid-August trip to Mississippi for an interview, and Ms. Allen testified that she felt confident about getting that or another job. Ms. Allen's testimony that she intended to pay charges through September 5 is credible in view of her state of mind that she would soon have employment with sufficient income to enable her to make the payments when due, as discussed further below.

Ms. Allen's charges on and after September 6, however, are different in nature and amount. The total charges during the Second Period on and after September 6, 2012, were \$7,974.45: \$1,091.61 for nails, hair-styling, and hair products; \$1,798.66 for the Myrtle Beach trip; \$2,745.13 for Macy's purchases; \$1,937.62 for the bunk bed; and \$401.43 for miscellaneous purchases on September 6 and 7. The fact that Ms. Allen charged almost \$8,000 over a four-day period requires further analysis.

Of particular importance is the fact that, on September 9, a minimum payment to American Express \$1,199.75 was due. Given her education and background in accounting, the Court infers that, by September 6, Ms. Allen knew that this payment was due on or about September 9 and that she would not make it. Other than Ms. Allen's testimony that she intended to pay for all of the charges, no evidence supports the proposition that she intended to make the payment due on September 9.¹⁰

The Court finds, therefore, that on and after September 6, Ms. Allen did not intend to make the minimum payment due on September 9. At the same time, she proceeded to make

¹⁰ September 9, 2012, was a Sunday. Presumably the payment was actually due on September 10, but the one-day difference is immaterial to the Court's analysis.

extraordinary charges that demonstrate an intent to use the card while she could, i.e., before she defaulted on September 9. In this regard, the Court notes that Ms. Allen had by this time reached the credit limit on her other credit cards and could not use them.

On September 6, Ms. Allen used the card to pay \$325 for hair-styling, including payment for two hair appointments in advance and charged \$156.00 at Polished Nail Salon. On September 7, she charged another \$55.00 at Polished Nail Salon, and on September 9, she charged \$555.61 for hair products. The total of these charges for hair and nails is \$1,091.61.

The Court understands the importance of these goods and services with regard to Ms. Allen's hair-style and the medical implications of it. But the advance payments and the extraordinary amount of the hair products purchased on September 9 demonstrate a state of mind that she would make sure that these needs were met for the next few times when she anticipated that she might not yet have a job and when she could no longer use the American Express card because of her imminent failure to make the September 9 payment.

On September 6 and 7, Ms. Allen also made charges totaling \$401.43 for miscellaneous items: \$295.72 at Big Apple Automotive; \$25.39 and \$13.15 for restaurant meals; and \$67.17 at QuickTrip. Although these charges, standing alone, are not especially noteworthy, the fact that they occurred in the context of the other charges made at that time gives rise to an inference that she made them with the same intent as the others.

The charges related to the Myrtle Beach trip (\$1,798.66) and the purchases of the bunk bed (\$1,937.62) and items at Macy's (\$2,745.13) upon her return from Myrtle Beach on September 9 also demonstrate such an intent. The Court understands a mother's desire that her children have proper beds and that her family be suitably clothed. The Court similarly sympathizes with a mother's desire to give her children an enjoyable vacation trip and a break from what may have

been a stressful family situation. Nevertheless, the timing and amount of the charges (\$6,481.41) shows a determination to take the trip and acquire these items while the American Express card – the last credit card she could use – would still be honored. For at least some time after September 9, she would not have the ability to take a vacation or purchase such items.

Ms. Allen argues that her spending patterns show “badges of honesty” in that she did not purchase meals at expensive restaurants, did not stay at a beach-front property in Myrtle Beach, and did not purchase “luxury” items such as expensive electronics or jewelry. From Ms. Allen’s credible testimony, the Court finds that Ms. Allen did not engage in a classical “spending spree” by purchasing goods and services without regard to their cost, reasonableness, or her ability to pay the charges she was incurring. This evidence supports the propositions that, as Ms. Allen credibly testified, she used the American Express card to get her through a temporary “rough spot,” she limited her purchases to what she thought she could afford in view of her employment prospects, and she fully intended to pay the charges she incurred.

Ms. Allen’s state of mind with regard to potential employment and the nature of the charges she made support the inference that she intended to pay American Express. Although the large purchases of clothing and other items at Macy’s, the amounts spent for hair-styling and hair products, the Myrtle Beach vacation, and the purchase of a bunk bed – all when she did not have employment – were not good choices, they were not necessarily beyond her means and were not extravagant. They are consistent with her testimony that she only charged what she thought she could afford. All of this indicates that she eventually intended to pay the charges.

Moreover, the evidence indicates that, if she had obtained a job as she expected, she could have paid her debts. At the time of the filing of her case, her husband’s income alone was \$889

short of being enough to pay monthly expenses.¹¹ Ms. Allen thought she could obtain a job within an annual salary range of \$60,000 to \$80,000, given her education, experience, and qualifications. With such a salary, the evidence supports the inference that Ms. Allen would have had sufficient income, together with her husband's, to enable her to bring her American Express account current and thereafter make minimum payments on that and other cards so that she could pay all of her debts over time. Adding monthly gross income of \$5,000 (the amount she earned at her job with Cabot Corporation) would have given the family enough money to meet regular expenses with money left over to pay debts.

Based on the Court's review of the evidence with regard to the charges totaling \$7,974.45 on and after September 6, 2012, the Court makes two factual findings. First, the Court finds that American Express has not shown by preponderance of the evidence that Ms. Allen did not have the subjective intent to pay the debts she incurred. Second, the Court finds that American Express has shown by a preponderance of the evidence that Ms. Allen did make these charges when she did not intend to make the minimum payment of \$1,199.75 that was due on September 9, 2012.

Partial Conclusions of Law and Briefing Schedule

As this Court explained in *In re Alam*, 314 B.R. 834, 841 (Bankr. N.D. Ga. 2004), a debtor commits actual fraud for purposes of 11 U.S.C. § 523(a)(2)(A) if the debtor uses a credit card without the actual, subjective intent to pay the debt thereby incurred.

With regard to the charges made during the First Period and during the Second Period on or before September 5, 2012, the Court's finding of fact is that American Express has not borne its burden of proving by a preponderance of the evidence that Ms. Allen did not intend to pay these

¹¹ Ms. Mitchell's Schedules I and J reflect expenditures over income of \$116.21. (Ex. 5 at 28-29). The income includes \$500 in food stamps and \$272.79 in unemployment compensation. The husband's income alone, therefore, is \$889.00 short of being enough to pay monthly expenses ($\$116.21 + \$500.00 + \$272.79 = \800.00).

debts. That portion of the debt, therefore, is not excepted from discharge under 11 U.S.C. § 523(a)(2).

With regard to the charges of \$7,974.45 made during the Second Period on or after September 6, 2012, the Court's factual findings are that Ms. Allen intended to pay the debt but that she incurred the charges when she knew she would not make the minimum payment of \$1,199.75 due on September 9. She thus made the charges knowing that she would not pay in accordance with the terms of the agreement under which she was permitted to use the card.

The Court's factual findings with regard to this portion of the debt raise a legal question: Does the holder of a credit card commit fraud when she incurs charges that she intends to pay but not in accordance with the terms that govern the use of the card? Put another way, the question is whether a cardholder commits actual fraud when she makes charges when she knows that she will be in default in a few days.

The Court raised this legal question during closing argument after the close of evidence, but the parties have not had an opportunity to fully address it. The Court, therefore, will defer its ruling on this issue for 45 days. Each party may file a supplemental brief within 30 days. Any party who files a supplemental brief may file a reply brief to the other party's supplemental brief within 15 days.

[End of Order]

This Order has not been prepared for publication and is not intended for publication.

