UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	
JEAN ELAINE GREEN,	Case No. 89-2402-C H
Debtor.	Chapter 7
HAMILTON'S FUNERAL HOME,	
Plaintiff,	Adv. No. 90-0026
vs.	
JEAN ELAINE GREEN,	
Defendant.	

- - - - - - - - - - - - - -

ORDER--COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

A hearing was held on June 11, 1990, to determine the dischargeability of a debt. Ben C. Chatman appeared on behalf of Plaintiff, and Robert C. Oberbillig appeared on behalf of Defendant. At the conclusion of the hearing, the Court took the matter under advisement and now considers it fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). The Court, upon review of the testimony, the arguments of counsel and the briefs submitted, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On October 16, 1989, Defendant, Jean Elaine Green,

and her family arranged for the provision of funeral services for their mother.

2. Defendant was too distraught over her mother's death to actually enter the "casket room" and participate in choosing a casket. Defendant's sister chose the casket for their mother's burial.

3. Defendant and her family wished to incur the funeral expenses as an estate debt but Plaintiff, Hamilton's Funeral Home, would not acquiesce to this arrangement.

4. Plaintiff required the signature of an individual on the agreement the family had reached with Plaintiff. Defendant signed the agreement with the intent that she was signing on behalf of her family.

5. Prior to making the funeral arrangements, Defendant had scheduled an appointment to seek legal assistance regarding the garnishment of her wages.

6. On October 27, 1989, Defendant filed a voluntary petition seeking Chapter 7 relief.

7. On January 10, 1990, Plaintiff received a life insurance payment of $3,640.00, reducing the outstanding balance on Defendant's account to $947.97.

8. On January 26, 1990, Plaintiff filed a complaint alleging its claim for the provision of funeral services should be nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A). In its subsequent brief and argument,

Plaintiff alleged the debt was also nondischargeable under 11 U.S.C. §523(a)(2)(C).

DISCUSSION

At issue in this matter is whether the debt owed to Plaintiff is nondischargeable under §523(a)(2)(A). The relevant statutory language is as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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 ....

To succeed in proving a debt is nondischargeable pursuant to §523(a)(2)(A), a creditor must prove the following elements:

1) the debtor made false representations;

2) at the time made the debtor knew the representations to be false;

3) the representations were made with the intention and purpose of deceiving the creditor;

4) the creditor relied on the representations; and

5) the creditor sustained the alleged injury as a proximate result of the representations having been made.

Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987); In re Simpson, 29 B.R. 202, 209 (Bankr. N.D. Iowa 1983). Section 523(a)(2)(A) does not require a creditor to prove that its reliance on a debtor's fraudulent misrepresentation was reasonable. In re Ophaug, 827 F.2d 340, 343 (8th Cir. 1987).

Creditors bear the burden of proof and must prove each element of a claim by clear and convincing evidence. Van Horne, 823 F.2d at 1287; see also In re Garner, 881 F.2d 579, 582 (8th Cir. 1989) cert. granted sub nom. Grogan v. Garner, ____ U.S. ____, 110 S. Ct. 1945, 109 L. Ed. 2d 308 (1990). Exceptions to discharge are narrowly construed against a creditor to effectuate the fresh start policy of the Code. Van Horne, 823 F.2d at 1287.

"Because direct proof of intent (i.e. the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred." Van Horne, 823 F.2d at 1287. Although intent to deceive may be inferred from the circumstances of the case, such a finding of intent generally requires a showing that the defendant knew or should have known of the falsity of his or her statement. In re Valley, 21 B.R. 674, 679 (Bankr. D. Mass. 1982). In assessing the defendant's knowledge and liability for fraud, the court will scrutinize the acumen and experience of the defendant. Matter of Newmark, 20 B.R. 842, 857 (Bankr. E.D.N.Y. 1982).

Plaintiff argues it is assisted in this matter by a shift in the burden of proof because this case falls within the ambit of §523(a)(2)(C). That section provides:

> [F]or purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty 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 twenty 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 (15 USC 1601 et seq.).

Subparagraph (c) was added to §523(a)(2) by the Bankruptcy Amendments and Federal Judgeship Act of 1984. It creates a rebuttable presumption of nondischargeability. Matter of Stewart, 91 B.R. 489, 494 (Bankr. S.D. Iowa 1988). This presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption. It does not, however, shift the burden of persuasion, which remains upon the party on whom it was originally cast. Fed.R.Bankr.P. 9017; Fed.R.Evid. 301; see also In re Koch, 83 B.R. 898, 899 (Bankr. E.D. Pa. 1988)

(§523(a)(2)(C) shifts the initial burden of production but not the ultimate burden of proof); In re Faulk, 69 B.R. 743, 752 (Bankr. N.D. Ind. 1986) (presumption imposes burden of going forward but does not shift burden of proof).

The purpose of §523(a)(2)(C) is to deter "loading up" by unconscionable or fraudulent debtors who engage in credit buying sprees in contemplation of filing bankruptcy. See Matter of Smith, 54 B.R. 299, 302-03 (Bankr. S.D. Iowa 1985); Koch, 83 B.R. at 901-02; Faulk, 69 B.R. at 751; In re Herran; 66 B.R. 323, 324 (Bankr. S.D. Fla. 1986). The burden of proof is upon the creditor to establish the applicability of §523(a)(2)(C) since dischargeability provisions are interpreted narrowly in favor of the debtor. Koch, 83 B.R. at 902; In re Costantino, 72 B.R. 189, 192 (Bankr. D.S.C. 1986). Once a plaintiff has established the presumption applies to a case, the defendant must present substantial evidence to refute application of the presumption.

To dispose of the complaint at hand, the Court must resolve several questions: 1) does the provision of funeral services constitute "luxury goods or services" as set forth in §523 (a)(2)(C); 2) has Plaintiff proven the elements of §523(a)(2)(A) by clear and convincing evidence; and 3) is Defendant entitled to costs and attorney fees as provided in §523(a)(2)(D). The Court will address each question separately.

§523(a)(2)(C)--Luxury Goods or Services

Section 523(a)(2)(C) applies only to consumer debts owed for "luxury goods or services." Section 523(a)(2)(C) only applies to a narrow set of circumstances. Smith, 54 B.R. at 303. The Bankruptcy Code, rules, and legislative history do not define what are luxury goods and services. Section 523(a)(2)(C) indicates only what are not luxury goods and services. That is, they do not include "goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor."

In applying §523(a)(2)(C), courts must keep in mind that what is a luxury depends on the fact of each case. Faulk, 69 B.R. at 743; see also In re Williams, 106 B.R. 87, 89 (Bankr. E.D.N.C. 1989) (courts consider whether "under the circumstances" the purchases were extravagant, indulgent, or nonessential); Herran, 66 B.R. at 324 (the definition of luxury goods must be determined "in light of the circumstances" of the debtors). Courts will look to see whether the items purchased served any important family function, Williams, 106 B.R. at 89, and evidenced some degree of financial responsibility. Id.; Herran, 66 B.R. at 324.

A review of the case law reveals purchases of designer or "higher level" merchandise will be considered luxury goods. See Williams, 106 B.R. at 89; Herran, 66 B.R. at 324. Cameras

and electronic equipment (i.e., video cassette recorders, televisions, radios and video or audio tapes) may be regarded as luxury goods. See In re Orecchio, 109 B.R. 285, 287 (Bankr. S.D. Ohio 1989); Koch, 83 B.R. at 902; In re Kramer, 38 B.R. 80, 83 (Bankr. W.D. La. 1984); In re Ciavarelli, 16 B.R. 369, 371 (Bankr. E.D. Pa. 1982). Expenditures for airline, hotel, restaurant or bar services can constitute "luxury services," In re Lipsey, 41 B.R. 255, 258 n. 5 (Bankr. E.D. Pa. 1984), and such varied items as a three-wheeler, In re Hussey, 59 B.R. 573, 575 (Bankr. M.D. Ala. 1986); oriental rugs, In re Johnson, 40 B.R. 756, 758 (Bankr. D. Minn. 1984) and floral arrangements, In re Barthol, 75 B.R. 305, 308 (Bankr. S.D. Ohio 1987) can constitute luxury items under §523(a)(2)(C). See also In re Blackburn, 68 B.R. 870, 874 (Bankr. N.D. Ind. 1987) (extensive discussion of what constitutes luxury goods and services).

This court was unable to discover any decision which has held funeral services would be regarded as luxury goods or services under §523(a)(2)(C). Such an absence of case law is not surprising. The provision of funeral services for a close family member is considered a luxury by few and a necessity by most. Even exemption statutes recognize burial plots are essential items which warrant protection from creditors. 11 U.S.C. §522(d)(1); Iowa Code §627.6(4). The burial of deceased parents and close family members in a respectful and

reverent manner serves a desired social goal and serves an important family function. This Court rejects Plaintiff's argument that it should hold that the provision of funeral services for a debtor's nondependent relative should always be regarded as a luxury expense.

Plaintiff alternatively argues this court should find that Defendant's choice of a casket and vault were excessive or extravagant in light of her financial situation. The record reveals Defendant's family chose a "Twilight Rose" or "Primrose" casket priced at $1,860.00 and an "Eagle Triplex" vault priced at $693.00.

Plaintiff's price list reveals a broad price range in the caskets and vaults it has available. Defendant did not purchase the "Cadillac" of caskets sold by Plaintiff (the "Persian Bronze" listed at $3,850.00) nor did she buy the most expensive vault it had available (the bronze concrete vault priced at $5,493.00). In fact, examination of the price list indicates Defendant's purchases fell well within the mid-range of prices available from Plaintiff. The Court cannot find these funeral services were so extravagant or excessive as to be luxuries under §523(a)(2)(C).

§523(a)(2)(A)--Fraudulent Misrepresentations

Plaintiff has failed to prove the applicability of the §523(a)(2)(C) presumption, and the Court now proceeds to

determine whether Plaintiff has proven the elements of §523(a)(2)(A) by clear and convincing evidence. This Court concludes Plaintiff has failed to meet its burden.

The record reveals Defendant and her family wished to incur the funeral expenses as an estate expense. When the funeral home insisted on a single signature on the agreement, Defendant signed the contract. Plaintiff has failed to prove Defendant made any false misrepresentations with the intent and purpose of deceiving Plaintiff. The fact that Defendant did not tell Plaintiff she had decided to meet with counsel to discuss her financial situation and a garnishment of her wages is not an omission of a material fact which can constitute a false representation under §523(a)(2)(A). See Van Horne, 823 F.2d at 1288.

Plaintiff suggests the proximity between the time Defendant incurred this debt and her filing of a petition in bankruptcy is indicative of her deceptive or fraudulent intent. The Court finds it highly unlikely that funeral costs are the type of expenses upon which a debtor strategically "loads up" before filing bankruptcy. The general uncertainty which usually surrounds the timing of death and the need to incur funeral expenses takes this matter out of the realm of "shopping spree" cases where the timing of the assumption of debts and the bankruptcy filing may be indicative of fraudulent intent.

§523(d)--Attorney Fees

Plaintiff has failed to meet its burden under §523(a)(2)(A) and this Court must now address Defendant's request for costs and attorney fees pursuant to §523(d). Section 523(d) provides:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

The purpose of §523(d) is to discourage creditors from commencing actions in an effort to obtain a settlement from an honest debtor who might not be able to pay for an attorney to handle an adversary proceeding. Stewart, 91 B.R. at 497.

Defendant contends and this Court agrees, expenditures made for funeral services do constitute a "consumer debt" under §523(d). "Consumer debt" is defined as a debt incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. §101(7). The term "consumer debt" is also used in 11 U.S.C. §707(b) and 11 U.S.C. §523(a)(2)(C).

Legislative history reveals the term "consumer debt" and

its definition were derived from various consumer protection laws. In re Restea, 76 B.R. 728, 734 (Bankr. D.S.D. 1987); In re Bernstein, 71 B.R. 259, 260 (Bankr. S.D. Fla. 1987); In re Almendinger, 56 B.R. 97, 99 (Bankr. N.D. Ohio 1985); In re Burgess, 22 B.R. 771, 772 (Bankr. M.D. Tenn. 1982). To be a consumer debt within the meaning of §101(7), a liability must be acquired to achieve a personal aim or directive. In re White, 49 B.R. 869, 872 (Bankr. W.D.N.C. 1985). When a credit transaction involves a profit motive or a business purpose, it is outside the definition of consumer debt. See Restea, 76 B.R. at 734; Almendinger, 56 B.R. at 99.

A broad reading of the term "consumer debt" conforms with the congressional purpose of deterring creditors from initiating dischargeability proceedings under §523(a)(2) in the hopes of forcing a favorable settlement from an honest debtor anxious to avoid costs and attorney's fees. Burgess, 22 B.R. at 773. This Court concludes expenditures made for funeral services are primarily for a personal or family purpose and constitute a consumer debt. See Matter of Bruno, 68 B.R. 101 (Bankr. W.D. Mo. 1986) (court's ruling on motion to dismiss implicitly suggests funeral expenses are a consumer debt within §707(b)).

This Court's decision on whether to award Defendant costs and attorney fees does not stop with the finding that the funeral expenses were a "consumer debt." A determination must

be made as to whether Plaintiff's position was substantially justified or if special circumstances would make an award of costs and attorney fees unjust.

This Court is not prepared to conclude that Plaintiff's position was substantially justified in light of the absence of evidence to prove Defendant's false representations and intent to deceive. See Matter of Van Buren, 66 B.R. 422, 425 (Bankr. S.D. Ohio 1986) (a creditor's position is "substantially justified" if the creditor produces some evidence in connection with each element upon which it has the burden of proof). However, Plaintiff argues and this Court agrees there is no case law which addresses whether funeral and internment expenses constitute luxury expenditures or consumer debts. Resolution of this novel issue constitutes a special circumstance which will preclude an award of costs and attorney fees pursuant to §523(d).

ORDER

IT IS ACCORDINGLY ORDERED:

1) Plaintiff has failed to meet its burden of proof; the debt owed to it by Defendant is dischargeable in bankruptcy; and the complaint is dismissed.

2) Defendant's request for costs and attorney fees is denied.

LET JUDGMENT ENTER ACCORDINGLY.

Dated this 24th day of October, 1990.

_____
Russell J. Hill
U.S. Bankruptcy Judge