UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re	:	**Case No. 96 – 4929 - CH**
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MILFORD R. FONZA II,	:	**Chapter 7**
And	:	
JULIE R. FONZA,		
	:	
Debtors.	:	
- -	:	
AT&T UNIVERSAL CARD SERVICES,	:	**Adv. No. 97 - 97034**
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
MILFORD R. FONZA,	:	
	:	
	:	
	:	
Defendant.	:	

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ORDER—COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On January 13, 1998, trial was held on the Plaintiff's Complaint to Determine Dischargeability of Debt. Debtor, Milford R. Fonza II, was represented by attorney John Meyer; Creditor, AT&T Universal Card Services, was represented by attorney Mark D. Reed. At the conclusion of the trial, the Court took the matter under advisement upon a briefing schedule. Post-trial briefs have been filed and the Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Milford R. "Roy" Fonza II is a 28 year-old firefighter who has been employed by the Des Moines Fire Department for seven years. He had been a reserve firefighter with the City of Pasadena, California in 1988-1989 and had applied for employment with fire departments in California.

2. In August or September 1995, Roy received $24,267.75 under terms of a settlement agreement with the City of Alhambra, California.

3. In September 1995, Roy was notified of an amended settlement agreement between the NAACP and the City of Pomona, California, which provided for "monetary relief to individuals who may have been the victims of any alleged discrimination in the Pomona Fire Department." If he believed he fell into one of the categories entitled to individual relief under the agreement, Roy was directed to complete and return a Proof of Claim form within 60 days of receiving the notice or by June 15, 1996. Roy submitted the claim form. The notice states, on page 3, that "[f]iling your claim does not automatically result in an award or consideration for future hiring. All claims must be property verified and substantiated. All claims are subject to approval or rejection based upon the circumstances of each individual claim." The notice states, on page 6, that "FILING YOUR CLAIM DOES NOT AUTOMATICALLY RESULT IN AN AWARD OR CONSIDERATION FOR HIRING. ALL CLAIMS MUST BE PROPERLY VERIFIED AND SUBSTANTIATED. ALL CLAIMS ARE SUBJECT TO APPROVAL OR REJECTION BASED UPON THE CIRCUMSTANCES OF EACH INDIVIDUAL CLAIM."

3. Roy had a credit card account with AT&T Universal since October 1994, when he responded to a solicitation offering a pre-approved credit line of $5,000. This is not a joint account.

4. During the billing cycle ending December 23, 1995, one charge was made against the account, resulting in an ending balance of $5,046.41. Roy made payments of $104.00, $106.00 and $500.00 during the January 23, 1996, February 23, 1996, and March 23, 1996 billing cycles, respectively.

6. In the May 23, 1996 billing cycle, Roy made a lump sum payment of $4,547.68, leaving an account balance of $83.01. On June 24, 1996, a $40.00 payment was made on the account.

7. In July 1996, Roy began using the AT&T credit card. The July 23, 1996 statement shows three charges and two cash advances were made. A minimum payment of $62.00 was required and the account balance was $2,942.58.

8. The August 23, 1996 statement shows a payment of $20.00, six additional charges, and one cash advance made on the account. Because the previous month's minimum payment was not received within this billing cycle, the statement contained the following language: "Possibly you have overlooked your minimum payment of $42.00. If the payment has already been mailed, thank you." The account balance had risen to $3,607.80 and a minimum payment of $118.00 was required.

9. The September 23, 1996 statement shows a payment of $62.00, a late payment charge, seven additional charges, and two cash advances made on the account. Because the previous month's minimum payment was not received within the billing cycle, the statement again contained language notifying Roy of the delinquency. The account balance had risen to $4,549.57 and a minimum payment of $152.00 was required.

10. The October 23, 1996 statement shows no payments, a late payment charge, two additional charges, and two cash advances made on the account. The billing statement contained

the following language: "Due to the past due status of your account, your cash advance limit has been decreased to $0. Please remit the past due amount of $152.00 immediately." The account balance was $5,060.29 and a minimum payment of $318.29 was required.

11. On about October 1, 1996, Roy called the Pomona City Attorney. The attorney told Roy that he had been eliminated from the list of persons included in the settlement agreement between the NAACP and the City of Pomona. At that time, Roy was aware he was not going to be entitled to any proceeds under the settlement.

12. The Fonzas contacted a bankruptcy attorney in October 1996, about the same time he received the oral notification of his disqualification from the settlement agreement.

13. Milford R. Fonza II and Julie R. Fonza filed for protection under Chapter 7 of the Bankruptcy Code on December 5, 1996.

14. Roy borrowed money from a friend to pay the bankruptcy attorney for his services.

15. By the time they filed bankruptcy, the Fonzas had maxed out a joint Visa credit card account, a Cash Reserve/overdrafts account at Boatmen's Bank, a Discover credit card account, and the AT&T credit card account.

16. The Fonzas' combined income was $42,547.86 in 1994, $51,882.82 in 1995, and $53,992.49 in 1996.

17. Roy was notified of his disqualification from the Pomona settlement in a letter dated January 15, 1997.

DISCUSSION

At issue is the (non)dischargeability of credit card debt pursuant to 11 U.S.C. § 523 (a)(2)(A). AT&T Universal Card Services seeks to have the debt owed by Debtor, Roy Fonza, declared nondischargeable. Debtor argues the debt was not fraudulently incurred.

Relevant portions of the Code at issue read:

> § 523. Exceptions to discharge.
> (a) A discharge under section 727 … 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.

11 U.S.C. § 523 (a).

The standard of proof under § 523 is a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 286-87 (1991). For nondischargeability of a debt under § 523 (a)(2)(A), the creditor must show:

> (1) the debtor made a false representation;
> (2) debtor knew the representation(s) were false at the time;
> (3) the debtor made them with the intent and purpose of deceiving the creditor;
> (4) the creditor relied upon the false representation; and
> (5) the creditor sustained loss and damages as a proximate result of representations being made.

See Matter of Fasano, No. 95-2689-CH, Adv. 95-95166, at 4 (Bankr. S.D.Iowa June 24, 1997)(J.Hill Dec. Bk. #291); See also In re Ophaug, 827 F.2d 340, 342 n.1 (8th Cir. 1987); Matter of Stewart, 91 B.R. 489, 494 (Bankr. S.D.Iowa 1988).

For the first element, false representation, AT&T has shown the credit card account was used by Roy, the cardholder or by Julie, with Roy's permission, thereby creating an implied representation that Roy, at the time of the transaction, had the ability and the intention to pay for the money obtained. See Stewart, 91 B.R. at 494. At the time of the transactions, Debtor did not have the ability to repay the debt. While the "buy now, pay later" aspect of credit cards in essence

drives the market, the card user's future ability to pay is what is represented by the account's use. The falsity of Debtor's implication of his future intent and ability to pay has been shown through his actions. Between July 12 and September 30, 1996, Roy maxed out the AT&T credit card account and yet made only $82.00 in payments. Neither of the two payments met the minimum monthly payments required. While he used some cash advances to pay other bills, he made little effort to pay this creditor.

Roy asserts that he was relying on receiving a cash settlement from the City of Pomona to pay off AT&T; he had previously paid down the account with proceeds from a similar class action settlement with the City of Alhambra. The facts show that Roy had no realistic expectation of a settlement that could pay the debt that was accumulating. Although Roy received notice of a settlement and a claim form to file, the notice included two prominent statements that filing a claim did not automatically qualify him for an award. Roy had tested for a firefighter position in Pomona twice. He flunked the test the first time; he passed one component of the test the second time. He knew that although he passed one component of the test, he was not eligible to be hired by the City. The correspondence he received regarding the Pomona settlement did not indicate any dollar amount any individual might receive under the settlement. After filing a claim with Pomona, Roy had no further communications with Pomona until after he had incurred the debt at issue. When he did contact the Pomona City Attorney in October 1996 and was informed he would not be included in the settlement, he did not pursue the matter further.

Considering all the circumstances surrounding the transactions at issue, Roy knew at the time of the transactions that he lacked the ability to repay the debt. He testified that he used the card for purchases when he did not have cash available and that he used some cash advances to

pay other bills. When he made the charges to the account, he knew that his monthly expenses exceeded his monthly income.

The following factors are considered by this Court in determining whether a debtor had an intent to deceive:

1) the length of time between making the charges and filing bankruptcy;
2) whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made;
3) the number of charges;
4) the amount of charges;
5) whether multiple charges were made on the same day;
6) whether the charges were above the credit limit on the account;
7) whether the purchases were for luxuries or necessities;
8) a sharp change in the buying habits of the debtor;
9) the debtor's financial sophistication;
10) the financial condition of the debtor when the charges were made; was the debtor hopelessly insolvent at the time;
11) the debtor's employment circumstances; and
12) the debtor's prospects for employment.

Fasano, No. 95-2689-CH, Adv. 95-95166, at 7; See also In re Willis, 190 B.R. 866 (Bankr. W.D.Mo. 1996) aff'd 200 B.R. 868 (W.D.Mo. 1996); Stewart, 91 B.R. at 495 (citations omitted); In re Dougherty, 84 B.R. 653, 657 (9th Cir. BAP 1988).

Considering all the factors, the Court finds that Roy intended to deceive AT&T at the time of the transactions. The factors in AT&T's favor are the short time between the transactions and filing bankruptcy, the credit limit was exceeded, the purchases were for luxuries, the transactions indicated a sharp change in the debtor's habits, and Roy's financial sophistication. Less than five months elapsed between the time Debtor started using this credit card heavily and the time he filed bankruptcy. Debtor hadn't used this credit card in 1996 until July, when its use increased dramatically, resulting in the credit limit being exceeded by October. A majority of the transactions were for luxuries such as cosmetic surgery, a vacation, restaurant dining, and tickets for Roy and friends to attend a boxing event. Although he was reimbursed by his friends for their

tickets, Roy did not apply that money to the AT&T account. Roy is not financially unsophisticated. He graduated from high school, attended the Fire Academy and City College. He has entered into a variety of financial relationships, including credit cards, mortgages, personal lines of credit, and home equity loans. He contributes to a deferred compensation program through his employer. Although the settlement received from Alhambra allowed Roy to indulge himself in a sybaritic lifestyle and to pay some of his bills, he saved none of it. His wife of seven years, Julie, is employed outside the home. Their combined income exceeded $50,000 in 1995 and 1996. Roy chooses to maintain champagne tastes on a beer budget at the expense of unsecured creditors.

Weighing in Debtor's favor are that an attorney was not consulted before the charges were made, the number and amount of charges on this account, and Roy's employment circumstances. The number of charges and the individual amounts of those charges might reflect steady use of a credit card and might not be indicative of a person "loading up" in anticipation of filing bankruptcy. Roy has been employed as a firefighter with the Des Moines Fire Department for seven years and there is no indication of his employment with the City changing. Roy did have a second job as a tobacco merchandiser at the time of the transactions but no longer has that job.

The fourth element, reliance, need not be reasonable, only justifiable. See Field v. Mans, 116 S.Ct. 437 (1995). The standard of justifiable reliance turns on the creditor's qualities and characteristics and the particular circumstances of the case. Id., 116 S.Ct. at 444. Thus, a person may be justified in relying on a factual representation without conducting an investigation, so long as the falsity of the representation would not be patent to him if he used his senses to make a cursory examination. Id. Debtor's financial relationship with the AT&T Universal Card account historically would not raise any red flags. During the first half of 1996, monthly payments were

being made while no new charges were being incurred. Once charges and cash advances started being made against the account, within a short time they exceeded the credit limit and then activity again ceased. Based on Debtor's credit card use and payment history, AT&T was justified in relying on an implied representation that Debtor could and would repay the debt incurred through the use of the credit card.

The evidence shows that AT&T is owed $5,177.47.

AT&T has proven each of the required elements; the debt is therefor nondischargeable.

ORDER

IT IS THEREFORE ORDERED that the credit card debt owed to AT&T Universal Card Services is nondischargeable pursuant to 11 U.S.C. § 523 (a)(2)(A).

Dated this _____ day of July, 1998.

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RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT