UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	**Case No. 95 - 2689 - CH**
	:	
JOSEPH A. and	:	**Chapter 7**
LINDA JO FASANO,	:	
	:	
Debtors.	:	
- -	:	
NORWEST BANK IOWA, N.A.,	:	**Adv. No. 95 - 95166**
	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
JOSEPH ANTHONY FASANO and	:	
LINDA JO FASANO,	:	
	:	
Defendants.	:	

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ORDER -- COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On August 12, 1996, trial was held on the Plaintiff's Complaint to Determine Dischargeability of Debt. Debtors Joseph and Linda Jo Fasano were represented by attorney John H. Neiman; Creditor Norwest Bank Iowa, N.A. was represented by attorney Philip Watson. 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. Debtor Joseph Fasano ("Debtor") has maintained a Mastercard credit card, account # 5317008075012658, with Norwest Bank Iowa, N.A. ("Norwest") since March 1986. The Norwest Mastercard credit card account is an open end credit plan.

2. Norwest operates its Card Services division separate from its consumer or business banking entities. Although owned by the same parent company, Norwest card services and Norwest Bank are operated as distinct entities..

3. Debtor was 50% shareholder in De-Cem Corporation, which was incorporated under the laws of the state of Iowa in 1990. De-Cem Corporation owed New Wall Street Restaurant ("Restaurant") which was operated by Debtors.

4. The Restaurant had financial problems and Debtor listed it for sale in 1995. Although listed for sale at $369,000, after negotiations, Bachman Restaurant Co. purchased the Restaurant for $207,500 on August 31, 1995.

5. Between August 1994 and July 1995, Debtor personally obtained cash advances against credit cards totaling $48,000. The cash advances were deposited into the Wall Street Restaurant bank account at Hawkeye Bank and used to pay business expenses. They were accounted for in the business books as loans from Debtor as an Officer of the Corporation.

6. Of the total cash advances, $4,000 was a cash advance taken against the Norwest credit card account on July 14, 1995. Debtor filed bankruptcy less than 60 days later and this cash advance transaction is the subject of this Adversary Proceeding. The credit limit on the card was $5,000. The balance on the Norwest credit card account when Debtors filed bankruptcy was $4,342.15.

7. Debtor paid nothing on the Norwest cash advance between the time he received it and the time he filed bankruptcy.

8. Within 30 days of obtaining the cash advance against the Norwest credit card, Debtors' personal loan application for $10,000 was denied by Norwest Bank based on a credit report. Debtors stated on the loan application the purpose was for remodeling the basement of their residence.

9. On September 6, 1995, Debtors Joseph and Linda Jo Fasano filed for protection under Chapter 7 of the Bankruptcy Code.

10. Norwest filed a Complaint to Determine Dischargeability of Debt on December 1, 1995. On February 26, 1996, this Adversary Proceeding was dismissed as to Defendant Linda Jo Fasano only.

DISCUSSION

At issue is the (non)dischargeability of credit card debt pursuant to 11 U.S.C. § 523 (a)(2). Norwest alleges that Debtor Joseph Fasano obtained a cash advance of $4,000 within 60 days of filing bankruptcy, thus triggering the presumption of § 523 (a)(2)(C) and that the debt is nondischargeable under § 523 (a)(2)(A). Debtor argues the debt at issue was not a consumer debt triggering the § 523 (a)(2)(C) presumption and the debt was incurred with the intent to repay and is therefore dischargeable.

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 obtain by --
> >
> > > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
> > > . . .
> > > (C) for purposes of subparagraph (A) of this paragraph, . . . 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 60 days before the order for relief under this title, are presumed to be nondischargeable; . . . 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.

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 intent and purpose of deceiving the creditor;
(4) the creditor relied upon the false representation; and
(5) creditor sustained loss and damages as proximate result of representations being made.

See In re Ophaug, 827 F.2d 340, 342 n.1 (8th Cir. 1987); See also Matter of Stewart, 91 B.R. 489, 494 (Bankr. S.D.Iowa 1988).

For the first element, false representation, Norwest has shown the credit card was used by Debtor, thereby creating an implied representation that Debtor, at the time of the transaction, had the ability and the intention to pay for the cash advance obtained. See Stewart, 91 B.R. at 494. At the time of the cash advance, 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 card's use. The falsity of Debtor's implication that he had the ability to pay is illustrated by his own testimony. Although his wife handled the financial affairs, both personal and business, Debtor knew in June of 1995 that his corporation, De-Cem, was insolvent, the Restaurant was losing money, and he had already obtained $24,000 in cash advances within the previous six months.

Considering all the circumstances surrounding July 14, 1995, Debtor knew he lacked the ability to repay the debt. At that time, the Restaurant was listed for sale, no offers had been received, neither he nor his wife were drawing an income from the Restaurant or their corporation, and his personal liability on other cash advances already totaled more than $33,000. He and his wife's combined income for the entire year of 1994 was $22,512.

If the rebuttable presumption under § 523 (a)(2)(C) applies, it goes only to the element of intent. See In re Fulginiti, 201 B.R. 730, 733 (Bankr. E.D.Pa. 1996)(cites omitted). Definitions under the Consumer Credit Code that are pertinent to determining whether the cash advance was "an extension of consumer credit under an open end credit plan" as required for the § 523 (a)(2)(C) presumption include the following:

> § 1602. Definitions and rules of construction
> . . .
> (e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
> . . .
> (h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.
> . . .
> (i) The term "open end credit plan" means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan which is an open end credit plan within the meaning of the preceding sentence is an open credit plan even if credit information is verified from time to time.

15 U.S.C. § 1602.

Applying the Consumer Credit Code definitions to § 523 (a)(2)(C), in order to trigger the presumption that Debtor had the requisite intent, the plaintiff creditor must show (1) cash advances aggregating more than $1,000, (2) primarily for personal, family, or household purposes, (3) within 60 days pre-petition, (4) obtained by an individual debtor who is a natural

person, and (5) under an open end credit plan which contemplates more than a single transaction. The $4,000 cash advance was obtained under a Norwest Mastercard open end credit plan by the individual Joseph Fasano within 60 days of filing for bankruptcy.

Whether Norwest is entitled to the presumption turns on whether the cash advance was primarily for personal, family, or household purposes. Considering either the purpose for which the credit was extended or the purpose for which it was ultimately used, the Norwest cash advance was for personal purposes. Debtor applied for and was issued a Mastercard credit card in his name only, for which he alone was liable. He had no business account with Norwest. He testified that it is his practice to have credit cards in his own name as opposed to being in the name of a corporation. Norwest intended for cash advances against the Mastercard charge card be used exclusively for personal, family, or household purposes, as evidenced in the first paragraph of the Cardholder Agreement, which states "[y]ou agree that your account with us will only be used for personal, family, or household purposes." By using the credit card, Debtor agreed to those terms. If the actual use of the cash advance is considered, Debtor used the funds for personal purposes. Debtor personally received the cash advance and deposited it in a checking account at Hawkeye Bank. Debtor's transaction with the Restaurant was accounted for as a loan from himself to the Restaurant. At the time of the transaction, the cash advance was intended to be used, and was used, for personal purposes. Norwest is therefore entitled to the rebuttable presumption of § 523 (a)(2)(C).

By testifying as to his intent at the time of the cash advance, Debtor has rebutted, or "burst the bubble," of the presumption that he intended to deceive Norwest. See In re Fulginitti, 201 B.R. at 734. The analysis under § 523 (a)(2)(A) proceeds as though the presumption never existed.

The following factors are considered 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.

See In re Willis, 190 B.R. 866 (Bankr. W.D.Mo. 1996) aff'd 200 B.R. 868 (W.D.Mo. 1996); Matter of Stewart, 91 B.R. at 495 (citations omitted).

Considering all these factors, this Court finds that Debtor, at the time of the cash advance, intended to deceive Norwest. Debtor made one transaction that is the subject of this proceeding. Although the cash advance amount was significantly greater than any transactions Debtor had previously made on this Norwest account, it was less than the credit limit on the account. It was the first and only cash advance against the account. Obtaining a cash advance in order to make a capital investment in his corporation was a luxury. Debtor was not drawing a wage from his corporation and knew the Restaurant had been losing money at the rate of $10,000 per month. At a time that he was personally insolvent, he advanced personal loans to the also insolvent Restaurant. Debtor's only hopes of solvency hinged on selling the Restaurant at a price that would cover the Restaurant's debts, including the personal loans he made to the corporation. He has taken several years of college courses and has been involved in corporate management and

established and ran De-Cem and the Restaurant corporations. Less than 60 days after obtaining the cash advance, Debtor filed bankruptcy.

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 Norwest Mastercard account historically would not raise any red flags. From September 1994 through July 1995, each month's balance was paid in full, avoiding finance charges. Based on Debtor's credit card use and payment history, Norwest was justified in relying on an implied representation that Debtor could and would repay the cash advance of July 14, 1995.

Norwest has met its burden of proof for each element required for nondischargeability of the debt at issue.

ORDER

IT IS THEREFORE ORDERED that the cash advance obtained by Joseph Fasano was a consumer credit transaction as defined by the Consumer Credit Code and as applied in § 523 (a)(2)(C).

IT IS FURTHER ORDERED that the credit card debt owed to Norwest Bank Iowa, N.A. by virtue of Mastercard credit card account # 5317008075012658 is nondischargeable pursuant to 11 U.S.C. § 523 (a)(2)(A).

Dated this _____ day of June, 1997.

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