UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re	:	**Case No. 97-2569-CH**
MARY E. BROERMAN,	:	**Chapter 7**
Debtor.	:	
- -	:	
AT&T UNIVERSAL CARD SERVICES,	:	**Adv. No. 97-97203**
Plaintiff,	:	
v.	:	
MARY E. BROERMAN,	:	
Defendants.	:	

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ORDER— COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On July 13, 1998, trial was held on the Plaintiff's Complaint to Determine Dischargeability of Debt. Debtor, Mary E. Broerman, was represented by attorney Randall C. Stavers; 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. The Debtor, Mary Broerman, is 75 years old. She completed the tenth grade and in 1986, at the age of 63, obtained a GED. Her husband, Homer Broerman, died in 1991. Mr. Broerman had been an accountant.

2. Mrs. Broerman (hereinafter "Broerman") accepted an unsolicited offer of a preapproved credit card with a credit limit of $6,000.00 with Plaintiff AT&T Universal Card Services (hereinafter "AT&T") on March 16, 1995.

3. On April 4, 1995, Broerman used two AT&T convenience checks in the amounts of $1,746.87 and $1,441.85 to pay off the balances on two of her other credit cards. The following day, Broerman made two cash advances in the amounts of $1,000.00 and $1,200.00, which she deposited into her Iowa Trust and Savings Bank checking account (hereinafter "checking account"), reserving $200.00 for spending money. During the initial billing cycle she also made two purchases totaling $190.34 on the card, bringing her balance to $5,643.30.

4. Sometime before October 3, 1995, Broerman took a cash advance against her AARP Mastercard account in the amount of $5,000.00, which was her credit limit on that account. She deposited $4,900.00 into her checking account.

5. On December 8, 1995, Broerman paid $2,000.00 to AT&T out of her checking account.

6. Broerman opened a new credit account with Advanta in February of 1996 with a credit limit of $7,500.00. The February 14, 1996 Advanta account statement indicates that a $4,000.00 balance transfer was charged against the account. However, a $4,000.00 deposit was made into

Broerman's checking account on February 21, 1996. It is thus likely that the $4,000.00 "balance transfer" was actually a cash advance, considering the fact that there doesn't appear to be any other likely source from which the deposit money could have come.

7. On March 7, 1996, the Debtor made a $3,200.00 payment on the AT&T account from her checking account, which now contained the funds from the Advanta deposit.

8. On April 1, 1996, Broerman took a $3,500.00 cash advance from the Advanta account. She then made a deposit to her checking account in the amount of $1,000.00.

9. On May 22, 1996, the Debtor took a $2,500.00 cash advance against her AT&T credit card. She then deposited $2,400.00 into her checking account.

10. Sometime in July, 1996, the Debtor opened a credit account with MBNA with a $3,500.00 credit limit.

11. The Debtor opened another credit card account the following month with Choice, with a credit limit of $5,000.00. Debtor took a cash advance of $1,200.00 on August 14, 1996 and deposited $1,000.00 into her checking account.

12. On August 16, Broerman charged $561.70 on her AARP card at a furniture store. On August 19, 1996, she charged $889.34 at a different furniture store, this time on her AT&T card.

13. Between August 21, 1996 and September 16, 1996, Broerman made four purchases on the AT&T account totaling $305.03.

14. On September 7, 1996, Broerman took a cash advance against her AT&T account of $1,200.00 and deposited $1,000.00 into her checking account two days later.

15. On September 9, 1996, Broerman made a payment to AT&T in the amount of $102.00. This was the last payment the Debtor made to AT&T. Broerman had previously paid her minimum monthly payments regularly.

16. On September 20, 1996, Broerman took a $1,600.00 cash advance against her AT&T account. Her available credit at that time, however, was only $875.00. Broerman deposited $1,000.00 into her checking account that same day.

17. Broerman made two additional charges on her AT&T account totaling $30.32 on September 28, 1996 and on October 12, 1996.

18. The Debtor stated in her answers to the Plaintiff's interrogatories that she believes she first considered bankruptcy on October 3, 1996. She first consulted her attorney concerning bankruptcy on October 8, 1996.

19. Broerman's AT&T Monthly Statement dated October 18, 1996 shows that she was $873.47 over her credit limit and that her next minimum payment of $1,213.47 was due on November 12, 1996.

20. The Debtor filed her bankruptcy petition on June 2, 1997. She has listed $24,817.00 in credit card debt on Schedule F of her bankruptcy petition. The debt owed to AT&T is shown as amounting to $10,097.78.

DISCUSSION

AT&T filed this complaint objecting to discharge of the credit card debt owed it by Broerman under §523(a)(2)(A). Such debt is dischargeable unless AT&T can prove by a preponderance of the evidence that it was incurred through "false pretenses, a false representation, or actual fraud . . . ." 11

U.S.C. §523(a)(2)(A); Grogan v. Garner, 498 U.S. 279, 286-87 (1991). The Eighth Circuit has adopted a five-part test to determine whether a debt will be excepted from discharge under §523(a)(2)(A): A court asks whether: (1) the debtor made false representations; (2) the debtor knew the representations were false at the time they were made; (3) the debtor made the representations with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representations; and (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987), as modified by Field v. Mans, 516 U.S. 59, 74-75 (1995) (holding that §523(a)(2)(A) requires "justifiable, but not reasonable, reliance").

The first, second, and third elements can be considered together by asking whether the debtor made false representations knowingly and with the intent to deceive the creditor. This Court has previously held that the use of a credit card serves as an implied representation to the credit card issuer that the cardholder has both the ability and the intention to pay for the charges incurred. In re Stewart, 91 B.R. 489, 494 (Bankr. S.D. Iowa 1989). See also In re Anastas, 94 F.3d 1280, 1285 (9th Cir. 1996). If AT&T can prove that Broerman had neither the ability nor the intention to pay for the charges she incurred, it will have proved the first three elements of the test under §523(a)(2)(A).

This case presents the Court with a "credit card kiting" scenario. Credit card kiting occurs when a debtor "uses cash advances on one credit card to make the minimum payments on another credit card and has no intention to pay for the money, property or services received . . . ." Citibank (South Dakota), N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1088 (9th Cir. 1996). The Eashai court describes credit card kiting as creating the illusion of an honest debtor, because minimum payments are

being made, while allowing a debtor to pile on increasing amounts of debt. Id. The credit card kiter thus hides her fraudulent intent not to repay her debts. Id.

The intent to deceive is the most important element in establishing a credit card kiting scheme. Id. at 1090. The debtor's intent is very difficult to prove; however, circumstantial evidence may be used. AT&T Universal Card Services v. Miller (In re Miller), No. 96-62499-W, Adv. No. 97-9007-W (Bankr. N.D. Iowa May 12, 1998); Eashai, 87 F.3d at 1090. 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 an attorney had been consulted concerning 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;
11) the debtor's employment circumstances; and
12) the debtor's prospects for employment.

AT&T Universal Card Services v. Fonza (In re Fonza), No. 96-4929-CH, Adv. No. 97-97034, at 7 (Bankr. S.D. Iowa July 30, 1998) (J.Hill Dec. Bk. #305). See also Eashai, 87 F.3d at 1087-88; First Deposit National Bank v. Cameron (In re Cameron), 219 B.R. 531 (Bankr. W.D. Mo. 1998). "The goal in applying these factors is to determine whether a particular debtor knew she would be unable to repay the specific debt, which knowledge obviously leads to the conclusion that debtor incurred the debt intending not to repay it." Cameron, 219 B.R. at 537.

Considering these factors, the Court finds that Broerman intended to deceive AT&T at the time she made charges on her credit card. Those factors which weigh in favor of finding intent to deceive in

this case include the large number of charges that were made, the amount of the charges, the fact that the debtor went over her credit limit, and her general financial condition.

Indeed, it is hard not to believe that Broerman knew she would be unable to repay the debts she incurred. Broerman had an income of $868.21 per month from social security and retirement benefits. By using several credit cards, she was able to live well beyond her means and keep up with her minimum monthly payments for a period of time. Between April, 1995 and September, 1996, Debtor took a total of $24,388.72 in cash advances against her various credit cards. It would simply be unreasonable for Broerman to think that she would be able to repay this debt on her income, especially considering the fact that she had no prospects for increased income or employment. Her credit card kiting activity created a misrepresentation that she had the ability and intention to repay her debts when, in fact, she knew she would be unable to repay them. Even though she knew this, Broerman decided to keep up the charade, knowing that her credit card accounts would likely be closed if she didn't try to keep up with her minimum balances. It was in this way that Broerman knowingly and intentionally deceived her creditors. AT&T has thus established the first three elements of its 11 U.S.C. §523(a)(2)(A) claim.

The next element, justifiable reliance, is established as well. As the Eashai court stated,

> [I]n a kiting case, the creditor continues to extend credit to the debtor in reliance on the fact that the debtor's credit card account is not in default. . . . Presumably, if the creditor knew the true state of the debtor's financial affairs and intentions, the creditor would revoke the debtor's credit card or deny the debtor's request for a credit card. Thus, by kiting, the debtor induces the creditor to refrain from action in reliance on the appearance of the debtor's intent to repay.

Eashai, 87 F.3d at 1091. There is no indication in this case that AT&T was put on notice as to the true state of Broerman's financial affairs. Broerman made her minimum payments regularly up until

September of 1996, at which time her kiting activity could no longer be maintained. The debt to AT&T will be held nondischargeable.

ORDER

IT IS THEREFORE ORDERED that the credit card debt owed by Mary Broerman to AT&T Universal Card Services is excepted from discharge under 11 U.S.C. §523(a)(2)(A).

Dated this ___19th_____ day of January, 1999.

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