UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-10124-JMD
Chapter 7

Roselind Bresnahan,
Debtor

Dorothy A. Ayoob,
Plaintiff

v. Adv. No. 99-1062-JMD

Roselind Bresnahan,
Defendant

Robert V. Johnson, II, Esq.
LAW OFFICES OF ROBERT V. JOHNSON, II, PLLC
Attorney for Plaintiff

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MEMORANDUM OPINION

I. BACKGROUND

Before the Court is a complaint filed by Dorothy A. Ayoob (the "Plaintiff") against Roselind Bresnahan (the "Debtor"), which seeks to have a debt owed from the Debtor to the Plaintiff declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).[1] A trial was held on January 6, 2000, at which time both parties presented documentary and testimonial evidence in support of their respective positions. Although the legal issues raised by this proceeding are narrow, the factual circumstances upon which they turn are in dispute.

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[1] Unless otherwise noted, all section references hereinafter are to Title 11 of the United States Code.

The parties' relationship began in 1993, when the Debtor started working for a business owned by the Plaintiff and her husband. The Debtor was initially employed as a secretary. After becoming acquainted with the Debtor personally, the Plaintiff made numerous personal loans to the Debtor at the latter's request. The debt at issue flows from the Plaintiff's sale of an automobile to the Debtor, which occurred during July 1997.

Before July 1997, the Plaintiff was the owner of a 1992 Ford Escort (the "Escort").[2] The Plaintiff desired to sell the Escort. At trial, the Plaintiff testified that there were two parties interested in purchasing the vehicle: the Debtor and another employee of the Plaintiff's business. At this point, the parties' testimony and representations diverge. The Plaintiff testified that the Debtor offered $4,500.00 for the vehicle, to be paid in a lump-sum. More specifically, the Plaintiff testified that the Debtor affirmatively stated that she had already sold her own vehicle and would pay the $4,500.00 purchase price for the Escort from the proceeds of the Debtor's sale as soon as she received the buyer's check, and that she would make

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[2] In actuality, the titled owners of the Escort were Richard S. Goonan and Melanie U. Goonan. See Ex. 5, N.H. Certificate of Title. Richard Goonan is related to the Plaintiff. The Plaintiff co-signed the original note that financed the purchase of the Escort by the Goonans. See Ex. 1, Retail Installment Contract dated September 28, 1995. After the Goonans separated, Melanie Goonan returned the vehicle to the dealer as a "voluntary repossession." At the time, the Goonans were four months behind regarding payments on the note. To protect her status as a co-signor, the Plaintiff paid the arrearage due on the note and took possession of the Escort. In addition to paying for numerous repairs to the Escort, the Plaintiff paid Chrysler Financial $4,900.13 in full payment of the note that she co-signed. See Ex. 4, Letter and Copy of Check to Chrysler Financial dated June 23, 1997. In an effort to recoup her expenditures, the Plaintiff obtained a power of attorney from Richard Goonan enabling her to sell the Escort, which was necessary given the fact that, at the time, Richard Goonan was overseas in the military. See Ex. 3, Special Power of Attorney dated May 7, 1997. At trial, the Plaintiff testified that she and Richard Goonan agreed that any proceeds from a sale of the Escort would belong to the Plaintiff given the fact that she had paid off the arrearage on the note and had satisfied the note in full. Accordingly, the Court concluded at trial that the Plaintiff was the beneficial owner of the vehicle at the time it was sold to the Debtor. Therefore, for reasons of simplification, the Court shall refer to the Plaintiff as the former owner of the Escort in resolving the instant matter.

This Court's conclusion that the Plaintiff was the beneficial owner of the Escort at the time of sale was instrumental in its denial of a motion to dismiss filed by the Debtor on December 30, 1999. The Debtor's motion to dismiss was largely premised on the argument that the Plaintiff did not own the Escort at the time of sale and that therefore the Plaintiff did not have standing as a creditor to object to the discharge of the debt resulting from the sale. Because the Court concluded that the Plaintiff was the beneficial owner of the Escort, it denied the motion to dismiss at trial.

up any difference through money from her brother. The Plaintiff also testified that the other party interested in the Escort also offered $4,500.00, but desired installment financing from the Plaintiff. The Plaintiff testified that she accepted the Debtor's offer primarily because payment was to be made in a lump-sum. The Plaintiff further testified that shortly after accepting the Debtor's offer, she endorsed the back of the title in favor of the Debtor, and then physically gave such title to the Debtor. Sometime in early July 1997, the Debtor took possession of the Escort. The Debtor had not yet remitted the purchase price to the Plaintiff.[3]

In early September 1997, the Debtor quit her employment with the Plaintiff's business. The Plaintiff testified that when the Debtor came to pick up her final paycheck in early September 1997, the Plaintiff produced a promissory note for $5,472.17, which included the amount due from the sale of the Escort. See Ex. 10, Promissory Note dated September 3, 1997. The Plaintiff testified that the Debtor voluntarily signed the note, which envisioned monthly payments of $40.00. The Plaintiff further testified that she received a call from the Debtor in January 1998 requesting that the payments be reduced to $20.00 per month until the Debtor found new employment. The Plaintiff testified that she agreed to such a modification and that she received eight $20.00 payments from the Debtor during 1998.

The Debtor offers a different account of the arrangement between the parties concerning the sale of the vehicle. The Debtor testified that she offered to purchase the Escort for $4,500.00 and that payment would be made through payroll deductions of $40.00 per week. The Debtor testified that the Plaintiff agreed to this arrangement and that no representation was made concerning payment in a lump-sum. The Debtor testified that she did sign a promissory note in September 1997, but that she felt compelled to do so since it was her impression that receiving her final paycheck was conditioned upon her signing the note.

The Debtor filed for bankruptcy under Chapter 7 on January 19, 1999. The Plaintiff and her husband are listed as unsecured creditors on the Debtor's Schedule F. The Plaintiff argues that the

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[3] It is undisputed that the Debtor did not grant, and the Plaintiff did not perfect, a security interest in the Escort. Accordingly, the Plaintiff holds an unsecured claim.

Debtor's conduct in connection with the purchase of the Escort triggers the application of § 523(a)(2)(A), thus making the resulting $4,340.00 debt owed to the Plaintiff nondischargeable.[4]

The Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

A. Elements of the Plaintiff's Claim

The Plaintiff grounds her complaint solely within § 523(a)(2)(A). Section 523(a)(2)(A) provides that a debt for money or property is nondischargeable if it is obtained by "false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). The Plaintiff bears the burden of proof with respect to each element of § 523(a)(2)(A), a burden that must be satisfied by a preponderance of the evidence. See Palmacci v. Umpierrez, 121 F.3d 781, 787 (1st Cir. 1997). Moreover, "'[e]xceptions to discharge are narrowly construed in furtherance of the Bankruptcy Code's 'fresh start' policy,' and, for that reason, the claimant must show that his 'claim comes squarely within an exception enumerated in Bankruptcy Code § 523(a).'" Id. (quoting Century 21 Balfour Real Estate v. Menna (In re Menna), 16 F.3d 7, 9 (1st Cir. 1994)).

To satisfy her burden under § 523(a)(2)(A), the Plaintiff must prove the following:

1. The Debtor made a false representation;
2. She did so with fraudulent intent – i.e., with scienter;
3. She intended to induce the Plaintiff to rely on the misrepresentation;
4. The misrepresentation actually induces reliance that is justifiable; and
5. The Plaintiff suffered damages.

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[4] The Plaintiff alleged that the debt at issue amounts to $4,340.00, which encompasses the $4,500.00 purchase price for the vehicle, minus the eight $20.00 payments received from the Debtor. The Debtor did not contest this amount at trial. Accordingly, the Court finds the relevant debt to equal $4,340.00.

See Palmacci, 121 F.3d at 786; Reilly v. Beeman (In re Beeman), 225 B.R. 522, 528 (Bankr. D.N.H. 1998); AT&T Universal Card Serv. Corp. v. Searle, 223 B.R. 384, 388 (Bankr. D. Mass. 1998). The key issue in this proceeding is what the Debtor represented to the Plaintiff regarding payment terms when the parties agreed that the Debtor would buy the Escort. As the Court noted at the conclusion of the trial, without dispute from either party, the subsequent promissory note merely memorialized and amended the parties' agreement and is not the pertinent time of inquiry for purposes of § 523(a)(2)(A). The Plaintiff alleges that at the time of the parties' agreement, the Debtor stated that she would make a lump-sum $4,500.00 payment once she received the proceeds from the sale of her car, with any deficiency to be made up from money received from the Debtor's brother. The Plaintiff argues that this statement constitutes a false representation for purposes of § 523(a)(2)(A), and that the remaining elements of that section are satisfied. The Debtor, on the other hand, argues that no such representation was made and that therefore the initial requirement of § 523(a)(2)(A) – that there be a false representation – is not satisfied. Distilled to its essence, the instant controversy is a battle of divergent accounts of the same transaction.

In order to prove the initial element of § 523(a)(2)(A) (i.e., that the Debtor made a false representation), the Plaintiff must show that at the time of making the relevant representation, the Debtor did not intend to perform the stated promise. See Palmacci, 121 F.3d at 787. However, here there is a question of whether the representation as alleged by the Plaintiff – that the Debtor was to pay the purchase price in a lump-sum – was even made. If this question is answered in the negative, then the Plaintiff's complaint is summarily short-circuited.

B. Evidence Presented

The circumstantial evidence presented by the parties fails to shed much light on the question of what the Debtor represented at the time of the relevant transaction. The testimony of the parties is in direct conflict on the terms of payment. As discussed, the Plaintiff testified that the Debtor offered to pay $4,500.00 for the Escort in a lump-sum upon receiving the proceeds from the sale of her old car, while the Debtor testified that the terms required her to pay $40.00 per week for the car as she had done with prior loans from the Plaintiff and her husband.

The documentary evidence submitted by the Plaintiff shows that immediately following the transfer of the vehicle to the Debtor, the Debtor's weekly payments to the Plaintiff increased from $14.09 to $73.28. See Ex. 11, Summary of Payments from Debtor to Plaintiff. In order to understand the significance of the change in weekly payments, the history of the loan relationship between the Plaintiff and the Debtor must be examined. The Debtor had borrowed money from her employer, the business operated by the Plaintiff and her husband, from time to time since January 1995. The evidence submitted by the Plaintiff shows that the Debtor made weekly payments to the Plaintiff's business on a regular basis in amounts varying between $10.00 and $14.09 per week, with occasional larger lump-sum payments. See id. The Plaintiff and her husband never charged the Debtor interest on any of the loans. The initial loan to the Debtor was $285.22 on January 31, 1995, followed by a loan of $200.00 on February 18, 1995. On March 31, 1995, the Plaintiff and her husband loaned $3,400.00 to the Debtor resulting in an outstanding balance of $3,785.22. Over the next two years the Debtor made regular payments and reduced the balance owed to $1,485.16 as of July 9, 1997, less than a week before the transfer of the Escort.

The increase in the weekly payments from $14.09 to $73.29, an increase of $59.20, and the timing of the increase tend to support the Debtor's testimony that she had agreed with the Plaintiff to pay $4,500.00 for the Escort through weekly payments of $40.00 each. The Plaintiff testified that the increase was not due to any agreement on time payments for the Escort, but due to an agreement between the parties concerning the acceleration of payments on the previous loans from the Plaintiff to the Debtor. However, after two and one-half years of regular periodic payments, a large increase in the weekly payment immediately after the sale of the Escort is questionable in the absence of any testimony with respect to a significant change in circumstances. No such evidence was offered. On the other hand, the Debtor's testimony regarding an agreement for the payment of $40.00 per week on the Escort would result in the Escort being paid off in 113 weeks, or just over two years.[5] In fact, if the new weekly payment in the

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[5] The Court assumes that if the parties had agreed upon the Debtor paying $40.00 per week for the Escort that no interest would be charged. The Plaintiff testified that no interest was charged on the prior personal loans to the Debtor and the Plaintiff's computation of the amount due on the sale of the Escort reflects no interest calculation. See Ex. 11, Summary of Payments from Debtor to Plaintiff.

amount of $73.29 were maintained on the Escort loan and the personal loans, the entire balance would be paid in 81 weeks or 20 months. The evidence regarding the history, timing, and amount of periodic payments from the Debtor to the Plaintiff and her husband tends to support the Debtor's testimony on the terms of the sale of the Escort.

However, the evidence also shows that the Plaintiff paid $282.88 to have the Escort released from a repair shop and a total of $5,649.13 to Chrysler Credit on account of her guarantee of the loan on the vehicle. After agreeing to sell the Escort to the Debtor, the Plaintiff paid a total of $1,931.01 to two different repair shops to fix problems with the Escort. The Plaintiff claims that after paying $7,863.02 for a car she did not need, in order to protect her credit history, she wanted to sell the Escort for a lump-sum to recover as much as possible in an expedited manner. The Court finds the Plaintiff's testimony on the reasons for wanting an immediate lump-sum payment to be credible and supportive of her claim regarding the terms of payment.

The Debtor testified that her old car was parked at the Plaintiff's business premises for approximately three weeks after the transfer of the Escort to her, and that she accepted telephone calls from prospective purchasers at work and showed her car to prospective buyers at the Plaintiff's business premises. Based upon such testimony, the Court can infer that the Plaintiff was aware of the fact that the Debtor's car had not been sold and knew of the date on which it was sold. However, the Plaintiff testified that she thought that the Debtor's car had been sold at the time she transferred the Escort to her and that the Debtor was merely awaiting a check. In addition, the Court can infer that the Plaintiff would also be aware that the Debtor's old car was the same year and make as the Escort, but with higher mileage. Accordingly, it would be logical for the Plaintiff to conclude that the Escort was in better condition than the Debtor's old car and that the sale of the old car would not generate sufficient cash to pay the $4,500.00 selling price for the Escort in a lump-sum. The Plaintiff's answer to this conundrum is that the Debtor represented that she would borrow any shortfall from her brother. However, the Plaintiff presented no evidence that after the sale of the Debtor's old car on August 8, 1997, she pressed the Debtor for the proceeds from that sale or for the completion of a loan from her brother. In fact, no evidence was

presented regarding the terms of sale or the amount of proceeds from the Debtor's sale of her old car. The Plaintiff's evidence does show that the weekly payments of $73.29 continued through the month of August until the Debtor's employment with the Plaintiff and her husband ceased on August 23, 1997. The Court finds the evidence regarding the sale of the Debtor's old car as tending to support the Debtor's testimony on the terms of payment.

The ultimate answer to the question of whether the Debtor agreed to pay the Plaintiff in a lump-sum would appear to turn on the credibility of the parties at trial. A problem with this view, however, is that it implies a condition of mutual exclusivity: if one party is found to be credible, the implication is that the other is not. Although the parties' testimony in this case regarding the representations made is directly at odds, the Court finds both parties credible to some degree and their testimony to be supported by the documentary evidence. Based upon all of the evidence presented, the Court believes that both parties, at the time of the relevant transaction, may have understood the payment terms to be as they testified and represented in their pleadings. Human cognitive powers are not infallible; it is reasonable to infer from the evidence that the parties' minds did not meet at the time of the transaction although it was their impression that they did. At best, the circumstantial evidence offered by the parties is equivocal.

C. Burden of Proof

Because the Plaintiff bears the burden of proving all the elements of her § 523(a)(2)(A) claim, her claim must fail. The Plaintiff has not proven by a preponderance of the evidence that, at the time of the relevant transaction, the Debtor promised that she would pay the purchase price in a lump-sum and that she did not intend to perform such a promise. Moreover, the Court finds that the Plaintiff has not carried her burden with respect to the second element of § 523(a)(2)(A): that the Debtor acted with scienter. To prove scienter, the Plaintiff must show that the Debtor acted with an actual intent to mislead or was reckless in disregarding the truth of a representation. See Palmacci, 121 F.3d at 788-89. See also Searle, 223 B.R. at 390. Based upon the analysis above, the Court finds that the Plaintiff has not shown, by a preponderance of the evidence, that the Debtor acted with an intent to mislead or in a reckless manner. It is the Court's view that the Debtor understood that payment would be made in installments and that she intended to

follow through with such payments as evidenced by the seven $73.28 payments she made after the sale of the Escort in 1997 and the eight $20 payments made on the debt during 1998. See Williamson v. Busconi, 87 F.3d 602, 603 (1st Cir. 1996) ("'[S]ubsequent conduct may reflect back to the promisor's state of mind and thus may be considered in ascertaining whether there was fraudulent intent' at the time the promise was made . . . .") (quoting Krenowsky v. Haining (In re Haining), 119 B.R. 460, 464 (Bankr. D. Del. 1990)). Accordingly, the Court finds that the Plaintiff has not proven the second element of her § 523(a)(2)(A) claim. Given the Court's conclusion that the Plaintiff has failed to prove a false representation, it finds that the Plaintiff has not proven the third and fourth elements of § 523(a)(2)(A) (i.e., that the Debtor intended to induce the Plaintiff to rely on the misrepresentation and that the misrepresentation induced justifiable reliance) since these elements, as a threshold matter, require the existence of a misrepresentation.

III. CONCLUSION

For the reasons stated above, the Court finds that the Plaintiff has not carried her burden of proof with respect to her claim under § 523(a)(2)(A). Accordingly, the Debtor's $4,340.00 debt to the Plaintiff is dischargeable. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate judgment in accordance with this opinion shall be entered.

DONE and ORDERED this 2nd day of February, 2000, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge