

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION**

IN RE: MELISSA J. MAIORELLE

**4:02-bk-10612 E
CHAPTER 7**

CITICORP CREDIT SERVICES, INC.

PLAINTIFF

VS.

AP NO.: 4:02-ap-1090

MELISSA J. MAIORELLE

DEFENDANT

ORDER

On September 18, 2002, the Court heard Creditor Citicorp Credit Services, Inc.'s ("Citicorp") Complaint to Determine and Deny Dischargeability in this Chapter 7 case, and took the matter under advisement. Debtor, who was also present, appeared through her attorney, C.T. "Bud" West. Plaintiff appeared through its attorney, Christian Frank.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). This Order shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule of Procedure 7052.

FACTS

Debtor filed a petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code on January 18, 2002. Plaintiff's Complaint asks the Court to find that certain prepetition charges made by the Debtor on two Citicorp credit card accounts are nondischargeable.

In May 2000, Debtor opened Citibank Advantage World Mastercard account number [REDACTED] [REDACTED] (the "Citibank" card) with a credit limit of \$5,000.00. Debtor opened AT&T Universal account number [REDACTED] (the "AT&T" card) with a credit limit of

\$5,000.00 in August 2000.

Ms. Lacy Carroll, a trial manager employed by Citicorp, testified regarding the procedure used when extending credit to a new cardholder. She explained that Citicorp conducts a credit check before issuing the card and continues to conduct credit checks on a quarterly basis to check for any “red flags.” If no red flags are present, the credit limit remains the same. Ms. Carroll explained that when charges are made on the card, there is an electronic approval process, and if approved, Citicorp must pay the charge. In return, the cardholder agrees to pay back charges made, and Citicorp relies on that promise.

At the time Debtor opened the Citicorp accounts, she lived in Anchorage, Alaska where she managed an apartment building and made approximately \$44,000.00 per year. Debtor testified that she was responsible for 800 apartments and routinely dealt with budgets and expenditures. The Debtor moved to Arkansas in May 2001, and between May and October 2001, she worked at several low-paying jobs. She testified that she worked for Nuvell in June 2001 making \$11.00 per hour plus a 13.0% differential. Debtor then went to work for Career Staffing, an employment agency, who placed her with OD Funk Manufacturing, Inc. at \$9.00 an hour. Debtor subsequently reached an agreement with OD Funk to work full-time on salary where she made \$1,700.00 per month after taxes. She worked there through September 2001 and was laid off due to a slow down in business following September 11, 2001.

Debtor is currently employed by the State at an annual salary of \$23,900.00. She applied for a different State job that paid an annual salary of \$30,000.00 but was told she needed more experience with the State. The Debtor has a bachelor’s degree in psychology and testified that she has management experience, and believed she would find a better job when she moved to Arkansas, and still believes she will eventually find higher paying work. Debtor testified that she currently has

no home and is living with various friends and family members.

Plaintiff submitted the following credit card statements on the Citibank card as Plaintiff's

Exhibit 1:

Statement closing September 25, 2001 (the "**September 2001 statement**");

Statement closing October 25, 2001 (the "**October 2001 statement**");

Statement closing November 27, 2001 (the "**November 2001 statement**");

Statement closing December 26, 2001 (the "**December 2001 statement**"); and

Statement closing January 25, 2002 (the "**January 2002 statement**").

The September 2001 statement shows a balance of \$264.25 for purchases made at a Wal-Mart Supercenter in Jacksonville, Arkansas on September 22, 2001. Ms. Carroll testified that prior to this charge, there was no outstanding balance on Debtor's Citibank card. The October 2001 statement shows that the Debtor made the minimum payment due of \$20.00 and charged a total of \$4,979.07 between October 4, 2001 and October 19, 2001. By that time, Debtor had exceeded her credit limit by approximately \$250.00. Of the charges made on the Citibank card in October 2001, \$1,075.48 were incurred at Wal-Mart supercenters on the following dates and amounts: October 4 - \$84.36; October 5 - \$112.43; October 6 - \$297.80; October 15 - \$208.67; and October 16 - \$372.22. Additionally, a cell phone payment of \$266.39 was made to Suncom Wireless, and a purchase of \$229.63 was made at Sports Fan Outlet. Debtor also transferred a balance of \$3,300.00 from another account on October 11, 2001 to the Citibank card. The November 2001 statement reflects that additional purchases of \$335.16 were made on October 31, 2001, and all but \$14.00 of these purchases were made at Wal-Mart. Because the Debtor exceeded her credit limit and did not make the required monthly payment, the interest rate on the Citibank card was subsequently increased from 16.4% for regular purchases to 24.99% as reflected on the December 2001 statement. The remaining

statements reflect that finance charges continued to accrue as Debtor failed to make payments on the account.

Plaintiff submitted the following credit card statements on the AT&T card as Plaintiff's Exhibit 2:

September 8 - October 5, 2000 (the "**September 2000 statement**");

December 7 - January 5, 2001 (the "**December 2000 statement**");

January 6 - February 6, 2001 (the "**January 2001 statement**");

June 7 - July 6, 2001 (the "**June 2001 statement**");

July 7 - August 7, 2001 (the "**July 2001 statement**");

August 8 - September 6, 2001 (the "**August 2001 statement**");

September 7 - October 5, 2001 (the "**September 2001 statement**");

October 6 - November 6, 2001 (the "**October 2001 statement**");

November 7 - December 6, 2001 (the "**November 2001 statement**");

December 7 - January 7, 2002 (the "**December 2001 statement**"); and

January 8 - February 6, 2002 (the "**January 2002 statement**").

The September 2000 statement reflects no charges or other account activity. The December 2000 statement reflects that charges of \$421.37 were made, and the January 2001 statement reflects that this balance was paid in full. The June 2001 statement shows that Debtor transferred a balance of \$2,500.00 to the AT&T card on June 27, 2001 for a total balance due of \$2,504.73 including finance charges of \$4.73. The July 2001, August 2001, and September 2001 statements indicate that payments were made on the outstanding balance, finance charges were incurred and no other charges were made on the account. In sum, other than the balance transfer of \$2,500.00 made in June 2001, no charges were made on this account until October 6, 2001.

The October 2001 statement reflects charges of \$1,701.23 made to the account between October 6, 2001 and November 5, 2001, and a cash advance of \$1,000.00 taken out on October 13, 2001. Of the total charges made on the account during this period, the statement reflects that \$1,217.45 of the charges were made at various Wal-Marts in central Arkansas on five separate days. Two charges were made at Wal-Mart on October 6 for \$12.07 and \$341.34, respectively; one on October 10 for \$138.79; one on October 17 for \$49.06; four on October 20 for \$10.60, \$23.01, \$149.08 and \$269.79, respectively; and three on October 27 for \$75.04, \$20.12 and \$128.46, respectively. Additionally, a cell phone payment of \$217.18 was made to Suncom Wireless on November 5, 2001. At the close of this statement, Debtor had exceeded the credit limit on this account by approximately \$65.00. Because the Debtor exceeded her credit limit and did not make the required monthly payment, the interest rate on the AT&T card was subsequently increased from 10.9% for regular purchases to 24.99% as reflected on the November 2001 statement. The remaining statements reflect that finance charges continued to mount as Debtor ceased making payments on the account.

Debtor acknowledged that she made the charges reflected on the Citibank and AT&T statements introduced in evidence. When questioned about these charges, Debtor testified that she was in the process of consolidating her credit cards and trying to pay off her debts. Debtor acknowledged that most of the charges were made at Wal-Mart and does not dispute that the total amount charged from Wal-Mart equaled approximately \$2,900.00. Debtor testified that the items purchased at Wal-Mart included clothes, bedding, food, cigarettes and gas among other things. Debtor explained that the cell phone charges were for two separate months' bills, and that the bills were high because she had no other phone and was job hunting. Debtor testified that she was trying to lower her expenses during this time period, and that she traded in her car to reduce her car

payment from \$388.00 to \$270.00 per month. Debtor explained that while she was trying to reduce her expenses, she had some extraordinary expenses during this time period such as living in Jonesboro, Arkansas for six weeks for job training, paying storage fees in Alaska, purchasing new clothes for work and paying for Cobra health insurance. Debtor testified that she expected to be able to repay the credit card balances when she made the purchases in September and October of 2001.

DISCUSSION

If a debtor obtains money or an extension of credit by false pretenses, false representation or actual fraud (other than a statement respecting the debtor's financial condition), such debt is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A). Plaintiff contends that Debtor committed fraud by using the Citicorp and AT&T credit cards from late September through early November 2001 with no intention of repaying the charges made. Accordingly, Plaintiff seeks to except from Debtor's discharge the charges made during that time period including cash advances and balance transfers. Plaintiff introduced into evidence two affidavits by Leslie Andrews, Unit Manager for Citicorp, declaring that the sums of \$5,746.33 and \$2,768.28 are currently due on the Citibank and AT&T cards respectively. The balance on the AT&T card was reduced by the \$2,500.00 balance transfer made before the time period at issue and accrued interest thereon. Debtor maintains that she made no oral or written misrepresentation amounting to fraud, and that she intended to repay the charges made on the credit cards.

To succeed in a § 523(a)(2)(A) claim, a creditor must prove five elements: (1) the debtor made a representation; (2) the debtor knew the representation to be false at the time; (3) the debtor made the representation with the intent of deceiving the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor sustained the alleged loss and damage as a proximate result of the representation. *See Thul v. Ophaug (In re Ophaug)*, 827 F.2d 340, 342 n. 1 (8th Cir. 1987 as

supplemented by *Field v. Mans*, 516 U.S. 59, 69, 116 S.Ct. 437, 443 (1995) (expressly stating that justifiable reliance rather than reasonable reliance is required). The creditor seeking to except a claim from discharge bears the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

In the context of credit card debt, the first element of the five-part test, the requirement of a representation, is satisfied when the debtor uses the card. “At that point, the debtor represents an intent to perform the unilateral contract by repaying the amount charged.” *Sears v. McVicker (In re McVicker)*, 234 B.R. 732, 736 (Bankr. E.D. Ark. 1999). The second element of the five-part test is met if a card holder uses a credit card without an intent to repay. With no intent to repay, the card holder has made a false representation with the knowledge that his representation is false. *Id.* at 736-737. The debtor’s use of the card with no intent to repay also satisfies the third element of the five-part test because the debtor’s use of the card with fraudulent intent shows that he also means to deceive the card issuer. *Id.* “This is so because the debtor’s purpose in making the fraudulent representation is to obtain credit from the creditor even though the Debtor has no intention to repay.” *Id.* (citations omitted). Accordingly, if a creditor proves the card holder lacks the intent to repay when charges are made, the creditor satisfies the first three elements of the five-part analysis. *Id.*

Credible direct evidence of a debtor’s intent to repay is rarely available; accordingly, courts infer lack of intent to repay by examining the facts and circumstances of the case. *See Sears v. McVicker*, 234 B.R. at 737 (citing *Thorp Credit & Thrift Co. v. Pommerer (In re Pommerer)*, 10 B.R. 935, 939-940 (Bankr. D. Minn. 1981). Bankruptcy Courts have examined the following factors to determine a debtor’s intent to repay: (1) the length of time between the credit card charges and bankruptcy filing; (2) whether debtor consulted an attorney regarding bankruptcy before making the charges; (3) the number of charges made; (4) the amount of the charges; (5) the debtor's financial

condition at the time the charges were made; (6) whether the charges were above the credit limit; (7) whether multiple charges were made on the same day; (8) whether the debtor was employed at the time; (9) the debtor's prospects for employment; (10) the debtor's sophistication; (11) whether there was a sudden change in debtor's buying habits; and (12) whether purchases were for luxuries or necessities. *Id.* (citations omitted).

In addition to proving that the debtor had no intent to repay, the creditor must also prove that it justifiably relied upon the debtor's false representation and sustained a loss as a result. "Courts have found reliance exists when use of the card by the debtor forces the credit card issuer to honor its guarantee of payment to the merchant." *Sears v. McVicker*, 234 B.R. at 741 (citations omitted). Again, the required reliance must be justifiable, as opposed to reasonable. *See Field v. Mans*, 516 U.S. at 72, 116 S.Ct. at 445-46. "Justifiable reliance is a subjective standard based on the qualities and characteristics of the particular plaintiff and surrounding circumstances of the case." *Sears v. McVicker*, 234 B.R. at 741 (citing *Field v. Mans*, 516 U.S. at 70-71, 116 S.Ct. at 444).

Debtor's Intent to Repay.

Debtor made a representation to Citicorp that she would repay the charges made on the Citibank and AT&T cards each time she used the cards. Based on the evidence presented at trial, the Court finds that Debtor had no intention of repaying the charges made between late September and early November 2001, and accordingly, Debtor made false representations to Citicorp with the knowledge that those representations were false each time she used the cards during that time period.

The Court reaches its decision by applying the factors outlined above. Given the number and amount of charges made between September 22, 2001 and November 5, 2001 and the Debtor's lack of stable employment during this time, it is clear the Debtor had no intent to repay these charges. The charges made during this time period are not only significant, but difficult to comprehend. The

numerous charges to Wal-mart, many of which were for amounts ranging from \$150.00 to \$400.00, in such a short period of time could not conceivably have been made for basic necessities such as groceries, clothes and household items. Additionally, Debtor made many of these purchases at Wal-Mart on the same day. The cell phone charges of almost \$500.00 for two months are also too high to be categorized as a necessity. The charges also mark a dramatic increase in Debtor's spending habits based on the evidence presented at trial. Prior to that date, Debtor had no outstanding balance on the Citibank card and only a transferred balance on the AT&T card (which Citicorp does not ask to be excepted from Debtor's discharge). No evidence was presented to show that Debtor routinely charged thousands of dollars in that short a period of time.

The Debtor contends that she recently moved to Arkansas and was making less money than she did in Alaska, and thus, used the credit cards to make ends meet during a difficult time. Again, if the credit card debt could have conceivably been incurred for necessities, the Debtor's financial condition may weigh in favor of Debtor. However, Debtor admitted that she had little success in finding a good job in Arkansas in the four months that she lived here. She had been laid off following September 11, 2001, and had begun working for the State at approximately half of her salary in Alaska when the surge in charges occurred. Her financial condition was unstable at best, and she had no prospects for higher paying work in the near future. Rather, she was making far less money than she was accustomed to, had been through several jobs in the past four months, and despite circumstances that would lead to minimal spending, she charged nearly \$8,000.00 on these credit cards in approximately one month. Furthermore, Debtor exceeded her credit limit on both these credit cards. Given the Debtor's level of education and experience as the manager of an apartment complex, she has the sophistication to know that she would be unable to pay these credit cards off given her level of income, especially at the increased interest rates triggered by her

exceeding the credit limits and failing to make required payments on these cards.

Finally, the Court notes that there was no evidence presented that Debtor consulted an attorney regarding bankruptcy before making the purchases, and accordingly, that factor weighs in favor of Debtor. The final remaining factor regarding the length of time between the purchases made and Debtor's bankruptcy filing does not particularly weigh in favor of either party. While Debtor did not immediately file bankruptcy following the purchases at issue, she did so only three months later, just 30 days past the time in which luxury items purchased within 60 days of filing bankruptcy would be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(C).

In sum, the facts outlined above show by a preponderance of the evidence that Debtor had no intent to repay the charges made during the time period at issue, and accordingly, Debtor knowingly made false representations with the intent to deceive Citicorp when she used the Citibank and AT&T cards in and around October 2001.

Creditor's Reliance and Loss.

Again, Citicorp must also prove that it justifiably relied on the Debtor's fraudulent misrepresentations and suffered a loss as a result. When Debtor made the purchases at issue, Citicorp extended credit to Debtor for these purchases, and therefore, actually relied on the Debtor's contractual promise to repay. Citicorp's reliance on Debtor's promise to repay was also justified. Evidence was presented to show that Debtor had routinely made payments on her Citibank charge account and that the AT&T card had a zero balance prior to Debtor's spending spree in and around October 2001. Additionally, Citicorp's trial manager, Ms. Carroll, testified that Citicorp routinely runs credit checks on its account holders to check for red flags, and none had shown up with respect to the Debtor. Accordingly, Citicorp's reliance on the Debtor's contractual promise to repay was justified, and Citicorp suffered a loss in the amount of credit extended to the Debtor for the charges

made between late September and early November 2001.

CONCLUSION

For the reasons stated herein, the Court finds that Debtor knowingly made false representations to Citicorp by using her credit cards with no intent to repay the charges made. Citicorp justifiably relied on Debtor's contractual promise to repay, and suffered a loss as a result. Accordingly, the Plaintiff's complaint is **GRANTED**, and the following debts are excepted from Debtor's discharge pursuant to 11 U.S.C. § 523(a)(2)(A): \$5,746.33 on Citibank Advantage World Mastercard account number [REDACTED] and \$2,768.28 on AT&T Universal account number [REDACTED]

IT IS SO ORDERED.

HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATE: _____

cc: Mr. Christian Frank, attorney for plaintiff
Mr. C.T. "Bud" West, attorney for defendant
Mr. Richard Cox, Chapter 7 Trustee
U.S. Trustee