

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DOUGLAS W. ROGGATZ and
KRISTINE L. ROGGATZ

Bankruptcy No. 96-51803

Debtor(s).

Chapter 7

AT&T UNIVERSAL CARD SERVICES

Adversary No. 96-5197

Plaintiff(s)

vs.

DOUGLAS W. ROGGATZ and
KRISTINE L. ROGGATZ

Defendant(s)

ORDER RE: COMPLAINT TO DETERMINE DISCHARGEABILITY

The matter before the court is the final trial of Plaintiff's complaint to determine the dischargeability of debt under 11 U.S.C. § 523(a)(2)(A). Trial was held October 16, 1997 in Sioux City. Mark D. Reed appeared for Plaintiff AT&T Universal Card Services. Jeffrey T. Myers appeared for Debtor-Defendants Douglas W. Roggatz and Kristine L. Roggatz. The court now issues its findings and conclusions as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

Debtors filed their Chapter 7 bankruptcy petition July 22, 1996. They scheduled an unsecured debt of \$5,597.10 owed to AT&T Universal Card.

The account was opened February 10, 1994 with a credit limit of \$5,000. When AT&T issues a credit card, it mails a copy of the cardmember agreement with the card. Exhibit 1 is a copy of the agreement that was in effect for the Debtors' account.

In December 1994, at the Debtors' request, AT&T increased their credit limit to \$6,500. Exhibit 4. In January 1995, Douglas Roggatz telephoned AT&T to ask what the minimum payment would be on a balance of \$6,000. Id.

The account lay dormant for several months. The balance for the billing period ending August 5, 1995 was zero. Exhibit 3, page 3. The card was next used December 18, 1995. Exhibit 2. During the billing period ending January 5, 1996, the Debtors made 24 purchases and took three cash advances, giving them a new balance of \$3,036.93. Exhibit 2, pages 1-2. They paid \$64.00 toward this bill, the

minimum payment. In the next billing cycle ending February 5, 1996, the Debtors made 29 more purchases and took five cash advances, bringing their new balance to \$5,597.10. Exhibit 2, pages 3-4. They again paid the minimum payment, \$118.00. In the billing cycle ending March 5, 1996, the Debtors made 17 additional purchases and took three cash advances. The ending balance of \$6,585.17 was \$85.17 over their credit limit. Exhibit 2, pages 5-6. The Debtors made no further payments on their account. The debt to AT&T at the time of their Chapter 7 filing was \$6,964.31. Exhibit 3, page 1.

Sometime in March 1996, the Debtors retained Jeffrey Myers as bankruptcy counsel. They paid him \$675 for his fee and the filing fee. Exhibit 5, Statement of Financial Affairs, question 9. The check written to attorney Myers cleared the Debtors' account March 29, 1996. Exhibit 7, page 30.

The Debtors missed the AT&T payment due March 30, 1996. On April 8, a representative of AT&T telephoned them to inquire about the missed payment. Kristine Roggatz advised that they had hired a bankruptcy attorney and would probably be filing a Chapter 7 petition. Exhibit 4.

At the time the charges to the AT&T card were made, the Debtors had other credit cards, none of which had a zero balance. Their schedule of unsecured creditors included the following debt for credit cards:

Citibank	\$8,997.65
First Card	2,758.84
First Union Visa Gold	9,314.45
Sears	312.78
Wachovia	2,919.51

Exhibit 5, Schedule F. The only other unsecured claim listed was a medical bill for \$74. The balances on at least some of the other credit cards were near the credit limit. The Debtors took cash advances on the other cards. Douglas said they may have used one card to pay another.

The Debtors had total income of \$26,801 in 1994, \$24,101 in 1995, and \$30,487 in 1996. Exhibit 6, Form 1040, line 22.

During the years 1994 to 1996, Douglas was employed as a truck driver for various employers. Exhibit 6, tax returns; Exhibit 5, Statement of Financial Affairs, question 1. In 1994 and 1995, he had income from unemployment compensation in addition to wages. Exhibit 6, Iowa Form 1040, line 12. In April 1996, he began a job which gave him greater income than he had in 1995. He was employed at the better paying job when the Debtors filed their bankruptcy petition.

On the date of filing, the Debtors had monthly net income of \$1,797.33 and scheduled expenses of \$2,265. Exhibit 5, Schedules I and J. Debtors did not include their minimum monthly payments on credit cards in Schedule J; at the time of filing, that expense totaled between \$500 and \$600.

In 1994 and 1995, Kristine Roggatz worked for MCI, then for Colonial Manor. Exhibit 5, Statement of Financial Affairs, question 1. She left Colonial Manor in the summer of 1995, about the time her youngest child was born. She was not employed outside the home again until March 1996, when she began working one day a week as a cashier at the Pronto store in Anthon, Iowa.

The Debtors have four children. The youngest, Ethan, was born in July, 1995. He and another of the children have cerebral palsy. The older child is in school. One of the children has crossed eyes which requires wearing a patch. Most of the children's medical expenses are covered by insurance. The Debtors scheduled an expense of \$100 each month for out-of-pocket medical costs, including over-the-counter medications. The family qualifies for assistance offered by the Shriners organization. The family incurs other expenses related to the children's medical conditions. They have expenses for gasoline and wear and tear on their vehicle for frequent visits to doctors and physical therapy, including trips to Omaha and Minneapolis for medical treatment. Ethan needs special clothing, because he is unable to manage without clothing that snaps. Ever since Ethan's birth, the demands of attending to the children's medical needs have prevented Kristine Roggatz from obtaining full-time employment outside the home.

Kevin Claus is employed by AT&T as a bankruptcy specialist. When a card holder files a bankruptcy petition, Claus screens the account to determine whether to recommend filing a dischargeability action. Claus testified about AT&T's procedures for adding and maintaining accounts. He first described the screening process before issuing a card. AT&T obtains a list of persons with qualifying credit history from one of the three major credit bureaus. It uses a scoring system called "FICO" to predict the probability of a person being more than 90 days delinquent within two years. It mails solicitations to those who score above a certain range. When a person applies for a card, AT&T verifies the information with a second credit bureau. If the information matches, AT&T issues the card. AT&T continues to monitor each account. It calculates the card holder's FICO score quarterly from the date the account was opened. A poor FICO score could result in AT&T reducing the card holder's credit limit, reducing the availability of cash advances, or closing the account. AT&T also uses a scoring system called "MDS" to predict the risk the card holder will file a bankruptcy petition within two years.

The Debtors' FICO and MDS scores, Claus said, showed they were a good risk. AT&T issued them a gold card. The minimum annual income to qualify for the card was \$30,000.

DISCUSSION

AT&T claims the Debtors' debt is nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code, which provides that the Chapter 7 discharge does not discharge a debtor from 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)(2)(A). AT&T argues that the Debtors' use of the card constituted obtaining money, property, services or credit through false representations or actual fraud. To prove actual fraud, AT&T must show that: (1) the Debtors made a false representation; (2) at the time made, they knew the representation was false; (3) the representation was made with the intention and purpose of deceiving AT&T; (4) AT&T relied on the representation; and (5) AT&T sustained damage as a proximate result. Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987). AT&T's reliance must have been justifiable. Field v. Mans, 516 U.S. 59, 116 S.Ct. 437 (1995).

Use of a credit card has been construed as an implied representation that the card holder has the intention to pay for the charges incurred. Anastas v. American Savings Bank (In re Anastas), 94 F.3d 1280, 1285 (9th Cir. 1996).

Direct evidence of intent to deceive is rarely available; intent may be proved by circumstantial evidence. Citibank (South Dakota), N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1090 (9th Cir. 1996). Actual fraud in use of a credit card may be established by showing use of the card with no intention at the time of repaying the debt. Citibank South Dakota, N.A. v. Dougherty (In re Dougherty), 84 B.R. 653, 657 (9th Cir. BAP 1988) (quoting Sears Roebuck & Co. v. Faulk (In re Faulk), 69 B.R. 743, 753-54 (Bankr. N.D. Ind. 1986)). In cases involving the dischargeability of credit card obligations, this court has adopted a "totality of the circumstances" test in examining the debtor's knowledge and intent, and in determining whether a debtor has made credit card charges with no intention at the time of repaying them. AT&T Universal Card Services v. Feldhacker (In re Feldhacker), Adv. No. 96-5119XS, slip op. at 8 (Bankr. N.D. Iowa Sept. 5, 1997) (citing First Deposit National Bank v. Coates (In re Coates), Adv. No. L-90-0137C, (Bankr. N.D. Iowa April 1, 1991)).

The circumstances a court may consider include but are not limited to the following: (1) the length of time between the charges and the bankruptcy filing; (2) whether the debtor consulted an attorney about filing bankruptcy before debtor made the charges; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time of the charges; (6) whether the charges exceeded the credit limit on the account; (7) whether the debtor made multiple charges on the same day; (8) whether the debtor was employed; (9) the debtor's prospects for employment; (10) the debtor's financial sophistication; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the debtor purchased luxuries or necessities. Coates, slip op. at 7; Dougherty, 84 B.R. at 657.

The court will first consider Douglas's use of the card. Douglas said he made purchases at Menard's, Ben Fish Tire Co., Knoepfler Chevrolet, and Champion Auto. This accounts for six purchases totaling a little more than \$1,000. He also bought gas at the Casey's and Pronto stores, and may have taken some cash advances to have money with him when he was driving his truck. No one identified the expense at Menard's, but the other charges appear to have been for necessities. The Debtors explained that they have high auto expenses because of travel for medical treatment for their children. Auto expenses can become emergencies. The strongest factor supporting AT&T's claim against Douglas is his poor financial condition at the time of the charges. He was supporting his family on a modest income, and had already incurred substantial credit card debt. Basing nondischargeability on this factor alone, however, could improperly equate insolvency with fraud. In re Anastas, 94 F.3d at 1285-86; In re Eashai, 87 F.3d at 1089-90 (law should not "make every desperate, financially strapped debtor a guarantor of his ability to repay," quoting Karelin v. Bank of America Nat'l Trust & Sav. Ass'n (In re Karelin), 109 B.R. 943 (9th Cir. BAP 1990)). Taking into account the size and number of the charges Douglas made and the apparent necessity of the charges, the court concludes that his financial condition at the time the debt was incurred is not sufficient to create an inference of fraud in his use of the credit card.

As will be discussed below, the court concludes that Kristine's use of the card constituted fraud. Counsel for AT&T argued that her fraud should be imputed to Douglas because he was aware of the fraud and did not try to stop it. Douglas admitted that he knew Kristine was using the card, and that he was aware of their financial situation. These general statements are not sufficient to find actual fraud by him. Nor do the circumstances of this case warrant imputing Kristine's fraud to him. In order to impute the fraud of another to an innocent person for purposes of § 523(a)(2), a court must find that the individuals are in a partnership or agency relationship. See Walker v. Citizens State Bank of

Maryville, Missouri (Matter of Walker), 726 F.2d 452, 454 (8th Cir. 1984) (debtor was liable for debt for money obtained by fraud of wife, his agent in operation of his business, if he knew or should have known of the fraud); see generally 4 Collier on Bankruptcy ¶ 523.08[3] (15th ed. rev. 1997). AT&T has not argued that specific facts exist which would allow the court to find such a relationship. An agency relationship, for purposes of imputing fraud, does not exist between husband and wife solely by virtue of the marriage relationship. First USA, Inc. v. Savage (In re Savage), 176 B.R. 614, 615-16 (Bankr. M.D. Fla. 1994) (distinguishing Walker); see 41 Am.Jur.2d, Husband & Wife § 148 (1995) (marriage alone does not create agency between spouses); see also Cortright v. Pettit, 461 N.W.2d 202, 204 (Iowa App. 1990) (agency is "a fiduciary relationship resulting from the manifestation of consent by one person, the 'principal,' that another, the 'agent,' shall act on the former's behalf and subject to the former's control and from consent by the latter to so act"). The complaint will be dismissed as to Douglas Roggatz.

Kristine's use of the card was considerably different. She admits she made approximately 80% of the charges. Most telling about her use of the card was the speed in running up the balance. The account balance was zero from July through November, 1995. Beginning in mid-December, 1995, there was a sudden flurry of activity on the account. In the billing cycle ending January 5, 1996, the balance went from zero to \$3,036.93 in 17 days. During the next month, an additional \$2,569.53 was charged to the account. The card balance was over the \$6,500 credit limit when the last charges were made, just 66 days after the spending spree began. There had been charged a total of 69 purchases and 11 cash advances.

At the time of these charges, the Debtors were in poor financial condition. Kristine was not working. They had substantial debt from other credit cards. Kristine's unrestricted spending in light of their financial situation creates an inference that she made the charges in contemplation of filing bankruptcy. This inference is supported by the timing of paying their bankruptcy attorney's fees, approximately one month after the last purchase. Kristine's statement that she expected to be able to go back to work and repay the charges is not credible. Her testimony about her youngest son's illness indicates she had no reasonable expectation that she would be able to work full time in the foreseeable future. Her spending pattern was not consistent with someone trying to make ends meet. Her speed in spending the credit card limit makes it more likely that she was simply buying things she wanted and had no intent to pay for them.

Kristine claimed that her purchases were for basic household necessities, including clothing and over-the-counter medications. Her explanation does not account for the high level of spending. Other than a total of three charges to Pearle Vision and Grandview Ophthalmology, there was little evidence that the charges to the AT&T card were medically related expenses. Other charges that were probably in the category of necessities were \$59.35 at Payless Shoes, and a total of \$137.94 at grocery stores.

On the other hand, there appear to be numerous charges for luxuries: Dec. 19, Rex TV, \$818.94 for a video camera; Dec. 22, Rex TV, \$63.59; Jan. 2, DJ's Black Hills Gold, \$31.80 for jewelry; Jan. 5, Columbia House Video \$80.08; Jan. 10, United Church Directory, \$90.10 for photographs; Jan. 25, Hair By Stewarts, \$24.35 for permanents for the Debtors' daughters; Feb. 14, Victoria's Secret \$29.68; Feb. 14, Younker's, \$31.79 and \$60.10 for Valentine's Day gifts for the children. Exhibit 2.

Kristine made numerous purchases at discount department stores that likely included household items, but her pattern of activity indicates she was buying more than the usual monthly necessities. During the approximately two-month period, she spent more than \$400 in six trips to Kmart, over \$600 on 11 purchases at Target, and nearly \$800 on 10 purchases at Wal-Mart. At the same time, the Debtors were spending all their income, presumably also for living expenses, by writing checks. Exhibit 7,

pages 17-26. This appears to be a case of "loading up." Kristine essentially admitted as much. Kristine said she decided her children needed things, and this was how they were going to get them. The court finds and concludes that Kristine used the card with the intent at the time of not repaying the charges, and thereby obtained money, goods and services by fraud.

The court also concludes that AT&T has proved it justifiably relied to its detriment on Kristine's false representation regarding her intent to pay. A credit card issuer's reliance is evaluated by the debtor's previous payment history. If the issuer has had no warning of the debtor's intent not to repay, it will be held to have justifiably relied in continuing to extend credit. In re Eashai, 87 F.3d at 1091. AT&T's procedures for screening prospective card holders and for monitoring open accounts appear well designed to alert it to risk of default. In AT&T's review of the Debtors' account, there were no "red flags" which would have warned them of the default. For several months the account balance was zero. When AT&T made its regular quarterly review of the account in February, 1996, the account was current. The Debtors first missed a payment due at the end of March; AT&T promptly contacted them after the default. By that time, the Debtors had already retained bankruptcy counsel. AT&T was damaged as a result of its reliance.

ORDER

IT IS ORDERED that judgment shall enter that the debt owed by Kristine L. Roggatz to AT&T Universal Card Services, identified as account 5396-8100-5038-9132, is excepted from her discharge under 11 U.S.C. § 523(a)(2)(A).

IT IS FURTHER ORDERED that AT&T's complaint against Douglas W. Roggatz is dismissed.

SO ORDERED THIS 20th DAY OF JANUARY 1998.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to Mark Reed, Jeffrey Myers and U.S. Trustee.