

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

MARY ANN SHANAHAN

Case No. 92-10990 K

Debtor

J.C. PENNEY COMPANY, INC.

Plaintiff

-vs-

AP 92-1179 K

MARY ANN SHANAHAN

Defendant

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Rochester, New York 14618

Attorney for Plaintiff

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Kenmore, New York 14217

Attorney for Defendant

ThisThis action under 11 U.S.C. § 523(a)(2)(A) came on for trial on December 30, 1992. It alleges fraud arising out of the Debtor's use of a credit card to buy Christmas presents, at a time when she was unemployed and heavily in debt. This Court finds that fraud has been established by a preponderance of fraud has been established that the creditor J.C. Penney must prevail in this action.

¹Grogan v. Garner, 112 L.Ed.2d 755 (1991).

CREDIT CARD ABUSE AS FRAUD

Abuse of credit cards or of lines of credit defies traditional analysis of "frauds." traditional analysis of "frauds." elements that traditionally define a "fraud"² are a false "representation" and "reliance" thereon: Although a credit card line of credit frequently is initially issued with representations concerning assets, income or debts using such accounts after they are established using such accounts after one wondering where these two one wondering transaction at a later point in time when assets, income or debts might have changed³. . Is there a new "representation" each account is used, and if bankruptcy ensues and the account paid can it be said that the representation was "false" and paid can it the creditor "relied" thereupon? At least three schools of the

²(1) That the Debtor made representations; (2) that at the time, the Debtor knew the representations were false; (3) that the Debtor made them with the intention and purpose of deceiving the creditor; (4) that the Creditor relied on such representations; and (5) that the Creditor sustained the alleged loss and damage as the proximate result of the representations. In re Dougherty, 84 B.R. 653, 656 (9th Cir. BAP 1988).

³The Court need not belabor the point that a "credit card purchase" involves, at most, the signing of a sales draft and the retailer's checking with the card issuer to make sure that the card has not been reported stolen, and to give the issuer a chance to make sure that the account is not delinquent or over the credit limit. Then the goods are handed over.

Slavish adherence to the "five elements of fraud" set forth at footnote 2 above was not required at common law, for it was long recognized that "fraud" is well summarized in 37 Am.Jur. 2d, Fraud and Deceit § 1:

[W]hile it has often been said that fraud cannot or should not be precisely defined, books contain many definitions, such as unfair dealing; malfeasance, a positive act from a wilful intent to deceive from a wilful intent to deceive by which a person is deceived to his hurt; a wilful, malevolent act, directed to perpetrating a wrong to the rights of others; anything which is calculated to deceive, whether it is a single act or a combination of circumstances, or acts or words which amount to a suppression of the truth, or mere silence; deceitful practice; endeavoring to deprive another of his known right by means of some artful device contrary to the plain rules of common law; the unlawful appropriation of another's property by design; and making one thing appear to a person with things are had to be the true state of things, while acting on the knowledge of things. Fraud has also been said to consist of conduct that operates on the rights of others and is so intended; a deceitful design to deprive another of some profit or advantage; or deception practiced to induce another to surrender some legal right, which the end desired. Fraud there general sense, is deemed to comprise anything calculated to deceive, including all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in injury to another, or by unconscientious advantage is taken of [Citations Omitted.]

Thus the Supreme Court has stated (at least in the context of the criminal law of

defraud' defraud' ... have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes' and 'usually signify the deprivation of something of value by trick, deceit, chicanery or overreaching.'" *Carpenter v. U.S.*, 98 L.Ed.2d (1987).

Furthermore, it is evident from itself that "actual fraud" does not require a false representation, for that provision speaks of "false pretenses, a false representation, or actual fraud." [Emphasis added.] The disjunctive bespeaks a distinction among the three.

It can be seen, therefore, that resort to concepts of "implied representation" is not always necessary when examining a question of fraud in the use of a credit card. Such resort, furthermore, may achieve untoward "representation" theory seems to imbue every use of a representation with implications that may be particularly onerous for a particular user, implications that turn the burden of proof of fraud on its head. For example, is a simple-minded person who has obtained a credit card (having received a "pre-approval" in the mail) really making an "implied representation" of his ability to pay when in fact he has severely limited knowledge of his financial resources or even of his duty to repay, and merely does exactly what he is told to do -- use the card? (This Court has had the experience of

aa case in which a mentally-impaired debtor was issued an unsolicited card, and was proven at trial to lack the mental aptitude to know that she had to pay for merchandise charged on a credit card.) Such a debtor should be subject to a penalty of a finding of fraud, of perjury, or of simpleton. The burden is on the creditor to prove fraud -- to prove that the debtor knew full well that any professed intention to repay was false or was known by the debtor not to be grounded, and that he or she nonetheless deliberately used the card to obtain goods he or she knew were not to be repaid.

If the creditor can make such a showing, then a finding of fraud, of perjury, or of simpleton on the part of the user -- even highly positive hopes and plans to repay -- might not purge sophisticated cardholder's actions of fraud. Stated otherwise, the fact that one has profoundly fooled oneself with respect to the future should not mean that any consequences to others was merely inadvertent and not fraudulent.

While there is some analytic appeal to the conclusion that the card issuer has assumed the risk that the card would be used in this manner⁵ this Court cannot accept that conclusion.

⁵First Nat. Bank of Mobile v. Roddenberry, 701 F.2d 927 (11th Cir. 1983).

something of which one assumes the risk. The issuer of a credit card or credit line card or credit line per ignorance, mistake, naivete, gullibility, misfortune, accident, or other innocent failing or adversity, but the Court declines to apply assumption of risk theory to the user's knowing and intentional use of the card to obtain goods without any realistic prospect of having the wherewithal to pay.

In sum, this Court finds that deciding whether credit card use was fraudulent does not record use was fraudulent does not record "traditional five elements of fraud," for the term "fraud" has a broader meaning.

THE PRESENT CASE

The Court will leave the matter of the Court will leave the matter of a "bank card" -- to another day.⁶ Here the card is a J.C. Penney Card and the Court will presume it to be a two-party card: just J.C. Penney and the debtor. The debtor (and her son, at the debtor's request) charged over a thousand dollars at J.C. Penney's for Christmas gifts in December of 1991 on her theretofore J.C. Penney Charge Account. (Plaintiff's Exhibit #2). Each slip is signed by the debtor, or by her son at her direction.

⁶The 3rd party issuer is subject to an agreement with the retailer. This may or may not be important.

the place where it boldly and conspicuously states "The cardholder acknowledges receipt of goods/sack hereon and agrees to pay the card issuer according to its current terms."

At the time of the charges the debtor had been out of work for five months, after having worked in a business office. She is articulate and presents has bookkeeping experience and was seeking a bookkeeping or data entry job. She was receiving approximately \$160.00 per week in unemployment compensation interviews during the five month period, and though she testified that she had "good prospects" that she had month, she "couldn't [now] say" who those month, she "couldn't [now] say" Her rate of pay at her previous job appears that her work was bookkeeping and office clerical.

At the time she made these charge purchases, her only assets were household goods and an automobile. She lived at home. Yet she admitted "perhaps" she had a balance due on a number of other accounts, some on a retail store or bank-card charge account with balances of \$2,000-\$3,000 each.

She may have been fully sincere when she testified to the Court and at the time she incurred the charges) in declaring her wholehearted "intent" to declare her wholehearted But within the next sixty days after the goods were obtained, she

obtainedobtained new employment that she determined was at insufficient pay
toto repay her debts ito repay her debts into repay her debts in whole
previousprevious job),previous job), and she consulted with an attorney in la
19921992 about filing bankruptcy. The Petition1992 about filing bankruptcy.
ChapterChapter 7 onChapter 7 on March 20, 1992.Chapter 7 on March 20, 1992.
repay these charges.

The debtor was not unsophisticated. She knew the scope
ofof her indebtedness. She knew that herof her indebtedness. She knew that
chargescharges did not rise to an "expectation"charges did not rise to an "e
rather,rather, her professed intention to repay must have appeared
unrealisticunrealistic even to her. Nonetheless it was understandable
important for her to buy Christmas gifts for her family.

INTENT TO TRICK OR OVERREACH MAY BE FRAUD

EVEN WITHOUT INTENT TO DAMAGE

SomeSome disciplines or callings aside from the law might
have no difficulty with the notion that one might intend to trick
someonesomeone else but not intend to damage that someone. Criminal Law
sometimesometimes recognizes such nuances, but more often it charges one
withwith the reasonably foreseeable consequences of an intentional act,
even if those consequences were not themselves intended. The law
of frauds in the context of bankruptcy might cease its utility if
itit were not to impose similar liability. It seems clear that if
damage results from trickery or overreaching or sham or the like,

The Debtor's charge account purchases from J. The Debtor's charges are non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

Plaintiff's exhibits 1 through 4 were admitted in evidence on Stipulation of the parties, except that the defendant did not stipulate to having made charges in the amount reflected therein - nearly \$1400.00. Having had the opportunity since trial to reflect upon the exhibits, it is not clear to the Court whether the parties had stipulated to the amount reflected there. There was no stipulation as to the amount of all new charges reflected on Exhibits 1 through 4, or upon the debtor, or upon her direct or indirect obligations. The debtor declared non-dischargeable in accordance with the above. If the parties have stipulated to a lesser amount, then that amount will be declared non-dischargeable.

Counsel for J.C. Penney shall submit to the Court, on notice to opposing counsel, an affidavit of amount due, including costs and prejudgment interest, and the Clerk shall enter money judgment thereon, which judgment shall be excepted from the debtor's discharge in this case. Postjudgment interest shall be awarded in accordance with law.

SO ORDERED.

⁸In re Marie B. King, 135 B.R. 734 (Bankr. W.D.N.Y. 1992).

Dated: Buffalo, New York
January 28, 1993

U.S.B.J.