UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

JAMES S. DAVIS and AMBER L. DAVIS	CASE NO. 05-18478-DWH
AMERICREDIT FINANCIAL SERVICES, INC.	PLAINTIFF
VERSUS	ADV. PROC. NO. 06-1102-DWH
JAMES S. DAVIS and AMBER L. DAVIS	DEFENDANTS

OPINION

On consideration before the court is a Motion for Summary Judgment filed by the plaintiff, AmeriCredit Financial Services, Inc., ("AmeriCredit"); no response having been filed by the defendants, James S. Davis and Amber L. Davis, ("debtors"); and the court, having considered said motion, finds as follows, to-wit:

I.

The court has jurisdiction of the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A), (B), and (I).

II.

AmeriCredit objects to the dischargeability of a debt owed to it by the debtors, who filed a voluntary petition for bankruptcy relief pursuant to Chapter 7 of the Bankruptcy Code on October 13, 2005.

The debtors are indebted to AmeriCredit by virtue of a Retail Installment Contract and Security Agreement dated August 20, 2005, relating to the purchase of a 2005 Pontiac Grand

Prix, VIN: 262WP542251180001. The contract provided for 72 payments of $552.44, beginning on October 4, 2005, to repay an indebtedness of $29,169.56. The debtors never made a payment.

The aforesaid contract was approved based on application for credit signed and submitted by the debtors. The application required the debtors to report their annual incomes. Mr. Davis reported his annual income as $36,383.00, and Mrs. Davis reported her annual income as $15,000.00.

JP Morgan Chase Bank was assigned the contract by the seller of the vehicle on August 20, 2006, and is reflected as the first lien holder on the motor vehicle certificate of title. AmeriCredit purchased the contract through an ongoing Servicing and Sale Agreement.

The debtors filed the Chapter 7 case only 54 days after purchase of the vehicle. They filed their bankruptcy schedules on November 7, 2005. Schedule I reflects that they were employed by the same employers who were listed on the credit application for the purchase of the vehicle. Schedule I shows that Mr. Davis' gross monthly income is $2,031.96, which represents a gross annual income of $23,375.96. Schedule I shows that Mrs. Davis' gross monthly income is $609.42, which represents a gross annual income of $7,313.04. These income figures are significantly lower than those appearing on the credit application.

III.

Summary judgment is properly granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056; Uniform Local Bankruptcy Rule 18. The court must examine each issue in a light most favorable to the nonmoving party. Anderson v. Liberty

Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Phillips v. OKC Corp., 812 F.2d 265 (5th Cir. 1987); Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). The moving party must demonstrate to the court the basis on which it believes that summary judgment is justified. The nonmoving party must then show that a genuine issue of material fact arises as to that issue. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.29 265 (1986); Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987), Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). An issue is genuine if "there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party." Phillips, 812 F.2d at 273. A fact is material if it would "affect the outcome of the lawsuit under the governing substantive law." Phillips, 812 F.2d at 272.

IV.

On July 10, 2006, AmeriCredit served the debtors with requests for admission. The 30 day period for answering the requests, set forth in Rule 7036(a), Federal Rules of Bankruptcy Procedure, and Rule 36(a), Federal Rules of Civil Procedure, expired without debtors answering or objecting to the requests.

"The matter is admitted unless within thirty days after service of the request...the party to whom the request is directed serves upon the party requesting the admission a written objection or answer addressed to the matter, signed by the party or his attorney..." Fed. R. Civ. Proc. 36(a) "Any matter admitted under this rule is conclusively established..." Fed. R. Civ. Proc. 36(b). See, In re Carney, 258 F.3d 415 (5th Cir. 2001). Consequently, the debtors' failure to serve a timely answer or objection to AmeriCredit's requests for admission requires that those matters set forth in the requests be deemed admitted.

AmeriCredit's complaint against the debtor is based on 11 U.S.C. §523(a)(2)(A), which states in pertinent part as follows:

> (a) A discharge under section 727... of this title does not discharge an individual debtor from any debt by -
>
> (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...financial condition.

The United States Court of Appeals for the Fifth Circuit set forth the analysis to determine whether a debt is excepted from discharge pursuant to 11 U.S.C. §523(a)(2)(A) in General Electric Capital Corporation v. Acosta (In re Acosta), 406 F.3d 367 (5th Cir. 2005). "For a debt to be non-dischargeable under §523(a)(2)(A), the creditor must show (1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the representation was made with the intent to deceive the creditor; (4) that the creditor actually and justifiably relied on the representation; and (5) that the creditor sustained a loss as a proximate result of its reliance." Id. at 372. (citing In re Mercer, 246 F.3d 391, 403 (5th Cir. 2001).

The court will now analyze whether each of these five requirements have been met to render the debt owed to AmeriCredit non-dischargeable. First, the debtors must have made a representation. This requirement is met by the debtors' credit application. The debtors admitted their signatures on the contract and credit application by their failure to respond to Request for Admission number 3 submitted by AmeriCredit which states, "[a]dmit that the signatures on the finance application and contract whereby Defendants purchased the 2005 Pontiac Grand Prix are those of Defendants."

Second, the debtors must have known the representation to be false. This requirement is met by the discrepancies in the amounts of annual income stated on the credit application and

those appearing on Schedule I. On the credit application Mr. Davis' statement of annual income is inflated by $12,007.04 ($35,383.00 - $24,375.96), and Mrs. Davis' statement of annual income is inflated by $7,686.96 ($15,000.00 - $7,313.04).

Third, the representation must have been made with the intent to deceive. "[I]ntent to deceive may be inferred from 'reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation'." Id. at 372. (citing In re Norris, 70 F.3d 27, 30 n. 12 (5th Cir. 1995)). The 50% and 100% increases by which Mr. Davis and Mrs. Davis respectively overstated their individual incomes demonstrate a reckless disregard for the truth. The fact that they made no payments on the contract exacerbates their misrepresentations.

Fourth, the creditor must have actually and justifiably relied on the representation. This element is met by the fact that the debtors were awarded financing for the vehicle following their representations. This is substantiated by the affidavit of Jessica Jernigan, a bankruptcy legal specialist employed by AmeriCredit.

Fifth, the creditor must have sustained a loss proximately caused by its reliance on the representation. This is evidenced by the loss sustained by AmeriCredit. Following the lifting of the automatic stay, the vehicle was repossessed and sold. AmeriCredit now has a deficiency claim in the amount of $19,637.29. See, Affidavit of Jessica Jernigan.

V.

There are no genuine issues of material fact remaining in dispute as a result of the debtors' deemed admissions. AmeriCredit is entitled to a judgment as a matter of law. The

deficiency debt owed to AmeriCredit by the debtors is non-dischargeable pursuant to 11 U.S.C. §523(a)(2)(A). A separate judgment shall be entered in favor of AmeriCredit, contemporaneously herewith, in the amount of $19,637.29, as well as, for all costs of this proceeding. Interest on the judgment shall be permitted to accrue at the highest lawful rate following its entry.

This the25th day of October, 2006.

/s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE