United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Diana Lynne Anzelone

Bankruptcy No. 02 B 11190

Adversary Caption: Oxford Bank & Trust v. Diana Lynn Anzelone

Adversary No. 02 A 00817

Date of Issuance: March 25, 2003

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: David P. Lloyd, Esq., Grochocinski, Grochocinski & Lloyd, Ltd., 800 Ravinia Place, Orland Park, IL 60462

Attorney for Defendant: Susan G. Castagnoli, Esq., Law Offices of Susan G. Castagnoli, P.C., 29 South Weber Street, Suite 320, Naperville, IL 60540

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
DIANA LYNNE ANZELONE,	)	Chapter 7
	)	Bankruptcy No. 02 B 11190
Debtor.	)	Judge John H. Squires
	)	
	)	
OXFORD BANK & TRUST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02 A 00817
	)	
DIANA LYNNE ANZELONE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the complaint filed by Oxford Bank & Trust (the "Bank") against the Debtor, Diana Lynne Anzelone (the "Debtor") to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(2)(A). For the reasons set forth herein the Court finds the debt non-dischargeable.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. FACTS AND BACKGROUND

The Bank filed the instant complaint against the Debtor seeking to determine a debt she owes the Bank non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Specifically, the Bank alleges that on October 30, 2000, the Debtor obtained a loan from it in the sum of $24,318.00 in order to purchase a 1995 Mercedes Benz automobile (the "Vehicle"). The Debtor executed a note and security agreement which purports to grant to the Bank a lien on the Vehicle. Additionally, the Debtor executed an agreement to provide insurance on the Vehicle. According to the Bank, by executing the note and security agreement and the agreement to provide insurance, the Debtor represented to the Bank that she would purchase the Vehicle and the Bank would obtain a valid security interest in the Vehicle. The Bank further contends that the Debtor intended that another person, Steven Sineni ("Sineni"), would be the true owner of the Vehicle. The Bank maintains that the Debtor obtained the loan with intent to defraud the Bank and that she made false representations to the Bank.

The Debtor responds to the Bank's allegations by stating that she did not know that she received the loan from the Bank and that she never had possession of the Vehicle. The Court held an evidentiary hearing wherein two witnesses testified. First, John Childress ("Childress") testified on behalf of the Bank. Next, the Debtor testified. At the close of the Bank's case in chief, the Debtor moved for a directed judgment pursuant to Federal Rule of Bankruptcy Procedure 7052(c). The Court declined to render any judgment until the close of all the evidence.

III. TESTIMONY AT TRIAL

Childress, one of the Bank's collection officers, testified that the Bank's business includes making car loans, sometimes several hundred per month. At the time of the loan to the Debtor, in accordance with the Bank's usual and customary procedures, it received the Debtor's application from a broker. Thereafter, the Bank verified her employment and income and obtained a credit report on the Debtor as a proposed new customer. The Debtor had no prior loans or other relations with the Bank. Childress handled collection efforts on this matter after the payments became delinquent.

The loan was originated by a brokerage firm known as America's Best Finance, Inc. (the "Broker") through an individual named Brenda. The Bank had an ongoing relationship with the Broker for some years, and had no prior problems with loans referred by the Broker. The Bank prepared a retail installment note and security agreement for the Debtor's purchase of the Vehicle, which was forwarded to the Broker for execution by the Debtor. See Bank's Exhibit No. 1. The Broker prepared and submitted the Debtor's loan application to the Bank. See Bank's Exhibit No. 2. The Debtor agreed to provide insurance on the Vehicle. See Bank's Exhibit No. 3. In addition, the Debtor executed a power of attorney by which she appointed the Bank her attorney in fact with authority to execute and record documents regarding registration and transfer of title for the Vehicle, and to retain a security interest in the Vehicle to secure the purchase money loan extended by the Bank. See Bank's Exhibit No. 4. The Debtor granted the Broker exclusive rights, pursuant to a loan brokerage agreement, to obtain a loan from the Bank for the acquisition of the Vehicle. See Bank's Exhibit No. 5. The Debtor admitted she executed all of these

documents.

According to Childress, the executed documents came to the Bank from the Broker on October 30, 2000. The Bank ran two credit checks on the Debtor and obtained credit reports. See Plaintiff's Exhibit Nos. 6 and 7. According to Childress, the loan application indicated the Debtor was going to trade in an existing vehicle in order to acquire the subject Vehicle. Additional documentation, including a pay stub and a copy of the Debtor's Illinois driver's license was required to verify the Debtor's current employment. See Plaintiff's Exhibit No. 8. These were received prior to the Bank approving the loan. The proceeds of the loan were furnished directly to the Dealer on November 7, 2000 in the amount of $24,300.00, via cashier's check, which showed the Debtor as the remitter. See Bank's Exhibit No. 10. According to Childress, after the Bank booked the loan, it ordered a payment book that was sent to the Debtor at her home address in Westmont, Illinois.

The file was assigned to Childress when the loan became delinquent after the first monthly installment was due on November 29, 2000. Childress attempted to telephone the Debtor at the number reflected in the loan application and other documents. In addition, Childress testified that he attempted to contact some personal references furnished to the Bank by the Broker on a form furnished by the Dealer. See Bank's Exhibit No. 11. Childress learned that none of the telephone numbers matched the names on the personal reference list. Childress made notations of his collection efforts on the jacket of the credit file folder. See Bank's Exhibit No. 12.

Ultimately, Childress received a telephone call from the Debtor on December 13, 2000 in response to one of his earlier calls. At trial, Childress identified the Debtor's voice from that

telephone call as the Debtor's voice when he subsequently met with her in August 2001. In the initial telephone conversation, Childress inquired about the lack of evidence of insurance on the Vehicle. He stated that the Debtor advised him that the car was insured. According to Childress, when he asked about the first missing payment, the Debtor stated that she thought it was "taken care of." She would not give him a direct answer, however, as to who was going to make the payments. Childress testified that he sent a demand letter on December 22, 2000 to the Debtor at her home address. See Bank's Exhibit No. 13. The letter advised that Childress suspected that the transaction was a straw purchase made by the Debtor for another person. Childress testified that he contacted the alleged insurer of the Vehicle, who advised him that the Vehicle was insured, but refused to disclose the identity of the insured party on privacy grounds.

Bank's Exhibit No. 14 was the Bank's computer generated collection card after the loan was more than fifteen days late. This document included a number of handwritten notes made by Childress and also reflected the payments that were received on the loan by the Bank. Monthly payments were made on the loan through October 2001. Two payment coupons bearing the Debtor's name and loan account number accompanied the payments that were made at the Bank by an unknown person. See Bank's Exhibit Nos. 15 and 16.

According to Childress, beginning in December 2000, he unsuccessfully attempted to locate the Vehicle in order to repossess it. Because the Bank never received a certificate of title for the Vehicle with the Bank's lien recorded thereon from the Dealer, the Broker or the office of the Illinois Secretary of State, Childress sent an information request to the Illinois Secretary of State regarding the Vehicle. See Bank's Exhibit No. 17. He received a response on September 14,

2001 indicating that the office had no title information regarding the Vehicle, which thus apparently has never been titled in Illinois. See Plaintiff's Exhibit No. 18.

Childress met with the Debtor in August 2001 after a demand letter had been sent to her by the Bank's attorney. Childress stated that the Debtor advised him that Sineni had the Vehicle. He demanded either return of the Vehicle or payoff of the outstanding loan balance. The Debtor told Childress that he could attempt to get the car from Sineni or recover it through the police authorities. Childress testified that the Bank made efforts to recover the Vehicle from Sineni without success. According to Childress, the unpaid loan balance is $24,402.60 for principal, interest and late fees, plus $3,955.00 for attorney's fees and $933.30 for costs. Childress testified that the Bank relied on the loan documentation and representations therein to make the loan. The Bank never received the papers in perfection of its lien on the Vehicle. Childress questions whether the Vehicle even exists.

On cross examination, Childress admitted that it was the Dealer's obligation to send the title application and other related documents to perfect the Bank's lien on the Vehicle. Childress was unable to account for the Dealer's failure to perfect the lien on the title to the Vehicle. According to Childress, in his various conversations with the Debtor, she would not tell him who had possession of the Vehicle. Childress advised the Broker of the known problems in December 2000, after he learned that the personal reference sheet listed disconnected telephone numbers. Brenda responded to his queries and concerns with "what is the big problem?" Childress testified that in his efforts to recover the Vehicle, Senini telephoned him and referred to the Vehicle as his, and stated that he would take care of it. Although Childress had spoken with agents of several

police forces, he was unable to obtain any assistance from those authorities. Childress admitted that after the loan had been booked and the proceeds disbursed, the Bank received a faxed copy of the purported bill of sale received from the Dealer to the Debtor on the loan, wherein the purported signature for the Debtor was not the same signature as those on the other loan documents admittedly signed by the Debtor. See Bank's Exhibit No. 19(E).

The only other witness who testified was the Debtor. She had previously purchased two other cars before executing the loan documents regarding the Vehicle. She testified that Senini was her boyfriend at the time of the execution of the documents, and he suggested that she purchase the Vehicle. According to the Debtor, Senini had a similar car. She trusted his judgment and followed his suggestion that she trade her existing car for the Vehicle. According to the Debtor, Senini presented the loan papers to her and she signed them in a bar where they worked, without carefully reading them. She testified that she never saw the Vehicle and thought that all the various papers she signed, including the retail installment agreement and note, were merely part of the loan application process.

The Debtor testified that the loan application was completed for her and she signed it in October 2000. She testified that she never received an approval letter from the Bank. The Debtor also stated that she never made a down payment to the Dealer, contrary to the receipt reflecting the same. See Bank's Exhibit No. 9. She was not aware that the Bank had tendered the loan proceeds to the Dealer. See Bank's Exhibit No. 10. She testified that she never saw the personal reference list form (Bank's Exhibit No. 11); she did not recall receiving the Bank's demand letter (Bank's Exhibit No. 13); and she did not receive a

coupon book for the loan. The Debtor testified that she did not make any of the payments to the Bank and did not authorize anyone to make payments on her behalf.

The Debtor testified that she met with Childress in August 2001. The Debtor further testified that she first became aware of the Bank's claim against her in late 2000 when Childress advised her that the Bank had lent the money for her benefit and the first payment was past due. According to the Debtor, she was shocked that she had been approved for the loan because she did not have the Vehicle and was under the impression she did not owe any money. She admitted that she had received various collection calls from Childress to the point she began to refuse his calls.

The Debtor stated that she and Senini mutually ended their relationship in November 2000. According to the Debtor, she never told Childress that she had purchased the Vehicle. When she met with Childress in August 2001, and received copies of the loan paperwork, she stated she did not know where the Vehicle was and contended that she had no idea she had received the loan. The Debtor testified that she never gave permission to the Broker or the Bank to fund and close the deal. She did not recognize who purportedly signed her name on the bill of sale, and she did not authorize anyone to sign on her behalf. See Bank's Exhibit No. 19(E).

According to the Debtor, she went to the Dealer, but was not furnished with any paperwork on the transaction. The Debtor does not know where the Vehicle is located or whether it even exists. She was unable to explain how the payment coupons were received by the Bank with these two payments made on the loan.

IV. APPLICABLE STANDARDS

The party seeking to establish an exception to the discharge of a debt bears the burden of proof. In re Harasymiw, 895 F.2d 1170, 1172 (7th Cir. 1990); Banner Oil Co. v. Bryson (In re Bryson), 187 B.R. 939, 961 (Bankr. N.D. Ill. 1995). The United States Supreme Court has held that the burden of proof required to establish an exception to discharge is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). See also In re McFarland, 84 F.3d 943, 946 (7th Cir.), cert. denied, 519 U.S. 931 (1996); In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994). To further the policy of providing a debtor a fresh start in bankruptcy, "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor." In re Scarlata, 979 F.2d 521, 524 (7th Cir. 1992) (quoting In re Zarzynski, 771 F.2d 304, 306 (7th Cir. 1985)). Accord In re Reines, 142 F.3d 970, 972-73 (7th Cir. 1998), cert. denied, 525 U.S. 1068 (1999).

Section 523 of the Bankruptcy Code enumerates specific, limited exceptions to the dischargeability of debts. Section 523(a)(2)(A) provides:

> (a) A discharge under section 727 . . . does not discharge an individual debtor from any 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). Section 523(a)(2)(A) lists three separate grounds for dischargeability: actual fraud, false pretenses and false representation. Bletnitsky v. Jairath (In re Jairath), 259 B.R.

308, 314 (Bankr. N.D. Ill. 2001). A single test was applied to all three grounds even though the elements for each vary under common law. Id. (citations omitted). The Seventh Circuit, however, has made it clear that misrepresentation and reliance therein is not always required to establish fraud. McClellan v. Cantrell, 217 F.3d 890, 894 (7th Cir. 2000).

The Seventh Circuit Court of Appeals recently defined the term "fraud:"

> 'Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.'

McClellan, 217 F.3d at 893 (quoting Stapleton v. Holt, 207 Okla 443, 250 P.2d 451, 453-54 (Okla. 1952)). "Actual fraud" is not limited to misrepresentation, but may encompass "'any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another.'" McClellan, 217 F.3d at 893 (quoting 4 L. King, Collier on Bankruptcy, ¶ 523.08[1][e] at 523-45 (15th ed. rev. 2000)). Hence, a different analysis must be utilized when a creditor alleges actual fraud. Id. The McClellan court opined that because common law fraud does not always take the form of a misrepresentation, a creditor need not allege misrepresentation and reliance thereon to state a cause of action for actual fraud under § 523(a)(2)(A). Id. Rather, the creditor must establish the following: (1) a fraud occurred; (2) the debtor was guilty of intent to defraud; and (3) the fraud created the debt that is the subject of the discharge dispute. Id. The fraud exception under § 523(a)(2)(A) does not reach constructive frauds, only actual ones. Id.

Of the three McClellan elements, there is no dispute that the first and third elements are present. The real dispute surrounds the second element--whether the Debtor was guilty of the proscribed intent to defraud and was part of the scheme, as the Bank argues, or was a mere innocent dupe, as she contends.

The determination of whether the debtor had the requisite scienter is a factual question which is resolved by a review of all of the relevant circumstances of a particular case. Park Nat'l Bank & Trust of Chicago v. Paul (In re Paul), 266 B.R. 686, 694 (Bankr. N.D. Ill. 2001) (citations omitted). Proof of intent to deceive is measured by a debtor's subjective intention at the time of the matter at bar. Mercantile Bank v. Canovas, 237 B.R. 423, 428 (Bankr. N.D. Ill. 1998). Where a person knowingly or recklessly makes false representations which the person knows or should know will induce another to act, the finder of fact may logically infer an intent to deceive. Glucona America, Inc. v. Ardisson (In re Ardisson), 272 B.R. 346, 357 (Bankr. N.D. Ill. 2001).

Reliance on a false pretense or false representation under § 523(a)(2)(A) must be "justifiable." Field v. Mans, 516 U.S. 59, 74-75 (1995). Justifiable reliance is an intermediate level of reliance. It is less than reasonable reliance, but more than reliance in fact. The justifiable reliance standard imposes no duty to investigate unless the falsity of the representation is readily apparent. Id. at 70-72. Whether a party justifiably relies on a misrepresentation is determined by looking at the circumstances of a particular case and the characteristics of a particular plaintiff, and not by an objective standard. Id. at 71. To satisfy the reliance element of § 523(a)(2)(A), the creditor must show that the debtor made a material misrepresentation that was the cause-in-fact

of the debt that the creditor wants excepted from discharge. In re Mayer, 51 F.3d 670, 676 (7th Cir.), cert. denied, 516 U.S. 1008(1995) ("reliance means the conjunction of a material misrepresentation with causation in fact").

V. DISCUSSION

There is no dispute that the Creditor was defrauded by this unusual scheme. The ultimate question to be decided is whether the Debtor was part of the scheme or was an innocent victim, along with the Creditor. It is unclear as to the full extent and identity of all the parties who were likely involved in the scam. Whether the genesis originated with the now absent and illusive Senini, who seemingly exercised a Svengali-like sway over the Debtor, and included possible confederates from the Broker, such as Brenda and perhaps some persons unknown from the Dealer, are all interesting and missing pieces of the puzzle, but are unnecessary to decide the ultimate issue. The Court must determine whether the Debtor was part of the con perpetrated on the Creditor and then left holding the indebtedness bag for which she is undeniably contractually liable, or whether she was an unwitting dupe of her ex-boyfriend and others in league with him.

Inasmuch as only two witnesses testified at trial, their credibility is particularly crucial. The Court is in the best position to assess the credibility of the witnesses and weigh the evidence. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985) (deference given to trial court's findings that involve credibility of witnesses because only the trial judge can be aware of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is stated); Torres v. Wisconsin Dept. of Health & Social Servs., 838 F.2d

944, 946 (7th Cir. 1988) (same). After considering their testimony as a whole and observing their demeanor, the Court finds that Childress' testimony was more credible than the Debtor's testimony and his version of the events was corroborated, in part, by the documentary evidence. Some of the Debtor's testimony was simply incredible inasmuch as she admitted that she intended to purchase the Vehicle and had previously been through the loan application and borrowing process when she financed and purchased two other vehicles. She was not an inexperienced automobile buyer, and her failure to carefully read and consider the effects of the loan documents she executed does not relieve her from the consequences attendant thereto.

Most telling were the exhibits reflecting two payments that were made on the loan, which included two of the payment coupons bearing the Debtor's name, address and loan number. See Bank's Exhibit Nos. 15 and 16. Childress testified that these payment coupons accompanied the payments made to Bank tellers by an unknown person. The coupons obviously came from the loan coupon payment book sent to the Debtor at the inception of the loan. Moreover, the Court found Childress' testimony credible concerning the verbal admissions made by the Debtor regarding the payments, insurance coverage for the Vehicle and the involvement of Senini, in their December 2000 and subsequent telephone calls and at their meeting in August 2001. The Court is left with the firm conclusion that the Debtor was more involved in the transaction, probably organized and orchestrated by Senini, than she professed at trial, notwithstanding their broken romance.

In short, the Court finds the Debtor's professed innocence and non-involvement utterly unconvincing. Her actions in signing the loan documents and applying for the loan, on which the Bank justifiably relied, caused the Bank to send the loan proceeds to the Dealer, the benefit of

which the Debtor received to acquire the Vehicle, with the assistance of Senini and Brenda. Section 523(a)(2)(A) does not require a spoken or written statement of misrepresentation on the part of the Debtor to be actionable under the statute if her actions created a false impression in the Bank's corporate mind. See Haeske v. Arlington (In re Arlington), 192 B.R. 494, 498 (Bankr. N.D. Ill. 1996).

As argued by the Bank, this matter is somewhat similar to the situation in Bombardier Capital, Inc. v. Dobek (In re Dobek), 278 B.R. 496 (Bankr. N.D. Ill. 2002). There, Judge Schmetterer held, among other things, that the debtor's obligation on a motorcycle she had purchased using her credit on behalf of a boyfriend, who would not have qualified for such credit, was non-dischargeable under § 523(a)(2)(A). The court found that the debtor obtained credit by her false representation in signing a purchase agreement that contained express representations that she was purchasing the motorcycle for herself, that she would be making all the payments, and that she would maintain possession of the vehicle. Id. at 507. Dobek is factually distinct from the matter at bar inasmuch as the boyfriend's involvement there was more clearly shown and the debtor was specifically acting for the benefit of the boyfriend with the poor credit, and had no intention of possessing or paying for the motorcycle and intended for the boyfriend to make the payments. Here, the Debtor had the intent to purchase and pay for the Vehicle, but argues that she did not read the loan documents she signed. Like Dobek, the Debtor here made express representations that she was purchasing the Vehicle and that she would be the party making payments to the Bank. Unlike the debtor in Dobek, however, the Debtor was not simply a nominal straw party to the transaction, but was the intended purchaser and user of the Vehicle.

As noted in McClellan, Congress' use of "obtained by" in § 523(a)(2) "clearly indicates that fraudulent conduct occurred at the inception of the debt, i.e., the debtor committed a fraudulent act to induce the creditor to part with his money or property." See McClellan, 217 F.3d at 896 (Ripple, J., concurring). The Court is left with the distinct impression that the Debtor was more involved in the transaction at bar than she admitted at trial. The Court concludes that the Debtor was a part of the fraud perpetrated upon the Bank, even though it was directed and orchestrated by others who have left her liable for payment of the loan. She had the requisite intent to defraud the Bank.

VI. CONCLUSION

For the foregoing reasons, the Debtor's motion for directed findings is denied. The Court finds that the debt owed by the Debtor to the Bank is non-dischargeable under § 523(a)(2)(A) in the amount of $24,402.60 for principal, interest and late fees, plus $3,955.00 for attorney's fees and $933.30 for costs.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

_____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
DIANA LYNNE ANZELONE,	)	Chapter 7
	)	Bankruptcy No. 02 B 11190
Debtor.	)	Judge John H. Squires
_____	)	
	)	
OXFORD BANK & TRUST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02 A 00817
	)	
DIANA LYNNE ANZELONE,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion the 25th day of March, 2003, the Court finds that the debt owed by Diana Lynne Anzelone to Oxford Bank & Trust is non-dischargeable under 11 U.S.C. § 523(a)(2)(A) in the amount of $24,402.60 for principal, interest and late fees, plus $3,955.00 for attorney's fees and $933.30 for costs.

ENTERED:

DATE:_____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List