

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**JACQUELINE P. HARRIS,
DEBTOR.**

**CASE NO. 04-10581-NPO
CHAPTER 7**

GMAC FINANCIAL SERVICES

PLAINTIFF

VS.

ADV. PROC. NO. 04-01097-NPO

JACQUELINE P. HARRIS

DEFENDANT

MEMORANDUM OPINION AND ORDER DENYING COMPLAINT

There came before the Court for trial (the “Trial”) the Complaint (the “Complaint”) (Adv. Dk. No. 1) filed by the Plaintiff, GMAC Financial Services (“GMAC”), and the Response to Complaint (the “Response”) (Adv. Dk. No. 8) filed by the Defendant, Jacqueline P. Harris (the “Debtor”) in the above-styled adversary proceeding (the “Adversary”). At the Trial, Joseph C. Gibbs represented GMAC, and Fredrick B. Clark represented the Debtor. The Court, having considered the pleadings and the evidence presented at the Trial, concludes for the following reasons that the Complaint is not well taken and should be denied.¹

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant

¹ The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (J). Notice of the Complaint was proper under the circumstances.

Facts

The following facts are derived from the stipulations included in the Pretrial Order (Adv. Dk. No. 39), as well as the evidence presented at the Trial, including the un rebutted and credible testimony of the Debtor:

The Debtor's boyfriend, Brian Jordan ("Jordan"), asked her to assist him in leasing a 2003 Cadillac Escalade (the "Vehicle"). Jordan explained to the Debtor that he already had worked out the details of the lease with Keith Gatewood ("Gatewood"), a salesman with Cadillac-Saab of Memphis, Tennessee (the "Dealership"). Jordan further explained to the Debtor that Gatewood had advised Jordan that he would need an employed person to sign the paperwork in order to lease the Vehicle. Jordan represented to the Debtor that if she would sign the required paperwork for him, he would be responsible for all payments on the Vehicle and maintain insurance on it. Based on his promises to her, the Debtor agreed to help Jordan lease the Vehicle.

Thereafter, the Debtor received a blank credit application (the "Generic Credit Application") (Trial Tr. Ex. D-1) from a person named "Smitty."² She completed the Generic Credit Application, which reflected her employment as a legal assistant at the Clark Law Office, her monthly income of \$1,800.00 per month, additional yearly income of \$2,400.00 derived from typing jobs, and her liabilities. The Debtor signed the Generic Credit Application and returned it to Smitty.

Subsequently, Jordan informed the Debtor that her credit application had been approved and

² At Trial, Smitty was identified as a "bird dog," i.e., a person who locates buyers for car salesmen. Smitty was not employed by the Dealership or GMAC.

advised her that she would need to go to the Dealership to sign the paperwork for the lease. The Debtor and Jordan went to the Dealership on April 24, 2003, for the lease closing (the “Closing”).

Gatewood met the Debtor and Jordan at the Dealership and escorted them to the office of Franco Quesada (“Quesada”), the finance manager.³ In accordance with the Dealership’s usual procedures, Gatewood had created and provided to Quesada prior to the Debtor’s arrival a folder which included credit bureau reports, a copy of the Debtor’s drivers’ license,⁴ the GMAC Insurance Information Form (the “Insurance Form”) (Trial Tr. Ex. P-7), and the GMAC SmartLease Agreement (the “Lease Agreement”) (Trial Tr. Ex. P-1). The folder also included a GMAC credit application (the “GMAC Credit Application”), which purportedly had been completed by the Debtor. The GMAC Credit Application reflected that the Debtor was employed as an attorney (sic) at Clark’s (sic) Law Office, and that she earned an annual income of \$85,000.00. The GMAC Credit Application also listed an incorrect telephone number for the Debtor’s employer.⁵ Quesada did not know who had completed the GMAC Credit Application that was provided to him.

Quesada prepared the Insurance Form⁶ and the Lease Agreement⁷ in the Debtor’s presence,

³ Quesada was employed by the Dealership, not GMAC.

⁴ The Debtor disputed that she supplied her drivers’ license to Quesada at the Closing, but stated that she did fax Quesada a copy of it the following week.

⁵ If the Debtor, a legal assistant, had completed the GMAC Credit Application, it is reasonable to assume that she would have correctly spelled “attorney” and correctly listed the name and telephone number of her employer.

⁶ The Debtor testified that she did tell Quesada that she had insurance coverage with Progressive Insurance on her own Ford Mustang, but that it was her understanding from Jordan that both Quesada and Gatewood expected him to obtain his own insurance on the Vehicle.

⁷ The Lease Agreement reflects a down payment amount of \$2,000.00, which was paid by Jordan.

and the Debtor signed both documents. Quesada then typed the information obtained from the GMAC Credit Application into the Dealership's computer system and submitted it, along with the Lease Agreement, to Debbie Dees ("Dees"), a GMAC employee.

Dees reviewed the GMAC Credit Application information and ran an independent credit bureau report on the Debtor, which reflected the Debtor's employer, but not her income. Dees determined the Debtor to be a credit-worthy customer with the capacity to make the payments on the Vehicle. Based on the information provided by the Dealership, GMAC approved the Lease Agreement.⁸

Upon Quesada's receipt of the Lease Agreement approval, the Debtor executed all of the remaining documents, including the GMAC Credit Application. The Debtor did not, however, review any of those documents. Rather, she assumed that the GMAC Credit Application which she executed at the Closing properly reflected the information that she had provided on the Generic Credit Application previously supplied to Smitty. When the Lease Agreement transaction was finished, Gatewood delivered the Vehicle to Jordan. The Debtor left the Dealership in her Ford Mustang.

The Debtor testified that her intention in regard to financing the Vehicle was only to accommodate Jordan. She never intended to make the payments, obtain insurance, purchase a car tag, nor retain possession of the Vehicle. The Debtor also stated that the Lease Agreement was her first important financial transaction. The purchase of her own Ford Mustang primarily had been handled by a co-signer, and the Debtor believed that the Lease Agreement transaction would work

⁸ Dees testified that if the GMAC Credit Application had reflected the information contained on the Generic Credit Application, she would not have approved the Lease Agreement.

the same way, i.e., that she would execute the documents, but that Jordan would possess the Vehicle and be responsible for the payments, insurance, and tag. She also believed that the Certificate of Title would be issued in Jordan's name.⁹

Subsequently, the Debtor received telephone calls from Gatewood and Quesada that payments were not being made and that insurance was not in place on the Vehicle. The Debtor informed Quesada that Jordan had possession of the Vehicle in Texas. When Jordan later contacted the Debtor and she advised him of the telephone calls from Gatewood and Quesada, Jordan promised that he would make the payments on the Vehicle. The Debtor then lost contact with Jordan. Eventually, the Debtor began working with GMAC to locate Jordan, but those efforts were unsuccessful. The Debtor thereafter reported the Vehicle as stolen, and it ultimately was located by the Police Department in Memphis, Tennessee.

David Luke ("Luke"), the GMAC corporate representative at the Trial, testified that he was informed that the Vehicle had been recovered and was located at an impound lot in Memphis. The Vehicle had been stripped and abandoned, and was towed to storage for GMAC. Luke testified that the Vehicle was sold at auction "as is" for \$22,000.00, leaving a deficiency balance of \$38,270.96, plus attorneys fees.

Faced with the deficiency, the Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code (the "Petition") (Dk. No. 1) on February 4, 2004.¹⁰ On June 14, 2004, GMAC initiated the Adversary by filing the Complaint. In the Complaint, GMAC contends that the Debtor

⁹ The Certificate of Title was issued by the State of Mississippi to GMAC in care of the Debtor, and GMAC is reflected as the first lienholder (Trial Tr. Ex. P-2).

¹⁰ On June 29, 2004, an Order was entered whereby the Debtor rejected the Lease Agreement and abandoned the Vehicle (Adv. Dk. No. 3).

made material false representations which induced GMAC to enter the Lease Agreement and that the Debtor made material misrepresentations with regard to possession of and payment for the Vehicle. As a result, GMAC maintains that the Debtor should be precluded from discharging her debt to GMAC pursuant to 11 U.S.C. § 523(a)(2)(A) and (B) or, alternatively, that the Debtor should be denied a discharge of all debts pursuant to § 727(a)(4).

In her Response, the Debtor maintains that she is entitled to discharge the GMAC debt as well as all other debts. The Debtor contends that she provided accurate credit application information to Smitty, but that he and/or Gatewood altered that information so that the Lease Agreement would be approved for Jordan to obtain the Vehicle. The Debtor also asserts that the Dealership, through Gatewood, not only was aware that Jordan was to have possession of, make payments on, and insure the Vehicle, but also, through Quesada, transmitted the incorrect information to GMAC. The Debtor thus asserts that she did not make any material misrepresentations in regard to the Lease Agreement. In fact, the Debtor takes the position that she, too, is a victim of Smitty's, Gatewood's, and Jordan's fraudulent actions.

Discussion

1. 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) excepts from discharge a debt:

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,”

11 U.S.C. § 523(a)(2)(A).¹¹ Section 523 should be construed liberally in favor of the debtor. *See*

¹¹ Hereinafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

Boyle v. Abilene Lumber, Inc. (In re Boyle), 819 F.2d 583, 588 (5th Cir. 1987).

The party objecting to discharge of the debt must demonstrate that: (1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) the creditor actually and justifiably relied on the representations; and (5) the creditor sustained losses as a proximate result of the representations. General Electric Capital Corp. v. Acosta (In re Acosta), 406 F.3d 367, 372 (5th Cir. 2005); AT&T Univ. Card Servs v. Mercer (In re Mercer), 246 F.3d 391, 403 (5th Cir. 2001); *see also* RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1292 (5th Cir. 1995); Bank of Louisiana v. Bercier (In re Bercier), 934 F.2d 689, 692 (5th Cir. 1991). Moreover, “[t]he creditor must prove by a preponderance of the evidence that the debt is nondischargeable.” RecoverEdge L.P., 44 F.3d at 1292 (citing Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991)).

In regard to the first element, GMAC has demonstrated by a preponderance of the evidence that the Debtor made representations. When the Debtor signed the GMAC Credit Application, she made a representation to GMAC that she was an attorney who earned an annual income of \$85,000.00. Furthermore, by signing the Lease Agreement and other documents, she made representations to GMAC that she would make the payments on, maintain insurance on, and retain possession of the Vehicle.

In regard to the second element, GMAC has demonstrated by a preponderance of the evidence that the Debtor knew that at least some of her representations were false at the time she

made them.¹² That is, the Debtor made written representations that she would be responsible for payments and insurance on the Vehicle. While she had been assured by Jordan that Gatewood, Quesada, and GMAC had approved the lease transaction with the understanding that Jordan would possess and be responsible for the Vehicle, she nevertheless knew at the time she made those particular representations that they were false.

In regard to the third element, however, GMAC has failed to demonstrate by a preponderance of the evidence that the Debtor made the representations with the intention and purpose to deceive GMAC. “Debts that satisfy the third element, the scienter requirement, are debts obtained by frauds involving ‘moral turpitude or intentional wrong, and any misrepresentations must be knowingly and fraudulently made.’” In re Acosta, 406 F.3d at 372 (quoting First Nat’l Bank LaGrange v. Martin (In re Martin), 963 F.2d 809, 813 (5th Cir. 1992)). “An intent 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. (quoting Norris v. First Nat’l Bank (In re Norris), 70 F.3d 27, 30 n. 12 (5th Cir. 1995)). “Nevertheless, an honest belief, even if unreasonable, that a representation is true and that the speaker has information to justify it does not amount to intent to deceive.” Id. (citing Palmacci v. Umpierrez, 121 F.3d 781, 788 (1st Cir. 1997)).

In this case, the Debtor did not knowingly and intentionally deceive GMAC. She believed the GMAC Credit Application properly reflected the information she had provided on the Generic Credit Application. Moreover, while the Debtor made written representations that she would make

¹² While, as noted, the evidence at the Trial established that the Debtor did not know that the representations on the GMAC Credit Application were untruthful, she nonetheless knew that some of the other representations she made in regard to the lease transaction were false at the time she made them.

the payments on and maintain insurance on the Vehicle, she made those representations with the understanding that the Dealership's employee, Gatewood, had arranged the transaction for Jordan's benefit, not for the Debtor's. In addition, the Debtor's only prior important financial transaction was the purchase of her Ford Mustang, which as noted, had been handled by a co-signer. The Debtor believed that the Lease Agreement transaction would be similar and that after she executed the documents, Jordan would retain possession, make payments on, and maintain insurance on the Vehicle.

Furthermore, GMAC offered no evidence at Trial to refute the Debtor's testimony. Neither Smitty, Gatewood, nor Jordan were present to contradict her,¹³ and none of the GMAC witnesses who were called at Trial had any knowledge of the events that transpired before the Debtor and Jordan met with Quesada. Thus, the Court is left with the Debtor's unrefuted and credible testimony that while she signed all of the lease transaction documents, she did so with the assumption that they were completed correctly and with the understanding that the entire Lease Agreement transaction had been orchestrated by the Dealership's employee, Gatewood, and approved by GMAC. Thus, while the Debtor may be inexperienced and naive, the evidence did not persuade the Court that she intended to deceive GMAC. In fact, viewing the series of events as a whole, the evidence suggests that the Debtor was a victim of a financial fraud perpetrated by Smitty, Gatewood, and/or Jordan.

Having failed to meet its burden with regard to the third factor, the Court need not address the remaining elements. GMAC has failed to demonstrate by a preponderance of the evidence the factors which would preclude the dischargeability of the debt to GMAC under § 523(a)(2)(A).

¹³ Apparently, GMAC employed professional investigators to locate those three individuals prior to Trial, but were unable to find them, including the former employee of the Dealership, Gatewood. The Debtor had no knowledge of their whereabouts.

2. 11 U.S.C. § 523(a)(2)(B)

Under § 523(a)(2)(B), an individual debtor is not discharged from any debt:

for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained by:

.....

- (B) use of a statement in writing - -
 - (I) that is materially false;
 - (ii) respecting the debtor's or an insider's financial condition;
 - (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
 - (iv) that the debtor caused to be made or published with intent to deceive.

§ 523(a)(2)(B). As stated previously, each of the factors regarding a false financial statement must be proved by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. at 286. Accordingly, GMAC must prove by a preponderance of the evidence: 1) the existence of a statement in writing; 2) the writing must be materially false; 3) the writing must concern the debtor's financial condition; 4) the creditor must have reasonably relied on the statement; and 5) the statement must be made or published with the intent to deceive. *Byrd v. Bank of Mississippi*, 207 B.R. 131, 134 (S.D. Miss. 1997).

GMAC again has failed to meet its burden with regard to the last element, the Debtor's intent. The Debtor testified at the Trial that she completed the Generic Credit Application, which correctly reflected her employment information and income, and submitted it to Smitty. She also

admitted that she subsequently executed the GMAC Credit Application. Yet, she did not review the GMAC Credit Application, and thus, was unaware that her employment information and income had been altered when it was transferred to the GMAC Credit Application. In addition, as noted previously, the Debtor believed that the entire Lease Agreement transaction had been coordinated by the Dealership's employee, Gatewood, and approved by GMAC.

Given the Debtor's credible testimony that she did not review the GMAC Credit Application, and given GMAC's failure to produce Smitty, Gatewood, or Jordan to deny their apparent participation in this alleged scheme, the Court finds that GMAC has failed to demonstrate by the preponderance of the evidence that the Debtor executed the GMAC Credit Application with the intent to deceive GMAC. Thus, GMAC has failed to establish the elements which would preclude the dischargeability of the debt to GMAC under § 523(a)(2)(B).

3. 11 U.S.C. § 727(a)(4)

In addition to objecting to the discharge of the particular debt owed to it, GMAC also objects to the Debtor obtaining a discharge of all debts pursuant to § 727(a)(4). Section 727 (a)(4) provides:

(a) The court shall grant the debtor a discharge, unless - -

. . . .

(4) the debtor knowingly and fraudulently, in or in connection with the case -

(A) made a false oath or account;

11 U.S.C. § 727(a)(4)(A).

The false oath or account contemplated by § 727(a)(4)(A) applies to actions taken "in or in connection with the case," such as when a debtor makes "a false statement or omission in [his] bankruptcy schedules or . . . a false statement . . . at an examination during the course of the

proceedings.” Beaubouef v. Beaubouef (In re Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992); *see also* L. King, 6 Collier on Bankruptcy, ¶ 727.04[2] (Matthew Bender 15th Ed. Rev. 2001). Thus, “[d]ischarge may [] be denied if the debtor makes a false oath in connection with his bankruptcy filings.” Cadle Co. v. Pratt (In re Pratt), 411 F.3d 561, 566 (5th Cir. 2005). In that GMAC has not demonstrated that the Debtor made a false oath with regard to her bankruptcy schedules or during an examination such as the meeting of creditors,¹⁴ § 727(a)(4)(A) seemingly would not apply to the alleged false representations made in connection with the GMAC Lease Agreement transaction at issue in this case. Yet, even assuming that § 727(a)(4)(A) does apply to the GMAC Lease Agreement transaction, GMAC nevertheless faces the same hurdle in successfully objecting to the Debtor’s discharge as it does with regard to objecting to the Debtor’s discharge of the particular debt owed to GMAC. That is, § 727(a)(4)(A) requires a debtor’s fraudulent intent to deceive.¹⁵ However, as discussed, GMAC has failed to demonstrate that the Debtor acted with fraudulent intent. Accordingly, GMAC has failed to persuade the Court by a preponderance of the evidence the elements which would preclude the discharge of the Debtor pursuant to § 727(a)(4)(A).

¹⁴ *See* § 341(a).

¹⁵ For instance, “[t]o establish a false oath under this section, the creditor must show that ‘(1) [the debtor] made a statement under oath; (2) the statement was false; (3) [the debtor] knew the statement was false; (4) [the debtor] made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case.’” In re Pratt, 411 F.3d at 566 (quoting In re Beaubouef, 966 F.2d at 178). And, as with objections to discharge of a particular debt, “[t]he elements of an objection to discharge under § 727(a)(4)(A) must be proven by a preponderance of the evidence.” In re Beaubouef, 966 F.2d at 177.

Conclusion

Based on the foregoing, the Court finds that GMAC has failed to demonstrate that the debt to GMAC should be excepted from discharge pursuant to § 523(a)(2)(A) or § 523(a)(2)(B), or that the Debtor should be denied a discharge of debts pursuant to § 727(a)(4)(A). Accordingly, the Court finds that the Complaint is not well taken and should be denied.

A separate judgment will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED, this the 3rd day of August, 2007.

/s/ Neil P. Olack
NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE