

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

In Re:)	
)	CHIEF JUDGE RICHARD L. SPEER
David/Mary Glover)	
)	Case No. 99-3186
Debtor(s))	
)	(Related Case: 99-32132)
Marian Newton)	
)	
Plaintiff(s))	
)	
v.)	
)	
David Glover, et al.)	
)	
Defendant(s))	

DECISION AND ORDER

The above captioned adversary complaint comes before the Court after a Trial on the Plaintiff's Complaint to determine the dischargeability of a debt. The specific claims, against which the Plaintiff seeks a determination of nondischargeability, are as follows:

- A claim of Conversion as a result of the Defendant, David Glover, transferring to himself a truck owned by the Plaintiff, the value of which was approximately Ten Thousand Dollars (\$10,000.00);
- A claim for Conversion against the Defendant, Mary Glover, for Fifty Dollars (\$50.00) as a result of an ATM transaction;
- A claim for Fraud against the Defendants for their alleged wrongful procurement of a Three Thousand Dollar (\$3,000.00) check from the Plaintiff.

The statutory basis upon which the Plaintiff relies for her cause of action, although not specifically stated in her pleadings, is 11 U.S.C. § 523(a)(2)(A) which provides that:

Newton v. Glover, et al.
Case No. 99-3186

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 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[.]

With regards to the Plaintiff's cause of action under § 523(a)(2)(A), the Defendants, David Glover and Mary Glover (a.k.a. Mary Case), assert, in their defense, that the transactions involving the Three Thousand dollar (\$3,000.00) check and the Plaintiff's Truck were meant to be "loans," and that they fully intended to repay these loans. In addition, the Defendant, Mary Glover, claims that with respect to the ATM transaction, any and all the funds withdrawn from the Plaintiff's account were subsequently returned to the Plaintiff. The Court, upon considering these arguments, finds that with respect to the Plaintiff's ATM account, insufficient evidence has been presented to show that the Defendants wrongfully obtained any money therefrom. However, based upon the following analysis, the Court finds that the Defendants' procurement of the Three Thousand dollar (\$3,000.00) check and the Plaintiff's Truck were incurred by fraud, and therefore such obligations, to the extent they are found to exist under state law, are not subject to the bankruptcy discharge.

Section 523(a)(2)(A) of the Bankruptcy Code promulgates the basic bankruptcy principle that those debts incurred by a false pretense, a false representation, or actual fraud are not entitled to the benefits of a bankruptcy discharge. Determinations under § 523(a)(2)(A), which are exclusively within the jurisdiction of the bankruptcy court, are made according to federal bankruptcy law. *Younie v. Gonya (In re Younie)*, 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997) (dischargeability of a debt under § 523(a)(2)(A) is a question of federal law that is governed by the Bankruptcy Code); *Smith v. Smith (In re Smith)*, 189 B.R. 240, 243 (Bankr. D.N.H. 1995) (pursuant to § 523(c), questions arising under § 523(a)(2)(A) are within the exclusive jurisdiction of the bankruptcy court). Under bankruptcy law,

Newton v. Glover, et al.
Case No. 99-3186

in order to hold a debt nondischargeable on the basis of fraud, a creditor bears the burden to prove, by a preponderance of the evidence, that the debtor actually intended to deceive the creditor. *Fifth-Third Bank of Northwest Ohio, N.A. v. Spitler (In re Spitler)*, 229 B.R. 1, 4 (Bankr. N.D. Ohio 1998). By definition, this burden consists of the creditor establishing that the debtor intentionally perpetrated a deception, artifice, or trick in obtaining the loan. *Cass v. Jones, (In the Matter of Jones)*, 50 B.R. 911, 921 (Bankr. N.D. Tex. 1985). However, as direct proof of a debtor's intent is nearly impossible to obtain, evidence may be presented of the circumstances surrounding the underlying transaction(s). *AT & T Universal Bank v. Pennell (In re Pennell)*, 238 B.R. 737, 741 (Bankr. N.D. Ohio 1999).

With these principles in mind, the Court finds that the following facts, which were presented to the Court at the Parties' Trial, establish a prima facie case that the Defendants intended to deceive the Plaintiff for purposes of § 523(a)(2)(4):

-The Plaintiff is an elderly widow with little, if any experience in financial matters;

-When the Defendant, Mary Glover, wrote to herself a \$3,000.00 check from the Plaintiff's checking account, the Defendant did not, for a significant period of time, write the transaction in the check register, but instead entered in another payee's name;

-The Vehicle Title which transferred ownership of the Plaintiff's Truck to the Defendant, David Glover, states that no consideration was paid, and that such a transfer was meant to be a gift;

-The Defendants were aware that the Plaintiff had suffered a stroke just prior to the time the above transactions took place;

-The above transactions occurred in close proximity to the time in which the Plaintiff's husband passed away.

In opposition to the Plaintiff's prima facie case of fraud under § 523(a)(2)(A), the Defendants assert that the above transactions involving the Three Thousand dollar (\$3,000.00) check and the Plaintiff's Truck were simply intended to be a loan, and that they fully intended to repay this loan.

Newton v. Glover, et al.
Case No. 99-3186

In support thereof, the Defendants testified that they made three payments, of Two Hundred Fifty dollars (\$250.00) each, to the Plaintiff. In addition, the Defendants, to establish their lack of fraudulent intent, called to the Court's attention the fact that the Defendant, David Glover, had maintained a long and lasting relationship with the Plaintiff's deceased husband. Once more, to show their lack of fraudulent intent, the Defendants established that around the time the transactions at issue in this case took place, the Defendants were planning on moving in with the Plaintiff in order to take care of her. The Court, however, while agreeing that such considerations could in some circumstances refute a creditor's allegation of fraudulent intent, does not find that such considerations, under the facts of this case, are sufficient to rebut the Plaintiff's prima facie showing of fraudulent intent. In particular, the Court was troubled by the following circumstances which surrounded the Defendants' supposed loan transactions with the Plaintiff:

First, the Court cannot understand why the Defendants, when supposedly entering into a Thirteen Thousand dollars (\$13,000.00) loan agreement with the Plaintiff, did not attempt to even contact one of the Plaintiff's daughters regarding this transaction. This is especially true considering that two of the Plaintiff's daughters held "power of attorney" over all of the Plaintiff's financial affairs, a fact which the Defendants surely knew given their close relationship to the Plaintiff's family. The Court is also troubled by the fact that nothing exists in writing which memorializes the Parties' alleged loan agreement; a fact which becomes all the more disturbing when one considers the large amount of the supposed loan in relationship to the limited financial resources the Plaintiff has available. In addition, when these considerations are viewed at in conjuncture with the fact that the Defendants were experiencing financial problems at the time they obtained money from the Plaintiff, the intentions of the Defendants become even more questionable. In this regard, the Court observes that the Defendants readily admitted that at the time the transactions at issue in this case took place, the Plaintiff was the only party from whom they could obtain any money. Therefore, given all the foregoing considerations collectively, the Court holds that with respect to the Defendants procurement of both the Three Thousand dollar (\$3,000.00) check and the Plaintiff's Truck, the Plaintiff has carried her burden of persuasion under the standard set forth in § 523(a)(2)(A).

Newton v. Glover, et al.
Case No. 99-3186

One final note: the Plaintiff has requested that she be permitted an award of punitive damages as a result of the Defendants' wrongful conduct. At this time, however, the Court declines to make such an award. Nonetheless, to the extent that a state court finds an award of punitive damages to be proper, and to the extent that such an award falls within the scope of the United States Supreme Court's decision in *Cohen v. de la Cruz*, 523 U.S. 213, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998), any award of punitive damages would be nondischargeable. In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that to the extent it is determined that the Defendants, David Glover and Mary Glover (a.k.a. Mary Case), have any liability under state law to the Plaintiff for their procurement of the Three Thousand Dollar (\$3,000.00) check and their obtainment of the Plaintiff's Truck, that such liability be, and is hereby, determined to be a Nondischargeable Debt in bankruptcy pursuant to 11 U.S.C. § 523(a)(2)(A).

Dated:

Richard L. Speer
Chief Bankruptcy Judge