IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Penny Sue Gainey, Debtor	Bk. No. 05-10277 Chapter 7
MBNA America Bank, N.A., Plaintiff v. Penney Sue Gainey Defendant	Adv. Pro. No. 05-80377-HB **JUDGMENT**

Based on the Findings of Fact and Conclusions of Law set forth in the attached Order of the Court, Plaintiff's Motion to Amend its Complaint to add causes of action pursuant to 11 U.S.C. § 727 is denied. Judgment is hereby entered in favor of the Defendant regarding the causes of action raised pursuant to 11 U.S.C. § 523(a)(2)(A), and the debt to Plaintiff on account number XXXXXX8370 is dischargeable. Judgment is hereby entered in favor of the Plaintiff on Defendant's counterclaim raised pursuant to 11 U.S.C. § 523(d) and no fees and costs will be awarded.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
June 7, 2006

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	
Penny Sue Gainey, Debtor	C/A No. 05-10277
	Chapter 7
MBNA America Bank, N.A., Plaintiff	Adv. Pro. No. 05-80377-HB
v.	**ORDER**
Penney Sue Gainey Defendant	

THIS MATTER came before the Court for trial on the issues raised in the Complaint, as amended, filed by Plaintiff MBNA America Bank, N.A. ("Plaintiff" or "MBNA"), seeking to determine the dischargeability of a consumer debt pursuant to 11 U.S.C. § 523(a)(2),[1] and the Answer thereto made by Penny Sue Gainey ("Defendant"). The trial was held on May 18, 2006. Plaintiff called the Defendant as its only witness. In addition, the following documents were admitted into evidence by agreement of the parties and without objection: (1) the Complaint and Amended Complaint, (2) ledger notes made by the Defendant in the operation of her business and (3) a copy of the Defendant's deposition with numerous attachments.

[1] Internal references to the Bankruptcy Code (11 U.S.C. § 101 et. seq.), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the Reform Act), shall be made by section number only.

FINDINGS OF FACT

1. Defendant filed this chapter 7 bankruptcy case on September 9, 2005. Her bankruptcy schedules list as her only interest in real property her residence valued at $56,600 with mortgage debt scheduled at $57,138. Her schedules do not list any other significant non-exempt or unencumbered assets except for business equipment valued at $8454.

2. The Defendant's schedules list unsecured debts primarily consisting of credit card debt of approximately $63,000. Included in that schedule of debts is an obligation to the Plaintiff. The parties agree that as of the date the case was filed the Defendant owed the sum of $9187.08 to the Plaintiff on account of charges and convenience checks made on her MBNA credit card account no. XXXXXX8370. Eight thousand dollars ($8000) of the charges were incurred on July 1, 2005, when the Defendant used convenience checks to transfer the balance of a higher rate credit card to this MBNA account. This balance transfer did not increase her overall debt. The Defendant filed her bankruptcy petition 70 days thereafter.

3. The Defendant testified that as of July 1, 2005, she was aware that her stereo and audio business was failing. The Defendant testified that although her financial circumstances and her business prospects at the time of the MBNA transaction appeared grim, she hoped that she would be able to get a job elsewhere to pay her debts and that she could continue with her business as well, in an attempt to improve it. At the time of the trial the Defendant was gainfully employed. She testified that it was never her intent to make a false representation of any kind and that at all relevant times she intended to repay the debt in question.

4. The Defendant testified that she had only used convenience checks on one other occasion and that this time she made the cash advance to take advantage of a promotional offer involving convenience checks drawn on the MBNA credit card account because they offered a 0% interest rate for the transaction.

5. Plaintiff filed its initial Complaint on December 9, 2005, asking that the Court except the debt to the Plaintiff from the Defendant's discharge. The Plaintiff relied on § 523(a)(2)(C), which provides a presumption of nondischargeability in favor of the Plaintiff for charges made and/or advances incurred within 60 days before the case was filed.[2]

6. On December 21, 2005 the Defendant filed an Answer denying the allegations and asserting a counterclaim pursuant to § 523(d) and indicating that in fact the charges were not made within the presumption period. The Defendant also filed a Motion to Dismiss or in the alternative, a Motion for Summary Judgment based on the alleged lack of a presumption.

7. On January 13, 2006, the Plaintiff filed its Response to Motion to Dismiss admitting its mistake regarding the 60 day presumption and asking that it be allowed to proceed with the action pursuant to § 523(a)(2)(A), without the benefit of the presumption found in § 523(a)(2)(C). The Plaintiff alleged that even without any presumption, the Defendant incurred the debt under false pretenses, a false representation or by actual fraud as proscribed by § 523(a)(2)(A) and asked that it be allowed to amend its Complaint accordingly. On January 23, 2006 the court granted the motion to amend and denied a request for dismissal and summary judgment, and the case was set for trial.

[2] Because the Defendant's bankruptcy petition was filed on September 9, 2005, prior to the effective date of the Reform Act, the pre-Reform Act version of § 523(a)(2)(C) applies to this case. The Act lengthened the presumptive time periods.

8. At the Defendant's deposition on March 31, 2006, to support its case, the Plaintiff sought to establish the first date that the Defendant realized that bankruptcy was imminent. She was questioned about the date of her first contact with her bankruptcy attorney, George Reeves. Defendant was questioned and responded as follows:

Q: . . . when did you first meet Mr. Reaves?
A: The day that I went in his office, the first day I went in his office to talk about bankruptcy.
Q: Do you know how long before September of 2005 you would have gone into his office to talk about bankruptcy?
A: No.
Q: Do you know when you would have paid Mr. Reaves?
A: No, I am uncertain when that was.
Q: Do you know if you would have written a check or if the business, Sound Off, would have written a check to Mr. Reaves?
A: Neither one.
Q: How did you pay Mr. Reaves?
A: In cash.
Q: Where did you get the cash from?
A: A friend.
Q: Do you know about when you got that cash?
A: No, I don't.
Q: What was the name of the friend you got the cash from?
A: The name of the friend?
Q: Yes, Ma'am, to pay Mr. Reaves?
A: Does that need to be revealed?
Q: Well, yeah, that way I can ask that person when you paid him since you don't remember.

(Def. Dep. at 41-42). The discussion continues with the Plaintiff's attorney indicating that because Defendant did not remember the date her friend gave her the money, the Plaintiff's attorney needed the name of the friend. It culminates with the Defendant's attorney objecting on the basis of relevance and instructing the Defendant that she should not answer the question. (Def. Dep. at 44). The Plaintiff's attorney continued with other questions designed to determine when the Defendant first considered filing a bankruptcy petition:

Q: Can you tell me when you first saw Mr. Reaves?
A: No, I cannot.
Q: Okay. Can you tell me when you first looked at the Yellow Page ad?
A: No, I cannot.
Q: Can you tell me when you first considering filing bankruptcy?
A: No, I cannot.

(Def. Dep. at 45-46.) A review of the Defendant's bankruptcy schedules indicates the amount that the Defendant paid to the attorney, but does not reveal any date of payment by the Defendant to her attorney.

9. On April 25, 2006, in response to a Motion to Compel filed by the Plaintiff, the Court entered an order compelling the Defendant to immediately provide the name of the friend who gave her the funds to file the case and also the date the assistance was provided.

10. At trial, the parties represented to the Court that the Defendant's attorney sent a letter to the Plaintiff's attorney dated April 24, 2006, which included the name of the friend and stated that the Defendant was not aware of the date the funds were given to her. At trial, the Defendant testified that the friend died in September of 2005 and therefore he could not be questioned about the timing of the financial assistance.

11. In addition to the facts set forth above, at trial the Plaintiff elicited testimony from the Defendant and presented documentary evidence indicating that as of July 1, 2005 the Defendant's business and financial condition was extremely poor and that as a result, repayment of the $8000 obligation was highly unlikely, should that financial condition persist. Included in the evidence presented as attachments to her deposition were the Defendant's own notes indicating a continuing business loss and a copy of her bankruptcy filings indicating her insolvency and negative budget at the time

of filing. Also, the Defendant testified that even her own son decided to leave her business before July 1 at least in part because of its poor financial condition.

12. Defendant failed to provide a full and complete answer to question number three on her Statement of Financial Affairs. That question requires the Defendant to list certain payments made to creditors within ninety days before the bankruptcy filing. It was established that the Defendant failed to list the payment on the higher rate credit card paid down by the MBNA $8000 advance. The Defendant also stated that her historical income on her statement of financial affairs may need to be altered in some fashion. At trial the Plaintiff asked the Court for leave to amend its already Amended Complaint to add a cause of action pursuant to 11 U.S.C. § 727 to deny discharge.

13. Regarding the omission of the payment on the higher rate credit card in the Defendant's Statement of Financial Affairs, the Defendant admitted her mistake but testified that in her mind she had not "paid off" the debt because she had not incurred new debt and therefore did not think of listing it in response to this question. The evidence as to the extent that her historical income needed alteration was unclear: the Defendant merely admitted that she needed to change the numbers relating to her 2004 and 2005 business income, but did not know the extent of the needed change.

DISCUSSION AND CONCLUSIONS OF LAW

Motion to Amend Amended Complaint to add claims under 11 U.S.C. § 727

The Plaintiff made a motion in its closing requesting that it be allowed to amend the Amended Complaint to assert causes of action pursuant to §§ 727(a)(3), (4) and (6). Under Rule 15(a) of the Federal Rules of Civil Procedure, the Plaintiff may amend the Amended Complaint "only by leave of court or by written consent of the adverse party;

and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The court may deny leave to amend if the newly asserted claims would be futile, that is, would be subject to dismissal for any reason or would not survive a motion for summary judgment. Scott v. Hern, 216 F.3d 897, 906 (10th Cir. 2000). Motions to amend are committed to the sound discretion of the trial court. Keller v. Prince George's County, 923 F.2d 30, 33 (4th Cir. 1991). A motion to amend pleadings during the course of trial is a matter addressed to the sound discretion of the judge, and her ruling will not be disturbed unless it results in manifest injustice. Maryland Casualty Co. V. Rickenbaker, 146 F.2d 751, 752-53 (4th Cir. 1944).

Regarding the claims under § 727, the burden of proof is on the Plaintiff, as the party objecting to discharge of the debt, to prove the elements of the discharge exceptions. Taunt v. Patrick (In re Patrick), 290 B.R. 306, 310 (Bankr. E.D. Mich. 2003). Based on the facts of this case, the Plaintiff did not meet its burden of proving a cause of action pursuant to § 727 and therefore, the question of whether the motion to amend should be allowed need not be considered.

Under § 727(a)(4)(A) discharge may be denied if "(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). In order to deny a discharge to a debtor under this subparagraph, a plaintiff must establish that: (1) the debtor made a statement while under oath; (2) which was false; (3) the debtor knew that the statement was false when making it; (4) the debtor had fraudulent intent when making the statement; and (5) the statement materially related to the bankruptcy case. Buckeye Retirement Co. v. Heil (In re Heil), 289 B.R. 897, 907 (Bankr. E.D. Tenn. 2003); Keeney v. Smith (In re Keeney), 227 F.3d

679, 685 (6th Cir. 2000); Hendon v. Oody (In re Oody), 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000). A debtor's statements and schedules are executed under oath and penalty of perjury. Fed. R. Bankr. P. 1008.

Plaintiff asserts that pursuant to § 727(a)(4)(A) the Defendant knowingly and fraudulently made a false oath or account as a result of her failure to list the $8000 payment to a creditor and due to her uncertainty over her historical income. However, the evidence presented does not support this assertion. To explain her error regarding the omission of payment information, the Defendant provided credible testimony sufficient to convince the court that this error was inadvertent. Regarding the possible inaccuracy of Defendant's historical income, Plaintiff did not prove the seriousness or extent of any inaccuracy. Additionally, the errors in question do not appear to be material errors that rise to the level necessary to deny the Defendant's discharge in this instance. See, e.g., Williamson v. Fireman's Fund Ins. Co. (In re Williamson), 828 F.2d 249, 251 (4th Cir. 1987)(denial of discharge upheld due to debtor's failure to disclose joint bank account and three monetary gifts to fiancé); Siegel v. Weldon (In re Weldon), 184 B.R. 710, 714 (Bankr. D.S.C.1995) (debtor denied discharge under § 727(a)(4) when he failed to disclose assets in the form of artwork held for sale by gallery, sale of $60,000 worth of artwork within two (2) years of bankruptcy, transfer of artwork to family members on eve of bankruptcy and post-petition receipt of proceeds from sale of artwork); Anderson v. Hooper (In re Hooper), 274 B.R. 210, 219-220 (Bankr. D.S.C. 2001) (ten instances of omitted or inaccurate information on schedules and statement of financial affairs, including payments and transfers of property to insiders and failure to disclose income, constitute grounds for denial of charge.) Therefore, the Plaintiff did not meet its burden

of providing that such errors were material or that they were made knowingly and fraudulently.

Regarding the allegations pursuant to § 727(a)(6), the Plaintiff asserts that the Defendant failed to obey a lawful order of the Court when she failed to provide the date she received financial assistance from her friend. The order in question required the Defendant to disclose the name of the friend who gave her money and the date the money was provided. Thus, this order is most accurately described as an order "to respond to a material question approved by the court." § 727(a)(6)(C).

Section 727(a)(6)(C) provides in pertinent part that a discharge may be denied if "the debtor has refused, in the case - . . . (C) . . . to respond to a material question approved by the court or to testify." The cases interpreting this provision distinguish a failure to respond from a refusal to respond: "[t]he term used in the statute is 'refused' not 'failed.'" Missouri ex rel. Nixon v. Foster (In re Foster), 335 B.R. 709, 716 (Bankr. W.D. Mo. 2006). See also Yoppolo v. Meyers (In re Meyers), 293 B.R. 417, 419 (Bankr. N.D. Ohio 2002) (requiring a "refusal" under § 727(a)(6) to be conduct sufficient to give rise to a civil contempt charge.) The debtor's lack of compliance with the court's order must be "willful and intentional." In re Foster, 335 B.R. at 716.

In the present case, the Defendant's conduct does not approach the type of willful refusal to respond to a question described in § 727(a)(6)(C). The Defendant in fact supplied the name of the friend in question. As to the time the financial assistance was provided by the friend, she testified that she did not know the date. Plaintiff offered no evidence that this was not true and therefore has not met its burden of proving that the Defendant refused to obey an order of the Court.

Finally, the Plaintiff asserts that the Defendant's discharge should be denied pursuant to § 727(a)(3) due to the Defendant's failure to keep records of the date that she received financial assistance from the friend and of her first visit to a bankruptcy attorney. Section 727(a)(3) provides that:

> (a) The court shall grant the debtor a discharge, unless –
>
> . . .
>
> > (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

This Court interprets the purpose of this statute as follows:

> The purpose of section 727(a)(3) is to insure [sic] that the trustee and creditors are supplied with dependable information on which they can rely in tracing a debtor's financial history. The trustee and creditors are entitled to complete and accurate information showing what property has passed through the debtor's hands prior to his bankruptcy.

Transworld, Inc. v. Volpe (In re Volpe), 317 B.R. 684 , 690 (Bankr. D.S.C. 2003); In re Weldon, 184 B.R. at 714 (citing In re Esposito, 44 B.R. 817, 826 (Bankr. S.D.N.Y. 1984) and Morton v. Dreyer (In re Dreyer), 127 B.R. 587, 594 (Bankr. N.D. Tex. 1991)). To prevail under § 727(a)(3), a plaintiff must establish that (1) the debtor failed to keep or preserve any recorded information, or destroyed or concealed it, (2) as a result, the debtor's financial condition cannot be ascertained, and (3) such failure was unjustified. Baron v. Klutchko (In re Klutchko), 338 B.R. 554, 572 (Bankr. S.D.N.Y. 2005). Adequacy of a debtor's records is determined on a case by case basis. Factors to be considered include "debtor's occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice." In re Trogdon, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990).

At trial the Defendant testified as to *the approximate* time that she visited and paid the bankruptcy attorney. She testified that she borrowed the money from a friend, that the transaction was in cash and therefore she had no records, and that the friend is now dead. The Plaintiff asserts only that the Defendant failed to keep a record of this transaction and that as a result the exact date of the transaction cannot be determined. It is certainly reasonable that an individual debtor would not keep a written record of a cash gift transaction from a friend in the amount of less than $1000. Failure to keep a record of this transaction is justified under all of the facts of this case. The Plaintiff has not met its burden of proof under this section in that it has not shown that a prudent person would keep a written record of such a transaction or what type of record would be required. Because all of the Plaintiff's proposed claims under § 727 are futile, Plaintiff's motion to amend the Amended Complaint is denied.

Plaintiff's Claim under 11 U.S.C. § 523(a)(2)(A)

The Plaintiff's primary case alleges that a debt in the amount of $8000, plus interest, costs and fees should be excepted from the Defendant's discharge pursuant to § 523(a)(2). That section provides:

> (a) A discharge under section 727 . . . 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.

In general, to establish that a debt should not be subject to discharge, a claimant must prove: (1) the debtor made a fraudulent misrepresentation; (2) the debtor's conduct was with the intention and purpose of deceiving or defrauding the creditor; (3) the creditor

relied on the debtor's representations or other fraud; and (4) the creditor sustained loss and damage as a proximate result of the representations of fraud. Foley & Lardner v. Biondo (In re Biondo), 180 F.3d 126, 134 (4th Cir. 1999). The Supreme Court has held that the burden of proof under any exception to discharge under § 523 is the "ordinary preponderance of the evidence." Grogan v. Garner, 498 U.S. 279, 291 (1991). Here, the Plaintiff bears the burden of proving by a preponderance of the evidence the following elements: 1. the debtor/defendant made a false representation; 2. at the time made, the debtor/defendant knew that the representation was false; 3. the debtor/defendant made the representation with the intention and purpose of deceiving the creditor; 4. the creditor relied on the representation; and 5. the creditor sustained the alleged loss and damage as a result of the representation having been made. Corestates Bank v. Richardson (In re Richardson), 179 B.R. 791, 794-795 (Bankr. D.S.C. 1994); Standex Int'l v. Bosselait (In re Bosselait), 63 B.R. 452, 457 (Bankr. E.D. Va. 1986).

Since a debtor will rarely, if ever, admit to fraudulent intent, courts have established that a credit card issuer can prove a debtor's lack of intent to repay through the presentation of circumstantial evidence. Citibank, N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1087 (9th Cir. 1996); Bank One Columbus, N.A. v. McDonald (In re McDonald), 177 B.R. 212, 216 (Bankr. E.D. Pa. 1994); Gordon v. Bruce (In re Bruce), 262 B.R. 632, 636 (Bankr. W.D. Pa. 2001) ("intent to deceive may be inferred from the totality of the circumstances of a case. It may be inferred when the facts and circumstances present a picture of deceptive conduct on the debtor's part." (citations omitted)). The factors to be considered in determining the intent of the debtor include:

1. The length of time between the charges and the filing of the bankruptcy petition;
2. The number of charges made;

3. The amount of the charges;
4. Whether the charges were above the credit limit of the account;
5. Whether there exists a sharp change in the debtor's buying habits;
6. Whether there were multiple charges on the same day;
7. The financial sophistication of the debtor;
8. The financial condition of the debtor at the time the charges were made;
9. Whether an attorney had been consulted about bankruptcy before the charges were made;
10. The debtor's employment circumstances;
11. The debtor's prospects for employment; and
12. Whether the purchases were made for luxuries or necessities.

In re Richardson, 179 B.R. at 795-796 (citing In re Weiss, 139 B.R. 928, 930 (Bankr. D.S.D. 1992)). The creditor need not prove the existence of all these factors in order for the court to find the requisite intent to deceive. First Card Services v. Team Motorsports, Inc. (In re Team Motorsports, Inc.), 227 B.R. 427, 431 (Bankr. D.S.C. 1998) (citing In re Valdes, 188 B.R. 533, 537 (Bankr. D. Md. 1995) and In re Williams, 85 B.R. 494, 499 (Bankr. N.D. Ill. 1988)).

The Defendant in this case has denied any intent to defraud, so the Court must look to factors to be considered in determining if such fraud exists. The Defendant made a charge of $8000 only 70 days before her petition was filed and while she was experiencing severe financial circumstances. At the time of the charge, the Defendant was somewhat financially sophisticated in that she operated a business. The charge in question did not exceed the credit limit, and the funds were used to pay down a balance on a credit card with a higher interest rate, so the charges were not for luxuries. The Defendant used a convenience check with a promotional offer of 0% interest, and testified that the rate and promotional offer were her motivation for the action. The Plaintiff did not prove that the Defendant either contemplated bankruptcy or visited a bankruptcy attorney prior to the time the charges were made. The first proven contact

with a bankruptcy attorney occurred approximately one and one half months after the charge in question. At the time of the charge the Defendant was operating her own failing business and had not pursued other employment. She testified that when the charge was made she intended to repay it and did not view it as incurring new debt that she could not repay because she was merely transferring a balance to take advantage of a lower interest rate. She testified that although she knew her financial circumstances were poor, she hoped to get an additional job to supplement her income and also continue to run her business and improve it, and she was in fact gainfully employed at the time of trial. Applying the factors of In re Richardson to the facts of this case, approximately half weigh in favor of the Defendant and half in favor of the Plaintiff.

In this case the Plaintiff has relied primarily on the fact that the Defendant had a lack of ability, and therefore a lack of a realistic intent, to repay the charges. However, a lack of the current ability to repay does not automatically equal the requisite intent. Although the Defendant's business and therefore her income was failing at the time of the charge, she still had the ability to choose to leave the business and seek other employment – and in fact has done so since the time the bankruptcy case was filed. Further, any factors weighing in favor of a finding of fraud are countered by the fact that the Defendant did not incur any additional debt affecting her overall financial situation, but rather took advantage of an offer to transfer a credit card balance to an existing card with a lower interest rate. If the Defendant were entertaining ideas of making charges that she was unable to repay and planned instead to discharge them in bankruptcy, she would not have been motivated by the interest rate involved. Further, if she possessed the intent to defraud and the ability to write a check for $8000, it seems logical that she would have

simply cashed the check or purchased luxury items and increased her debts, rather than transferring a balance. The Defendant's testimony regarding her motivation for her actions is supported by other documented facts in this case such as the interest rate on the credit cards in question and the fact that no additional debt was added to her balance sheet, and her testimony was credible on the issue of her motivation and intent. The Plaintiff has the burden of proving by a preponderance of the evidence that the charges in question were incurred by false pretenses, a false representation or actual fraud. The Court finds that the Plaintiff has failed to meet its burden of proving that the Defendant had the requisite intent and therefore the exception to discharge of § 523(a)(2)(A) does not apply. Accordingly, the debt shall be discharged.

Defendant's Counterclaim under 11 U.S.C. § 523(d)

Section 523(d) provides as follows:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Initially the Plaintiff included incorrect information in its Complaint, but was allowed to amend quickly to correct the error after it was identified. The case continued to trial under the Amended Complaint. While the Court finds that the Plaintiff failed to meet its burden of proof in this case, the matter ultimately turned on the credibility of the witness and the evidence at trial. The outcome of the matter was not readily apparent either before the trial or during the proceedings. The Plaintiff raised substantial and serious questions about the Defendant's intent in incurring the charges in question and the timing of the charges in relation to the bankruptcy filing.

Certainly one of the initial questions that must be asked by a creditor when considering an action to except a recently incurred debt from discharge, and one of the factors set forth in In re Richardson, is: *When did the Defendant first seek bankruptcy counsel or contemplate filing bankruptcy?* This Defendant was asked repeatedly and was unable to provide an answer until April of 2006, shortly before the May 18th trial and long after the adversary proceeding and the Defendant's request for attorneys' fees was filed. Even at that late date and continuing at the trial, the Defendant was unable to provide the exact date she received financial assistance to pay bankruptcy fees. Further, the Defendant's bankruptcy schedules did not disclose the date that bankruptcy counsel was first paid. Because of these factors, the Plaintiff was certainly justified in its suspicions regarding the Defendant's intentions and inability to supply such dates. Therefore the Plaintiff was substantially justified in proceeding with this action. Any debtor who incurs debt shortly before a bankruptcy petition is filed and fails to provide or is slow to provide pertinent information to a creditor – such as the first date he or she made contact with a bankruptcy attorney, the date bankruptcy fees were paid or the date he or she received financial assistance to pay those fees – runs the risk of defending a substantially justified suit to except a debt from discharge. Only after a full trial and an opportunity to carefully review all evidence and observe the credibility of the witness did it become apparent in this case that the Plaintiff would not prevail.

Therefore, the Court finds that the Plaintiff was substantially justified under the circumstances in pursuing the action under § 523(a)(2) and therefore no costs or attorneys' fees will be awarded. The Court finds no merit to Defendant's argument that fees and costs should be granted due to the Plaintiff's error in the initial Complaint as that

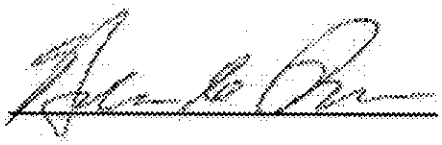
error was corrected early in this matter and the case proceeded to trial on other grounds that were substantially justified.

IT IS THEREFORE, ORDERED:

1. That the Plaintiff's Motion to Amend its Complaint to add causes of action pursuant to 11 U.S.C. § 727 is denied;

2. That judgment is hereby entered in favor of the Defendant regarding the cause of action raised pursuant to 11 U.S.C. § 523(a)(2)(A), and the debt to the Plaintiff on account number XXXXXX8370 is dischargeable;

3. That judgment is hereby entered in favor of the Plaintiff on Defendant's counterclaim raised pursuant to 11 U.S.C. § 523(d) and no fees and costs will be awarded.



UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
June 7, 2006