

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

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| IN RE: | § | |
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| JIUNN CHAU LI AND | § | CASE NO. 99-10863-7 |
| LIN YU-CHIH LI, | § | |
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| Debtors. | § | |
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| CITIBANK, S.D., N.A., | § | |
| | § | |
| Plaintiff | § | |
| vs. | § | ADVERSARY NO. 00-1005 |
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| JIUNN CHAU LI AND | § | |
| LIN YU-CHIH LI, | § | |
| | § | |
| Defendants. | § | |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Plaintiff, Citibank, S.D., N.A. (Citibank), contends that debt incurred by the Debtors, Jiunn Chau Li and Lin Yu-Chih Li, under a Citibank MasterCard is nondischargeable under § 523(a)(2)(A) and (B) of the Bankruptcy Code.

2. On August 2, 1998, the Debtor, Jiunn Chau Li, signed a document entitled “Citibank Platinum Select Invitation”. *See* Plaintiffs’ Exh. CB-1. While this document is not entirely legible, it appears to reflect that Jiunn Chau Li’s total yearly income is \$35,000.00. *Id.* Citibank’s representative, Albert Mellon¹, described this document as the “application” or “certificate” signed by Jiunn Chau Li prior to issuance of the Citibank MasterCard.

¹Mr. Mellon testified he is the National Agency Manager for “Citigroup”. The relationship between the named Plaintiff, Citibank, and Citigroup is unclear. For purposes of these findings, a reference to Citibank shall include Citigroup.

3. Citibank's procedure before issuing a pre-approved credit card is as follows²: Citibank buys a list of names from a vendor. It then runs a credit report with a credit bureau with which it has a prior arrangement. Mellon testified that this is not a full blown credit report, however. Anyone who hits the "first tier" based on certain indicators is targeted to receive a "pre-approved application". The actual credit card is not sent initially with the pre-approved application. When Citibank receives the pre-approved application back from the customer, it then runs a full-blown credit report. While the extension of credit and issuance of the credit card is pre-approved, Citibank reserves the right to determine the amount of credit based upon the information that is received on the pre-approved application. The customer is then sent a cardholder's agreement with the credit card.³

4. Billing statements dated January 14, 1998, through November 19, 1999, on the Citibank MasterCard were admitted into evidence. These statements reflect that for the months of January, 1998, through June, 1999, the balance on the MasterCard account fluctuated to some extent but basically leveled off at approximately \$2,000.00. Plaintiff's Exh. CB-2. In the months of July and August, 1999, the charges increased significantly, resulting in a balance in excess of \$5,200.00. *Id.*

5. The Debtors filed bankruptcy on November 12, 1999. There were no charges made on the Citibank MasterCard within sixty days of the bankruptcy filing.

6. Charging privileges on the MasterCard terminated in September, 1999, when Jiunn Chau Li exceeded the credit limit.

²This case was jointly tried with **Universal Bank, N.A. vs. Jiunn Chau Li and Lin Yu-Chih Li**, Adversary No. 00-1006, which concerned a pre-approved credit card. Citibank contends the MasterCard was not pre-approved. However, there is no evidence to establish whether the card was or was not pre-approved.

³A cardholder's agreement was not offered into evidence in this case.

7. The Debtors, who moved to the United States from Taiwan, bought and started a restaurant in Big Spring, Texas, in 1991. They moved the location of the restaurant in 1995. In doing so, they obtained a bank loan in the approximate sum of \$170,000.00 from Norwest Bank (then the First National Bank in Big Spring, Texas). The evidence suggests that the restaurant business declined along with the downturn of the oil and gas industry experienced regionally in Big Spring.

8. In May, 1999, the restaurant flooded because of a broken pipe. There was extensive damage to the interior of the restaurant building, causing the Debtors to close the restaurant for approximately a week. The business continued to decline after the flood.

9. The Debtors' son, Hsiao Hsuan Li, who worked in the restaurant, testified that the charges on the MasterCard relate to repairs to the building. Indeed, the identity of the vendors on the statements for the months of July and August lend credibility to Hsiao Hsuan Li's testimony.

10. Because of the downturn in their restaurant operation, the Debtors defaulted in making payments on their bank loan. While the Debtors had insurance on the building, the bank, apparently because of the default on its loan, applied the insurance proceeds to its indebtedness. Accordingly, the insurance funds were not available for use in making the repairs caused by the flood.

11. The Debtors attempted to sell the restaurant and hoped to raise sufficient funds from a sale to satisfy their debts.

12. The Debtors were unsuccessful in selling the restaurant; the bank posted the restaurant for a foreclosure sale by a notice of trustee's sale dated October 25, 1999, which noticed a sale for December 7, 1999.

13. There is no evidence that the Debtor, Lin Yu-Chih Li, applied for or used the MasterCard.

14. If appropriate, these findings of fact shall be considered conclusions of law.

Conclusions of Law

15. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding. 28 U.S.C. § 157(b).

16. Section 523(a)(2)(A) of the Bankruptcy Code provides that debt arising from the extension of credit is nondischargeable to the extent obtained by “false pretenses, a false representation, or actual fraud, other than a statement reflecting the debtor’s or an insider’s financial condition” A creditor must prove its claim by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *AT&T Universal Card Services v. Mercer (In re Mercer)*, 211 F.3d 214, 216-17 (5th Cir. 2000); *Universal Bank, N.A. v. Kuntz (In re Kuntz)*, 249 B.R. 699, 703 (Bankr. N.D. Tex. 2000).

17. To establish false pretenses or a false representation, the creditor must prove the debtor: (1) made a knowing and fraudulent falsehood; (2) describing past or current facts; (3) that was relied upon by the creditor; (4) who thereby suffered a loss. *In re Mercer*, 211 F.3d at 216-17; *In re Kuntz* at 703. To recover under an actual fraud theory, the creditor must prove 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) that the creditor relied on such representations; and (5) that the creditor sustained losses as a proximate result of the representations. *In re Kuntz* at 703-704, citing *RecoverEdge, L.P. v. The Pentecost*, 44 F.3d 1284, 1292 (5th Cir. 1995). The creditor must show justifiable reliance on the

debtor's representations. *Field v. Mans*, 516 U.S. 59, 69-70, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995); *In re Mercer*, 211 F.3d at 216-17; *In re Kuntz* at 704.

18. Either theory, false pretense/representation or fraud, requires, as a threshold element, a representation by the debtor.

19. Citibank offered no evidence of either a written or oral representation made by either Debtor before or proximate to the time of approval of credit and issuance of the Citibank MasterCard. The August 2, 1998, "application" was completed and signed by Jiunn Chau Li well after issuance of the card.⁴

20. There is no evidence of an extension, renewal, or refinancing of credit at or near the time the August 2, 1998, application was signed by Jiunn Chau Li. Therefore, the August 2, 1998, application does not constitute a representation made by either Debtor in connection with Citibank's approval of credit and issuance of the Citibank MasterCard.⁵

21. Although Citibank contends the Citibank MasterCard was not a pre-approved card, there is no evidence to establish whether it was pre-approved or not.

22. As there is no evidence of an oral or written representation by either Debtor in connection with either the issuance of the MasterCard by Citibank or usage of the card by the Debtors, Citibank must rely upon the implied representation theory. This court rejects such theory. See *In re Mercer*; *In re Kuntz*.

23. As Citibank has failed to prove a representation by either Debtor, Citibank's claim

⁴The billing statements reflect the MasterCard was issued prior to January, 1998. In fact, there is no evidence that explains the relevance of the August 2, 1998, application.

⁵The Plaintiff contends that Jiunn Chau Li's representation concerning annual income contained on the August 2, 1998, application is false. The court notes that § 523(a)(2)(A) specifically excludes a representation regarding the debtor's financial condition.

under § 523(a)(2)(A) is denied.

24. As the Citibank MasterCard was issued prior to Jiunn Chau Li signing the August 2, 1998, application, Citibank's claim under § 523(a)(2)(B), which requires use of a statement in writing in connection with issuance of credit, must also fail.⁶

25. As there is a split of authority on the issue of whether use of a credit card constitutes an implied representation of intent to repay, Citibank has not acted in bad faith in filing the complaint.

26. For a debtor to recover costs and attorney's fees, the creditor must have sought and lost a determination of dischargeability of a consumer debt. 11 U.S.C. § 523(d).

27. The evidence indicates the charges on the MasterCard were for repairs to the restaurant following the flood. Such charges do not constitute a consumer debt as required by § 523(d). *In re Baker*, 213 B.R. 834 (Bankr. N.D. Ill. 1997).

28. The Debtors' request for recovery of attorney's fees and costs is denied.

29. If appropriate, these conclusions of law shall be findings of fact.

Signed October ____, 2000.

Robert L. Jones
UNITED STATES BANKRUPTCY JUDGE

⁶Section 523(a)(2)(B) provides that a debt arising from the extension of credit is nondischargeable to the extent it is obtained by "use of a statement in writing that is (i) 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" 11 U.S.C. § 523(a)(2)(B).