Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
September 13, 2021

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re: ANDRIA NICOLE ROBINSON, Debtor.	Case No.: 19-16550-MKN Chapter 7
JESSIE ROBINSON, Plaintiff, vs. ANDRIA NICOLE ROBINSON, Defendant.	Adv. Proc. No.: 20-01003-MKN Date: August 24, 2021 Time: 9:30 a.m.

"Apparently no good deed goes unpunished."[1]

MEMORANDUM DECISION AFTER TRIAL[2]

[1] Chief Justice Roberts used the phrase in Winter v. Natural Resources Defense Council, 555 U.S. 7, 31 (2008), but the precise origin of the oft-quoted sentiment is unknown. See generally Quote Investigator: Tracing Quotations (April 30, 2018) https://quoteinvestigator.com/2018/04/30/good-deed/.

[2] In this Memorandum Decision, all references to "ECF No." are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the Clerk of Court. All references of "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "Bankruptcy Rule" are to the provisions of the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence.

On August 24, 2021, a trial was conducted in the above-captioned adversary proceeding. The appearances of counsel were noted on the record. After conclusion of the trial, the matter was taken under submission. This Memorandum Decision constitutes the court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Civil Rule 52.

PROCEDURAL BACKGROUND

On October 10, 2019, Andria Nicole Robinson ("Debtor") filed a voluntary Chapter 7 petition ("Petition") commencing the above-captioned bankruptcy proceeding. (ECF No. 1). On the same date, a notice of bankruptcy and meeting of creditors was issued (ECF No. 5), which set forth a deadline of January 13, 2020, for creditors to file objections to the Debtor's Chapter 7 discharge or objections to the dischargeability of any debt.

On October 28, 2019, Debtor filed her schedules of assets and liabilities ("Schedules"), Statement of Financial Affairs ("SOFA"), Statement of Intention ("SOI"), and related documents. (ECF No. 12). On the same date, Debtor also filed her Chapter 7 Statement of Current Monthly Income ("CMI Statement").

On January 8, 2020, creditor Jessie Robinson ("Plaintiff") commenced the instant adversary proceeding by filing an adversary complaint ("Complaint") against the Debtor. (AECF No. 1). Plaintiff seeks a determination that the balance of a $10,000 personal loan to the Debtor is excepted from the Chapter 7 discharge pursuant to Section 523(a)(2)(A).[3]

On August 5, 2020, Defendant filed an answer to the Complaint ("Answer"). (AECF No. 29).

On August 18, 2020, a joint Discovery Plan was filed. (AECF No. 30).

On December 8, 2020, Debtor filed a motion for summary judgment ("SJ Motion"). (AECF No. 32).

On May 6, 2021, an order was entered denying the SJ Motion. (AECF No. 55).

[3] No other creditor objected to a discharge of any otherwise dischargeable debts incurred prior to the filing of the bankruptcy petition.

On May 6, 2021, an Order of Discharge was entered. (ECF No. 30).[4]

On May 24, 2021, an order was entered scheduling a trial and pre-trial conference in this adversary proceeding. (AECF No. 58).

On July 29, 2021, Debtor filed a trial statement ("Debtor's Trial Statement"). (AECF No. 60).

On August 3, 2021, Plaintiff filed an amended trial statement ("Plaintiff's Trial Statement"). (AECF No. 63).

On August 10, 2021, Debtor filed an objection to certain trial exhibits identified in Plaintiff's trial statement. (AECF No. 69).

On August 17, 2021, Debtor filed her alternate direct testimony declaration. (ECF No. 70).

On August 17, 2021, Plaintiff filed her alternate direct testimony declaration. (AECF No. 71).

On August 23, 2021, Debtor filed an additional alternate direct testimony declaration. (ECF No. 74).

ELEMENTS OF A CLAIM UNDER SECTION 523(A)(2)(A)

Plaintiff alleges the debt owed to her by Defendant is nondischargeable under Section 523(a)(2)(A). Under Section 523(a)(2)(A), a Chapter 7 discharge does not include a debt "for money, property, services, or an extension … of credit to the extent obtained by false pretenses, false representations, 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) (emphasis added).

To establish a nondischargeable debt under Section 523(a)(2)(A), a creditor must demonstrate, by a preponderance of the evidence, five elements: (1) the debtor made

[4] As a result of the discharge, creditors are legally enjoined from any act to collect a debt as a personal liability of the Debtor. See 11 U.S.C. §524(a)(2). Creditors who violate the discharge injunction are subject to sanctions, including the payment of damages. See Taggart v. Lorenzen (In re Taggart), 139 S.Ct. 1795 (2019). Although the Debtor obtained a discharge, she is legally permitted to voluntarily repay any debt even if she cannot be compelled to do so. See 11 U.S.C. §524(f).

representations; (2) that at the time she knew were false; (3) that she made the representations with the intention and purpose of deceiving the creditor; (4) that the creditor justifiably relied[5] on such representations; and (5) that the creditor sustained the alleged loss and damages as the proximate result of the misrepresentations having been made. See Wickam v. Ivar (In re Werner), 817 Fed. Appx. 432, 435 (9th Cir. 2020); see also Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010).[6] "Intent to defraud is a question of fact." Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997), as amended (Mar. 21, 1997). "Intent to deceive can be inferred from surrounding circumstances." Thomas v. Kenmark Ventures, LLC (In re Thomas), 716 Fed. Appx. 647, 649 (9th Cir. 2018). Because a debtor's circumstances may change, proof of the debtor's intention to deceive at the time the debt was incurred is critical to any finding that a debtor obtained money or credit through fraud.[7] See

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[5] In Field v. Mans, 516 U.S. 59 (1995), the Court held that the exception to discharge of debt under Section 523(a)(2)(A) based on actual fraud requires proof of justifiable reliance rather than reasonable reliance. While reasonable reliance may be established by providing objective proof of what creditors generally should consider when evaluating any representations made by a debtor, "[j]ustifiable reliance is a subjective standard that looks to the qualities and characteristics of the particular plaintiff, the knowledge and relationship of the parties, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." Brown v. Johnson, 2021 WL 560093, at *6 (Bankr. D. Idaho Feb. 10, 2021), citing Field v. Mans, 516 U.S. at 71. Thus, when a plaintiff alleges that he or she justifiably relied on alleged misrepresentations or omissions by the defendant, the plaintiff places his or her own credibility at issue. Moreover, a creditor's alleged justifiable reliance that strays from what would be objectively reasonable may suggest that there was no actual reliance whatsoever on the representations attributed to the debtor. See Field v. Mans, 516 U.S. at 76 ("As for the reasonableness of reliance, our reading…does not leave reasonableness irrelevant, for the greater the distance between the reliance claimed and the limits of the reasonable, the greater the doubt about reliance in fact…The subjectiveness of justifiability cuts both ways, and reasonableness goes to the probability of actual reliance."). See also Federal Trade Comm. v. Lake, 628 B.R. 664, 674-75 (Bankr.C.D.Cal. 2021).

[6] The parties agree that each of these elements must be proven to prevail under Section 523(a)(2)(A). See Plaintiff's Trial Statement at 3:16-23; Debtor's Trial Statement at 5:14-20.

[7] Section 523(a)(2) also addresses renewals or refinancing of credit obtained through fraud. If a debtor seeks to renew or refinance an existing loan, the intention to deceive must exist at the time of the renewal or the refinancing. Thus, if a debtor engages in fraud to obtain an extension, renewal or refinance of an existing, legitimate debt, the result may be an exception from discharge under Section 523(a)(2) as long as the creditor demonstrates the value of the collection remedies it held at the time of the new agreement. See Hillsman v. Escoto (In re

Shults v. Faulkiner, 594 B.R. 426, 439 (Bankr. D. Nev. 2018). See also Chou v. Brody (In re Brody), 2017 WL 992408, at *6 (B.A.P. 9th Cir. Mar. 15, 2017)("Moreover, the debtor's lack of intent to perform must exist at the time he entered the contract."); Fiebelkorn v. Cooke, 2020 WL 3256805, at *11 (Bankr. D. Ariz. June 15, 2020)(there is "the widely accepted rule that, '[i]n order to establish that a debtor knowingly acted with intent to deceive, it must be shown that **at the time the debt was incurred**, the debtor never had any intention of repaying the obligation in full.'")(emphasis in original).

The Supreme Court of Nevada noted that, "a defendant may be found liable for misrepresentation even when the defendant does not make an express misrepresentation, but instead makes a representation which is misleading because it partially suppresses or conceals information." Epperson v. Roloff, 102 Nev. 206, 212 (Nev. 1986). Even absent an express misrepresentation, a defendant engages in misrepresentation if statements are calculated to mislead another into believing something that is not true. Id. at 213. A defendant engages in misrepresentation by partially concealing information or if statements are calculated to mislead another. Id. at 212-13.

A debtor's concealment of important facts and information from a creditor can qualify as a "false representation" for purposes of Section 523(a)(2)(A). See Citibank (S.D.) N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1089 (9th Cir. 1996).[8] The mere failure to perform a

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Escoto), 2017 WL 1075046, at *3 (B.A.P. 9th Cir. Mar. 21, 2017), aff'd, 713 Fed.Appx. 722 (9th Cir. Feb. 27, 2018), cert. denied, Hillsman v. Escoto, 139 S.Ct. 321 (2018). In this instance, Plaintiff does not allege that the Debtor sought or obtained an extension, renewal, or refinance of the Loan Agreement.

[8] In Eashai, the circuit panel examined the intent to deceive element for actual fraud under Section 523(a)(2)(A) as it pertains to credit card debt incurred prior to an individual debtor's Chapter 7 bankruptcy. The circuit adopted a twelve-factor test to determine an intent to deceive in connection with the use of a credit card. 87 F.3d at 1090. Those twelve factors include: (1) The length of time between the charges made and the filing of bankruptcy; (2) Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made; (3) The number of charges made; (4) The amount of the charges; (5) The financial condition of the debtor at the time the charges are made; (6) Whether the charges were above the credit limit of the account; (7) Whether the debtor made multiple charges on the same day; (8) Whether or not the debtor was employed; (9) The debtor's prospects for employment; (10) Financial sophistication of the debtor; (11) Whether there was a sudden change in the

promise is not fraud, but a projection or a statement of belief constitutes an actionable factual misstatement "if (1) the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement's accuracy." Provenz v. Miller, 102 F.3d 1478, 1487 (9th Cir. 1996); Kaplan v. Rose, 49 F.3d 1363, 1375 (9th Cir. 1995).

THE EVIDENCE PRESENTED AT TRIAL

Both the Plaintiff and the Debtor testified at trial and were subject to cross-examination. Both sides offered various documents into evidence.

A. The Documentary Evidence.

Plaintiff offered eight exhibits at trial. Exhibit 1 is a copy of a one-page document dated 01/30/2017, that is signed by both the Debtor and the Plaintiff ("Loan Agreement"). Exhibit 2 are copies of the Debtor's federal income tax returns and related documents for the 2017 and 2018 tax years ("Tax Returns"). Exhibit 3 consists of copies of the Debtor's earnings statements for the periods ending 01/05/2019 to 09/28/2019 for employment at the Southern Nevada Regional Housing Authority ("Earnings Statements"). Exhibit 4 is a copy of a Small Claims Complaint filed by the Plaintiff on May 3, 2019, as well as related documents ("Small Claims Complaint"). Exhibit 5 consists of a copy of a cover page and index to the transcript of Plaintiff's deposition taken on 10/26/2020. Exhibit 6 consists of copies of transcriptions of various text messages between the Plaintiff and the Debtor on 9/08/18 and 9/13/18. Exhibit 7 consists of a copy of the Debtor's voluntary bankruptcy petition. Exhibit 8 consists of copies of the Debtor's Schedules, SOFA, SOI, and other documents filed in her Chapter 7 case. Debtor objected to the introduction and admission of Exhibits 2, 3 and 4, and those objections were overruled. Debtor also objected to Exhibits 7 and 8, and those objections were overruled inasmuch as the court could take judicial notice of the Debtor's bankruptcy petition, schedules, and related documents under FRE 201.

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debtor's buying habits; and (12) Whether the purchases were made for luxuries or necessities. Id. at 1087-88, citing Citibank South Dakota, N.A. v. Dougherty (In re Dougherty), 84 B.R. 653, 657 (B.A.P. 9th Cir. 1988).

Debtor offered three exhibits at trial. Exhibit A is a copy of the Loan Agreement. Exhibit B is a reproduction of "screen shots" of various text messages between the Plaintiff and the Debtor occurring between May 16, 2018, and September 13, 2018. Exhibit C is a copy of records from the disposition of a criminal proceeding initiated by an information filed on May 10, 2017, by the district attorney for Clark County, Nevada, against the Plaintiff ("Criminal Judgment").[9] Plaintiff objected to the introduction and admission of Exhibit C but that objection was overruled.

During the course of trial, Debtor referenced the Plaintiff's responses to certain written interrogatories and answers to questions at her deposition. Plaintiff was shown those written responses and deposition transcript portions for impeachment purposes when she was cross-examined, but those written items were not introduced or admitted into evidence.

B. The Live Witness Testimony.

The direct testimony of both the Plaintiff and the Debtor was provided through their respective declarations.

1. Andria Nicole Robinson ("Debtor").

In her direct testimony declaration, Debtor testified that the Plaintiff is her paternal grandmother and they previously attended the same church. She stated that sometime near the end of 2016, she was having difficulties with her 2007 Ford pickup ("Ford") and informed

[9] The Criminal Judgment related to a prosecution involving Plaintiff and one of her children for conduct between August 2008 and December 2014 in "willfully, knowingly, feloniously, and without lawful authority" obtaining subsidized housing benefits for a rental property through "a material misrepresentation with intent to deprive" the Southern Nevada Regional Housing Authority of the amount of $69,596.00. After the information was filed on May 10, 2017, Plaintiff pleaded guilty and an initial judgment of conviction was entered on September 15, 2017. That judgment included a probationary period not to exceed three years as well as the payment of restitution in the amount of $81,828.00 "in monthly installments, to be set by the Division based on deft's income and ability to pay." After completion of probation, an amended judgment was entered in July 2020, based on a finding of "an economic hardship that has prevented deft from making all the restitution payments." As a result, the prior guilty plea was ordered withdrawn, Plaintiff was honorably discharged from probation, and the conviction was reduced to conspiracy with credit for time served. The amended judgment also ordered that there is still a balance of $77,358.00 owed from the original amount of $81,828.00. Based on these figures, it appears that the Plaintiff paid $4,470.00 of the restitution amount originally agreed.

church members that she was searching for another vehicle. Debtor testified that in January 2017, she was contacted by the Plaintiff regarding a 2014 Chevrolet Equinox ("Equinox") that was being sold by a third party. After an inspection, Debtor decided to purchase the Equinox. Debtor testified that without asking, Plaintiff offered to loan Debtor $10,000.00 to purchase the Equinox and a loan agreement was prepared by the Plaintiff. Debtor acknowledged that she agreed to repay the loan. The written loan agreement required $300.00 monthly payments until the full amount was paid in full. Debtor testified that she believed that the $300.00 payments would commence once the Ford was paid off. The parties discussed the monthly payments required to pay off the Ford. Both parties signed the loan agreement.

Debtor also testified that at the time she borrowed the funds to purchase the Equinox, she was employed as a call center representative and "felt that I was able to afford these payments once I had paid off my older vehicle." She testified that she experienced different health problems that included surgery in April 2017 as well as various hospitalizations. As a result, her call center job hours varied. Debtor testified that she thereafter made two payments of $100.00 and an additional payment of $150.00. She attested that she offered to give the Equinox to the Plaintiff to satisfy the loan, but the offer was refused. Debtor further attested that about a year after the January 2017 loan, she had fallen behind on payments of rent, utilities, and the Ford payment, and was facing eviction. She testified that the Ford was repossessed and she used the Equinox to obtain a vehicle title loan to pay rent and utilities.[10] Thereafter, she attested that she fell behind on the title loan and the Equinox was repossessed.

Debtor further testified that after the Equinox was repossessed, she financed the purchase of a 2011 Mazda CX-9 ("Mazda") so that she could go to work, take her son to daycare, attend medical appointments, and shop for groceries. She also testified that the Mazda was soon repossessed when she defaulted on payments due to a further reduction in her work hours.[11]

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[10] On her Schedule "E/F," Debtor listed Rapid Cash as having a nonpriority unsecured claim incurred on 1/1/2018 in the amount of $400.00 based on a title loan.

[11] On her Schedule "A/B," Debtor listed the Mazda. On her Schedule "D," Debtor listed Lobel Financial Corp. as having a debt incurred in May 2019 secured by the Mazda. On her

Debtor also testified that she did not receive any tax refunds "for 2017-2019 because I owed the IRS." She additionally testified that she did not consider seeking bankruptcy relief until some point in 2018 when her debts had become unmanageable and she was facing eviction. Debtor testified that she thought bankruptcy would "take some of the debts off my plate so I could better pay back my grandmother." She stated that she first scheduled an appointment to see a bankruptcy attorney in April 2019 and was thereafter sued by the Plaintiff in small claims court. Debtor attested that after the Plaintiff sued her in small claims court, she met with a bankruptcy attorney in May 2019 who informed her that she could obtain bankruptcy relief from the Plaintiff's loan, various medical debts, payday loan balances, and other obligations. Debtor attested that she had every intention and always intended to repay the loan she obtained from the Plaintiff.

Debtor was cross-examined concerning her written testimony.

2. Jessie Robinson ("Plaintiff").

In her direct testimony declaration, Plaintiff testified that she is the Debtor's grandmother and is the pastor of the church previously attended by the Debtor. She attested that she was "aware of [Debtor's] daily struggles and matters going on in her life." Plaintiff stated that she was aware of the Debtor's complaints about her Ford vehicle and informed the Debtor about a 2013 Chevy Equinox being available for purchase. Plaintiff attested that the Debtor did not have the money to purchase the vehicle and she offered to loan Debtor the funds to do so. She testified that she loaned $10,000 to the Debtor in January 2017 and typed a written loan agreement. Plaintiff testified that the loan agreement states that the Debtor could pay no interest, that there would be a one-year grace period before payments commenced, and that payments would be $300.00 per month. The parties discussed the remaining payments on the Debtor's existing Ford and a grace period on the $10,000.00 loan. Plaintiff also attested that the loan

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SOFA at Item 6, Debtor indicated that she paid payments totaling $870.00 on the Mazda within 90 days prior to bankruptcy with a balance remaining of $7,947.00. On her SOI, Debtor indicated her intention to retain the Mazda by making regular payments. All of these documents were filed by the Debtor on October 28, 2019, i.e., eighteen days after the Chapter 7 petition was filed.

agreement provided for the Debtor to pay the loan sooner if the Debtor was financially stable. Plaintiff attests that she had "never loaned anyone in the family (including my biological children) this type of money" and that "I had no reason to believe [Debtor] was not sincere in needing a reliable vehicle or that she would not pay me back." She testified that the Debtor "promised to pay me back and accepted the money."

Plaintiff also testified that she received a payment of $100.00 on March 20, 2018, and another payment of $100.00 on April 22, 2018, but no others. She attested that she filed a small claims complaint on May 3, 2019, that was scheduled to be heard on August 14, 2019, but was continued to November 12, 2019.

Plaintiff further testified that she does "not believe [Debtor] intended to repay me based on her actions of not making any real effort or significant payments towards the balance." She also attests that she is seeking the $9,800 balance of the loan, plus pre-judgment and post-judgment interest,[12] as well as costs and attorney's fees,[13] for an aggregate amount of $21,488.73.[14]

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[12] The Loan Agreement does not include a provision for accrual of interest or a term under which any remaining loan balance will become due. It appears to provide only for $300.00 or more in monthly payments and that all monies paid will be deducted from the balance. There is no state or federal statute requiring interest to be charged or accrued in private financial transactions. Absent interest terms contained in the Loan Agreement that was prepared by the Plaintiff, it is unclear how the Plaintiff can demand interest without obtaining an enforceable final judgment. No judgment was ever obtained on the Small Claims Complaint.

[13] Under the "American Rule," parties to litigation are not entitled to recover attorney's fees from each other unless they agree in advance or there is a statute requiring payment. See generally In re Andrade-Garcia, 627 B.R. 158, 168 (Bankr. D. Nev. 2021). There is no language in the Loan Agreement allowing either party to recover attorney's fees. Pursuant to Section 523(d), a debtor may recover reasonable attorney's fees and costs if he or she prevails on a creditor's complaint brought under Section 523(a)(2) that was not substantially justified. Section 523(d) does not permit recovery of attorney's fees by the Plaintiff, nor would the Nevada fee shifting statute, see Nev.Rev.Stat. 18.010(2)(b), be applicable in this case. Compare Andrade-Garcia, 627 B.R. at 170-172 (fee shifting statute applied when holder of time-barred claims opposed Chapter 13 debtor's objection to proofs of claim). Thus, even if the Plaintiff prevails in this adversary proceeding, there appears to be no legal basis for her to seek attorney's fees.

[14] Excluding her request for interest as well as attorney's fees and costs, the debt owed to the Plaintiff would remain at $9,800.00.

Plaintiff was cross-examined concerning her written testimony.

DISCUSSION

There is no dispute that the Equinox was purchased by the Debtor in early 2017 using $10,000 borrowed from the Plaintiff. There is no dispute that on January 31, 2017, the Debtor executed the Loan Agreement that had been prepared by the Plaintiff. There is no dispute that the Loan Agreement states as follows:

> Agreement between Andria Robinson and her grandmother Jessie Robinson concerning monies owed to Jessie Robinson as a loan to Andria Robinson for the purchase of a care for herself Andria Robinson, a 2013 Chevy Equinox.
>
> I Andria Robinson do hereby agree to pay my grandmother Jessie Robinson the amount agreed upon monthly $300.00 until the sum of $10,000.00 is paid in full. Should Andria Robinson become financially able to pay more than the stated above amount monthly of her own free will all monies will be deducted from the balance due amount that has been agreed upon.

There is no dispute that the Loan Agreement was signed by both the Debtor and the Plaintiff.

There is no dispute that the Debtor made a payment on the Loan Agreement of $100.00 on March 20, 2018 and another payment of $100.00 on April 22, 2018. There is no dispute that the Debtor offered to transfer the Equinox to the Plaintiff to apply to the balance owed on the Loan Agreement, but that the Plaintiff refused the offer. There is no dispute that the Plaintiff did not seek or obtain a lien against the Equinox to secure payment of the Loan Agreement. There is no dispute that the Debtor later obtained a title loan on the Equinox to meet her living expenses, but that the Equinox was repossessed and sold after the Debtor defaulted on the title loan.

There is no dispute that the Debtor listed $400.00 being owed to Rapid Cash for the unpaid balance of the title loan when she filed her bankruptcy Schedules on October 28, 2019. There is no dispute that the Debtor also listed $9,800.00 being owed to the Plaintiff when she filed her bankruptcy Schedules on October 28, 2019. There is no dispute that in addition to the balance owing to Rapid Cash on the title loan and to the Plaintiff on the Loan Agreement, the Debtor scheduled other non-priority unsecured debts totaling $48,372.00, plus $7,947.00 of debt secured by the Mazda. There is no dispute that the Debtor listed $18,524.00 as her gross income

for 2017 when she filed her SOFA on October 28, 2019. There is no dispute that she listed $28,923.00 as her gross income for 2018 when she filed her SOFA. There is no dispute that the Debtor listed $38,146.68 as her gross wages for 2019 to the date she filed her Chapter 7 petition. There is no dispute that the gross income figures for 2017, 2018 and 2019 set forth in the SOFA are consistent with the figures in the Tax Returns and Earnings Statements. There is no dispute that the Debtor listed monthly net income of $2,999.00 when she filed her bankruptcy Schedules on October 28, 2019. There is no dispute that the Debtor listed monthly expenses of $2,985.00 when she filed her bankruptcy Schedules.[15] There is no dispute that the Debtor listed $14.00 as her monthly net income when she filed her bankruptcy Schedules on October 28, 2019.

There is no dispute that after the Debtor commenced her Chapter 7 proceeding on October 10, 2019, she was laid off from work in March 2020 as a result of the COVID-19 pandemic. There is no apparent dispute that the Debtor remains unemployed as of the date of the trial conducted in this matter.[16]

Against this backdrop of undisputed facts, the court is presented with a dispute between family members arising from economic hardship. Both members accuse each other of misrepresenting under oath their relevant state of mind. Both members have incurred significant

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[15] Schedule "I" reflects average monthly expenses for a household of 2 people. There is no dispute that Debtor's household includes her minor son. According to the CMI Statement, Debtor's average gross monthly income for a two-person household does not exceed the median income for a similar household in Nevada. Accordingly, no presumption of Chapter 7 abuse has arisen. See 11 U.S.C. §707(b)(1). Because the Debtor's monthly income is below the median, she was not required in the CMI Statement to claim the average monthly expense amounts set forth by the IRS for shelter, utilities, food, clothing, insurance, dependent care, and other common expenses. See 11 U.S.C. §707(b)(2).

[16] As of the date of trial, residential evictions are no longer prohibited by pandemic moratoria previously authorized by the governor of Nevada. Additionally, residential evictions are no longer prohibited by nationwide moratoria imposed by the U.S. Department of Health and Human Services. Residents in Nevada who are served by their landlords with unlawful detainer complaints, however, are able to prevent immediate entry of an eviction judgment as a result of Nevada Assembly Bill 486 that went into effect on June 4, 2021. The new law requires residential tenants to have applied for rental assistance available under federal pandemic relief programs, and to timely assert the existence of a pending application as an affirmative defense to the unlawful detainer complaint.

time and energy in presenting this matter. Both members have incurred legal expenses for the professional services well-provided by their respective counsel in presenting this case.[17]

1. Representations Made by the Debtor at the Time of the Loan Agreement.

There is no dispute that the parties signed the Loan Agreement and the Debtor agreed to repay the loan. No evidence was presented, however, identifying an express misrepresentation of fact made by the Debtor – oral or written – by which she obtained the subject loan from the Plaintiff. The absence of such evidence is no surprise as neither the Plaintiff nor the Debtor stipulated prior to trial as to a specific statement made by the Debtor that was not true when she obtained the loan from the Plaintiff. See Plaintiff's Trial Statement at 7:21 to 8:8; Debtor's Trial Statement at 9:13 to 11:5.[18]

2. Knowledge of Misrepresentations and Intention to Deceive Based on Subsequent Failure to Repay the Loan.

Because Plaintiff offers no evidence of an express statement by the Debtor that was not true or an express statement that she never intended to repay the loan, Plaintiff argues that an intent to deceive can be inferred from the subsequent payment history. See Plaintiff's Trial Statement at 3:3-23 to 5:6, citing Sharma v. Salcido (In re Sharma), 2013 WL 19897351 (B.A.P. 9th Cir. May 14, 2013). There is no dispute that payments on the Loan Agreement were not to commence for approximately one year, i.e., until February 2018. There is no dispute that monthly payments of $300.00 were required by the language of the Loan Agreement unless the Debtor had the ability to pay more. Thus, according to the terms of the Loan Agreement and the testimony, the repayment period commenced no earlier than February 2018 and apparently had

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[17] Plaintiff has requested $10,000.00 in attorney's fees, which exceeds the unpaid balance of the loan. As discussed in note 13, supra, there is no basis for Plaintiff to obtain attorney's fees even if she prevails in this adversary proceeding.

[18] Moreover, any oral statement respecting the Debtor's financial condition would not be a basis to deny discharge of the Loan Agreement under Section 523(a)(2)(A) ("other than a statement respecting the debtor's…financial condition") nor under Section 523(a)(2)(B) (requiring "use of a statement in writing…respecting the debtor's…financial condition.").

lapsed no later than May 2019 when the Plaintiff filed the Small Claims Complaint seeking immediate payment of the remaining loan balance.[19]

In keeping with her substantive theory of the case, Plaintiff has identified, *inter alia*, the following issue for trial: "Why [Debtor] did not pay more on the Loan despite having the money to do so." Plaintiff's Trial Statement at 2:20. There is no dispute that during the repayment period the Debtor made only two payments totaling less than $300.00. Plaintiff asserts, however, that the Debtor had the funds available during that period to pay more. For this factual allegation, there is no dispute that Plaintiff bears the burden of proof.

Plaintiff offered evidence of the Debtor's income during the repayment period. The 2018 Tax Return reflects gross income of $28,923.00 during 2018. There is no 2019 tax return in the record, but the SOFA attests that the Debtor had gross wages of $38,146.68 in 2019 as of the date she filed her bankruptcy petition on October 10, 2019. The 2018 Tax Return also reflects that the Debtor would be entitled to a tax refund of $3,735.00, to be received in 2019. The 2017 Tax Return reflects that the Debtor would be entitled to a tax refund of $5,079.00 to be received in 2018. The Earnings Statements encompass the Debtor's wages for the earning periods ending 01/05/2019 to 09/28/2019 and reflect that she was employed during 2019. The evidence therefore establishes that the Debtor had income during the subject repayment period.

Absent from this record, however, is evidence of the Debtor's monthly expenses and other liabilities during the repayment period. Debtor testified that prior to obtaining the loan from the Plaintiff, she was employed but had many financial difficulties, including the necessity to obtain another vehicle. She also testified that she had a number of health problems[20] that

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[19] The evidence also indicates that the relationship between the Debtor and the Plaintiff broke down well before the Small Claims Complaint was filed. The evidence includes both "screen shots" and transcripts of various text messages exchanged by the Plaintiff and the Debtor between May 16, 2018, and September 13, 2018. Unfortunately, those text messages reflect a type of acrimony that does not exist in typical arms-length lending relationships. The earliest of those messages is dated after the Debtor made her second and last payment on April 22, 2018.

[20] An unsecured debt to North Vista Hospital in the amount of $20,000.00 is listed in Schedule "E/F," but shows a date incurred of "1/1/2008." It is not clear whether the year 2008 was entered in error and should have been the year 2018. At the trial, Debtor was not questioned about this information in the Schedule.

resulted in reduced hours of employment. Debtor also testified that there were several threatened or completed evictions that may have occurred[21] as well as multiple vehicle repossessions.

Debtor also testified that the tax refunds to which she was entitled "for 2017-2019" were never received because she owed the IRS. According to her Schedules, as of the commencement of the bankruptcy case, there was a balance of $400.00 owed to the IRS for the 2014 tax year. Debtor attested in her Schedules "I" and "J" that as of the date she filed for Chapter 7 relief, she had net monthly income of $14.00 after listing all of her net monthly income and average monthly expenses. For example, Debtor attested on her Schedule "I" that her average net monthly income of $2,999.00 reflected average monthly payroll deductions of $1,194.00, which may or may not be reflected by the Earnings Statements. She attested on her Schedule "J" that her average monthly expenses of $2,985.00 reflected housing and utility expenses totaling $1,450.00, vehicle, vehicle maintenance, vehicle insurance, and gasoline expenses totaling $805.00, and food, clothing, childcare, medical, dental, and other personal living expenses totaling $730.00. No evidence was offered that any of these expenses are non-existent or excessive, and Plaintiff makes no suggestion that the expenses would exceed the housing, vehicle, and living expense standards that would apply if the Debtor's income was above-median. See note 15, supra. More important, Debtor was not examined regarding the amount of her monthly net income that existed during the repayment period. As a result, there is no evidentiary basis to conclude that the Debtor had funds available to pay more than what she actually paid under the Loan Agreement.[22]

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[21] According to her SOFA, Debtor resided at 6312 Legend Falls Street in North Las Vegas from 2014 until October 2018. According to her bankruptcy Petition, Debtor resided at 2655 E. Deer Springs Way in North Las Vegas at the time she commenced her Chapter 7. The same address is shown on the Earnings Statements for the pay period beginning on 12/23/2018 and ending on 01/05/2019. Thus, it appears that the Debtor lived at one address prior to and after she signed the Loan Agreement but relocated to a different address thereafter.

[22] "Economic hardship" or similar terms are a common reason offered for a failure to pay a financial obligation. Compare 11 U.S.C. §523(a)(8) (educational loans are not discharged through bankruptcy unless the borrower proves that continued payment would result in undue hardship). Ironically, Plaintiff's probation under Criminal Judgment was honorably discharged in July 2020 due to her claim of economic hardship. See discussion at note 9, supra. No one

There also is no dispute that the Debtor offered to transfer the Equinox to the Plaintiff as means of making a payment on the Loan Agreement. At trial, Plaintiff acknowledged the offer, but testified that she refused "because she already had a car; two cars." No one suggests that Plaintiff was required to accept the Equinox in lieu of cash payments, but no one disputes that after the funds were borrowed from the Plaintiff, Debtor attempted to satisfy the obligation by offering what she could. No one suggests that the Equinox was subject to a lien at the time of the offer inasmuch as the Debtor subsequently used the Equinox to obtain a title loan. In other words, Debtor's conduct after executing the Loan Agreement, including the two partial payments and the offer to transfer the Equinox, militates against a factual conclusion that she never intended to repay the Plaintiff when she obtained the loan.

Based on this evidentiary record, the court concludes that the Plaintiff has failed to prove by a preponderance of the evidence that the Debtor intended to deceive the Plaintiff when she obtained the subject loan.[23] The evidentiary record in this adversary proceeding is

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suggests that Plaintiff's subsequent payment of only $4,470.00 of $81,828.00 of the agreed criminal restitution amount should have been construed as evidence that she never intended to pay the original amount. No one suggests that Plaintiff manufactured her economic hardship to mislead the State of Nevada and the state court judge. No one suggests that the State of Nevada would have been better served by pursuing enforcement of the balance of Plaintiff's restitution obligation or subjecting her to incarceration. Obviously, the bankruptcy process itself addresses unpaid debts. Bankruptcy relief assumes that debtors are honest but just unfortunate in their failure to pay debts. In other words, the mere failure to pay a debt does not disqualify an individual from obtaining a fresh start, nor should it.

[23] There is no dispute that the Debtor was considering whether to seek bankruptcy protection in 2018 due to her financial circumstances, had scheduled to meet with a bankruptcy attorney in April 2019, and retained bankruptcy counsel in May 2019. Debtor was not examined at trial whether she incurred significant new debt after she met with bankruptcy counsel, thereby implying an intention not to pay the new debt. Debtor's nonpriority unsecured creditor Schedule "E/F" lists forty-one claims, only two of which appear to be for debts incurred after she consulted with bankruptcy counsel. Those two debts in the amount of $2,500.00 (Check City) and $1,000.00 (Southwest Medical Services) were for a payday loan and medical services, respectively. According to her SOFA, Debtor paid $1,200.00 to Check City within 90 days before filing her Chapter 7 petition. While a debtor's profligate spending after obtaining bankruptcy advice may be a factor in establishing an intent to deceive a creditor, see discussion at note 8, supra, there is little evidence of the Debtor's general intent to deceive creditors nor a specific intention with respect to the Plaintiff.

distinguishable from the decision by the Ninth Circuit Bankruptcy Appellate Panel ("BAP") in In re Sharma on which the Plaintiff relies. In that case, the BAP affirmed the bankruptcy court's entry of default judgment on a nondischargeability complaint alleging fraud under Section 523(a)(2)(A).[24] The fraud began years prior to the bankruptcy when the individual debtor made multiple misrepresentations of fact to induce the plaintiff to make two loans of $240,000. Id. at *1-2. When the debtor did not pay the principal amount of the second loan, the plaintiff sued the debtor for breach of contract and fraud in a California state court. Id. at *2. Thereafter, the parties entered into a settlement agreement under which a stipulated judgment on the claims could be entered in the event the debtor failed to make the settlement payments. Id. After the debtor defaulted on the settlement agreement, a stipulated judgment in the full amount was entered. Debtor also did not make any payments on the stipulated judgment. Id. When the debtor filed his Chapter 7 petition thereafter, the plaintiff commenced an adversary proceeding to determine the $240,000 to be nondischargeable, *inter alia*, under Section 523(a)(2)(A) based on actual fraud. Id. at *3.

In affirming the bankruptcy court decision, the BAP examined whether the facts could establish that the debtor never intended to repay the original two loans as well as whether he had ever intended to make the payments required by the settlement agreement. Id. at *11. Based on the debtor's multiple misrepresentations as to the use of the loan proceeds and his repeated misrepresentations of his lavish lifestyle, as well as his sporadic disbursement of promised interest payments, the BAP concluded that the facts were sufficient to establish that the debtor induced the plaintiff to make the loans with intent to deceive. Id. at *12-13. Based on the debtor's subsequent failure to make payments on the stipulated judgment as well as his transfer of all of his assets to create the appearance of insolvency, the BAP also concluded that the facts

[24] The facts underlying the BAP's decision in Sharma are based on the Chapter 7 debtor's default on the adversary complaint as well as declarations admitted into the record for entry of a default judgment. 2013 WL 1987351, at *1 and *3. Beyond the substantive merits of the fraud claim under Section 523(a)(2)(A), most of the BAP opinion addresses the procedural issues raised by the debtor on appeal.

were sufficient to establish that the debtor induced the plaintiff to enter into the settlement agreement without intention of honoring the subsequent judgment. Id. at *14.

While Plaintiff suggests that her case "is almost spot-on to the facts and circumstances in *In Re Sharma*," see Plaintiff's Trial Statement at 5:6, the evidentiary and factual record is not even close. As previously discussed, there is no evidence that the Debtor made any express or specific representations to induce the Plaintiff to make the loan. There is no suggestion that the Plaintiff believed or had any reason to believe that the Debtor had significant assets or lived an extravagant lifestyle. Exactly the opposite is evident from the Plaintiff's own testimony. There is no evidence that the Debtor transferred her assets to give the appearance of insolvency. To the contrary, the undisputed evidence is that the Debtor offered to transfer the Equinox – likely her most valuable monetary asset – to the Plaintiff to apply to the Loan Agreement. The evidence also suggests that the Equinox was not encumbered by a lien at the time it was offered by the Debtor. Plaintiff correctly asserts that "intent to deceive may be inferred if a debtor takes no steps to perform under a contract," see In re Sharma, 2013 WL 1987351, at *10, but the evidence in the present case reflects that the Debtor did take meaningful steps to perform on the Loan Agreement. Thus, Plaintiff's reference to the Sharma decision is simply misplaced.

In short, Debtor attests that she always intended to repay the Loan Agreement but economic hardships arose that prevented her from paying more on the loan. Having considered the written evidence in the record, as well as the written and oral testimony presented, the court finds the Debtor's testimony to be credible.

3. Plaintiff's Reliance on Debtor's Intention to Repay.

Even if the Plaintiff can establish that the Debtor made a misrepresentation of fact with the intention to deceive, she still must demonstrate that she actually relied on the misrepresentation and that the reliance was justified. In this instance, however, there is scant evidence admitted that would support either requirement.

The Loan Agreement itself references the parties' family relationship and sets forth the terms for repayment of the $10,000.00 loan to purchase the Equinox. It was not a gift, but the

repayment terms are generous and without any apparent expectation of turning a profit. Substantial and needed funds were provided to the Debtor, no interest was charged, the length of the payment term extended beyond four years, and the Plaintiff never protected her own financial interest by taking a lien on the subject vehicle. On its face, it appears to be a financial favor between family members, i.e., a "good deed" by a grandmother to a grandchild (and great grandchild). The loan bears none of the hallmarks of an arms-length loan that the Debtor could obtain from any other source. Under circumstances where one family member generously assists another family member, however, what information is actually relied upon in deciding to provide assistance?

Plaintiff testified without contradiction that she had never made a similar loan to anyone in her family, not even her biological children. Plaintiff testified that she was aware of the Debtor's daily struggles and matters going on in her life, but was not aware of her financial hardships. Plaintiff testified, and Debtor agreed, that the Plaintiff (rather than the Debtor) approached the Debtor about the Equinox, and that Plaintiff prepared the Loan Agreement so that Debtor could purchase the vehicle. Plaintiff testified, and Debtor agreed, that no payments would be made for at least one year. Neither party suggests, and no evidence was presented, that either of them reviewed the Debtor's then-current credit report information before the Plaintiff provided $10,000.00 to the Debtor and executed the Loan Agreement.[25] Under these circumstances, it is not apparent that the Plaintiff actually relied at all on any representations made by the Debtor, either true or untrue, in providing the funds necessary for the Debtor to immediately purchase the Equinox.

Plaintiff's justifiable reliance on the misrepresentations of intent she attributes to the Debtor separately requires consideration of the "qualities and characteristics of the particular plaintiff, the knowledge and relationship of the parties, and the circumstances of the particular

[25] Even if the Tax Returns and Earnings Statements had misrepresented the Debtor's financial condition, copies were never provided to the Plaintiff before she made the loan, and they also could not be the basis for Plaintiff's claim under Section 523(a)(2)(A). See note 18, supra.

case." See discussion at note 5, supra, and Plaintiff's Trial Brief at 4:25-27, (both) quoting Field v. Mans, 516 U.S. at 71. Challenging Plaintiff's assertion of justifiable reliance, Debtor questioned the qualities and characteristics of the Plaintiff by introducing a copy of the Criminal Judgment. See discussion at note 9, supra. In other words, Debtor disputes the credibility of Plaintiff's assertion of subjective reliance because of Plaintiff's previous conviction of offenses establishing her own intentional misrepresentations. Plaintiff was examined concerning the circumstances of the Criminal Judgment, including its subsequent amendment after completion of probation and the honorable discharge of the terms of probation. As to the circumstances giving rise to the Criminal Judgment, the court finds the Plaintiff's testimony to be credible.[26] The court therefore gives little weight to any inferences that might be drawn from the Criminal Judgment about the Plaintiff's veracity in this adversary proceeding. However, considering the knowledge and relationship between the parties, and the circumstances of the case, the balance of the evidence does not support a finding that Plaintiff's reliance on an unexpressed intention to repay was justifiable.

As mentioned, Plaintiff acknowledges the unique nature of the loan: she had never made a similar loan to any family member, not even her biological children. As a result, she apparently had no history of making prior such loans to any other family members. Plaintiff attested that there were no prior "problems with trust" between them, but she concedes that she

[26] The evidence presented by the parties does indicate this sequence of events: (1) on January 31, 2017, Plaintiff loaned $10,000.00 to the Debtor to purchase the Equinox; (2) on May 10, 2017, the information was filed by the district attorney initiating the criminal proceedings against the Plaintiff for unlawfully obtaining $69,596.00 in housing benefits; (3) on September 15, 2017, the Criminal Judgment was entered on the plea agreement requiring significant restitution payments as a condition of probation; (4) on April 22, 2018, Debtor made the last of two deficient payments on the Loan Agreement; and (5) as of the date of the last payment on the Loan Agreement, Plaintiff was behind or would fall behind on the monthly restitution payments required by the Criminal Judgment. Thus, it appears that Plaintiff's own financial situation changed shortly after she made the loan to the Debtor. It is unclear whether the Plaintiff would ever have loaned $10,000.00 to the Debtor if she had known she would soon be facing a substantial criminal restitution obligation as a condition of probation. It also is unclear whether the Debtor's failure to make additional payments on the Loan Agreement and her commencement of Chapter 7 in October 2019, actually may have assisted Plaintiff in demonstrating the economic hardship that facilitated her honorable discharge from probation.

had never loaned "this type of money" to the Debtor or any other family member. Plaintiff testified that she knew of the Debtor's difficulties with her existing vehicle and was aware of her daily struggles and matters going on in her life. She testified that she was not aware of the Debtor's financial hardship, but knew that the Debtor still had to complete payments on the Ford before she could start repaying the loan used to purchase the Equinox. Plaintiff did not suggest nor offer any documents evidencing that she did anything to determine whether the Debtor had the ability to repay the loan. Plaintiff personally prepared the Loan Agreement and did not provide for a lien on the Equinox to assure a source of repayment. Even when the Debtor offered to give her the vehicle when she could not make the agreed payments, Plaintiff refused. Plaintiff argues that her reliance on the Debtor's unexpressed misrepresentation of intent to repay was justifiable, but she does not identify any point in time that such reliance arose. On this record, the court is not persuaded that any reliance on the alleged misrepresentations was justifiable under the particular circumstances of the case.

Having considered the entire record, the court concludes that the Plaintiff has failed to prove both that she actually relied and that she justifiably relied on a misrepresentation by the Debtor.

4. Plaintiff's Loss and Damages as a Proximate Result.

Even if the Plaintiff can demonstrate that the Debtor misrepresented her intent to repay the Loan Agreement and that Plaintiff actually and justifiably relied, she still must demonstrate that she sustained loss and damages as a proximate result. Debtor acknowledges in her Schedules that $9,800.00 is the remaining balance owed on the Loan Agreement. While it is clear that the Debtor's failure to pay the balance of the loan is the cause in fact of Plaintiff's damage, it also is clear that the Plaintiff could have avoided or mitigated some of her loss by accepting Plaintiff's offer to give her the Equinox. The value of the Equinox at the time of the offer is not known, however, nor is the amount the Debtor received on the title loan secured by the vehicle. Thus, even if the court could consider whether to find the Plaintiff, rather than the

Debtor, to be the legal cause of any portion of unpaid balance of the loan, there is no evidentiary basis to do so.

Under the circumstances, the court concludes that the Plaintiff sustained loss and damages in the amount of $9,800.00, but the Debtor's personal liability for such loss and damages should be discharged under Chapter 7.

CONCLUSION

Plaintiff bears the burden of proving by a preponderance of the evidence all of the considerations required under Section 523(a)(2)(A). Based on the foregoing, the court concludes that Plaintiff has failed to demonstrate: (1) that the Debtor intended to deceive the Plaintiff when she entered into the Loan Agreement; (2) that the Plaintiff actually relied on any representations by the Debtor of her intent to repay the subject loan; and (3) that the Plaintiff justifiably relied on any representation by the Debtor of her intent to repay the subject loan. The court also concludes that the Plaintiff sustained loss and damage in the amount of $9,800.00, but not as a result of conduct by the Debtor that is excepted from discharge under Section 523(a)(2)(A).

Debtor testified that she originally considered bankruptcy to relieve herself from other debts so that she could repay rather than punish her grandmother. Debtor has received her Chapter 7 discharge of the other debts. As discussed in note 4, supra, nothing prevents the Debtor from still voluntarily repaying her grandmother if and when she has the means and desire to do so.

Contemporaneous with this Memorandum Decision, a judgment has been entered in favor of the Debtor. Both parties shall bear their own attorney's fees and costs.

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