UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re:

Chapter 7

MOHAMED Z. ASHRI,

Case No. 03 B 10966 (AJG)

Debtor.

UNITED NATIONS FEDERAL
CREDIT UNION,

Plaintiff,

Adv. Pro. No. 03 B 93821 (AJG)

-v-

MOHAMED Z. ASHRI,

Defendant.

OPINION DENYING SUMMARY JUDGMENT REGARDING OBJECTION TO DEBTOR'S DISCHARGE UNDER 11 U.S.C. SECTION 523(a)(2)(A) REGARDING FIRST CAUSE OF ACTION AND OBJECTIONS TO DISCHARGEABILITY OF CERTAIN DEBTS UNDER 11 U.S.C. SECTION 727 REGARDING THIRD AND FIFTH CAUSE OF ACTION, GRANTING SUMMARY JUDGMENT REGARDING OBJECTION TO DEBTOR'S DISCHARGE UNDER 11 U.S.C. SECTION 523(a)(2)(A) REGARDING SECOND CAUSE OF ACTION

A P P E A R A N C E S:

WELTMAN & MOSKOWITZ, LLP
Attorneys for Plaintiff
270 Madison Avenue, Suite 1400
New York, New York 10016-0601

Michael L. Moskowitz, Esq.
Of Counsel

MOHAMED Z. ASHRI
Pro Se

ARTHUR J. GONZALEZ
United States Bankruptcy Judge

The issues before the Court are raised in the context of an objection to debtor's discharge under section 727(a)(2)(A) and (B) and section (a)(4)(A) of the Bankruptcy Code and objections to dischargeability of certain debts under section 523(a)(2)(A) of the Bankruptcy Code.

I. Jurisdiction And Venue

The Court has subject matter jurisdiction over this adversary proceeding under sections 1334(a) and (b) and 157(a) and (b) of title 28 of the United States Code and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York (Ward, Acting C.J.). This is a core proceeding within the meaning of section 157(b)(2)(I) and (J) of title 28 of the United States Code.

Venue is proper before this Court pursuant to section 1409(a) of title 28 of the United States Code.

II. Procedural History

On February 20, 2003,[1] Mohamed Z. Ashri (the "Debtor") filed a voluntary petition (the "Petition") under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code").

On April 17, 2003, the United States Trustee for the Southern District of New York (the "U.S. Trustee") filed a motion to dismiss the Debtor's Petition "for cause" pursuant to section 707(a) of the Bankruptcy Code (the "Motion to Dismiss"). On May 16, 2003, the Motion to Dismiss was joined by the United Nations Federal Credit Union (the "UNFCU"), the principal creditor in this matter.

By consecutive orders dated April 23, 2003, September 16, 2003, and November 5, 2003, the Court extended the last date to object to the Debtor's discharge and/or debt dischargeability

[1] The Court in its Memorandum Decision dated November 24, 2003 and the parties to this proceeding erroneously stated that the voluntary petition was filed with the Court on February 12, 2003. The actual filing date was February 20, 2003, as reflected on the electronic docket.

from the original date of May 27, 2003 to July 28, 2003, to October 28, 2003, and then finally to December 29, 2003.

By a Memorandum Decision dated November 24, 2003, the Court denied the Motion to Dismiss (the "November 24th Decision").

On December 24, 2003, the UNFCU filed a complaint objecting to the dischargeability of the debts owed to the UNFCU and to the Debtor's discharge (the "Complaint"). The first cause of action of the Complaint objects to the discharge of the debt in the amount of $95,583.3 pursuant to section 523(a)(2)(A) of the Bankruptcy Code (the "First Cause of Action"). The second cause of action objects to the discharge of the debt in the amount of $25,909.09[2] pursuant to section 523(a)(2)(A) of the Bankruptcy Code (the "Second Cause of Action"). The third cause of action objects to the debtor's discharge pursuant to section 727(a)(2)(A) and (B) of the Bankruptcy Code (the "Third Cause of Action"). The fourth cause of action objects to the debtor's discharge pursuant to section 727(a)(3) of the Bankruptcy Code (the "Fourth Cause of Action"). The fifth cause of action objects to the debtor's discharge pursuant to section 727(a)(4)(A) of the Bankruptcy Code (the "Fifth Cause of Action"). The sixth cause of action objects to the debtor's discharge pursuant to section 727(a)(5) of the Bankruptcy Code (the "Sixth Cause of Action").

On May 24, 2004, the UNFCU filed a motion for partial summary judgment, requesting summary judgment on the First, Second, Third, and Fifth Causes of Action of the Complaint (the "Motion for Partial Summary Judgment").

III. Factual background

[2] In the UNFCU's Memorandum of Law in support of its motion for summary judgment, this loan amount is increased to $26,727.24, including interest through April 30, 2004. The principal amount of this loan is $25,000.

The Debtor was employed by the United Nations as a "reviser," a person who translates foreign language documents.

The mandatory retirement age at the United Nations is 60 years old. The Debtor turned 60 years old on December 12, 2001. Prior to that date, on or about August 2001, the Debtor made a request to extend his mandatory retirement date. The request was granted for four months, extending the date to April 30, 2002.

It appears that the Debtor and the UNFCU had a debtor-creditor relationship for the past twenty years in which the UNFCU loaned monies and provided the Debtor with various forms of credit. As of December 31, 2001, the Debtor had two credit lines with the UNFCU, a Visa credit card and a line of credit (collectively the "Credit Lines"). On that date, the total debt owed to the UNFCU under the Credit Lines was $8,484.37.[1]

As of February 6, 2002, the total debt the Debtor owed to the UNFCU for the Credit Lines was $2,950.46. That same day, the UNFCU issued to the Debtor a consolidation loan in the amount of $40,000.00 (the "First Loan") to pay the debts owed to the UNFCU and three other consumer credit card issuers (1) Citibank, issuer of the Citi Platinum Select Card ("Citibank") in the amount of $13,983.82; (2) AT&T, issuer of the AT&T Universal Card ("AT&T") in the amount of $13,125.11; and (3) Chase, issuer of the Chase MasterCard ("Chase") in the amount of 10,202.84, (collectively the "Consumer Credit Cards"). The Debtor used the proceeds of the First Loan consistent with the stated purpose and paid off the balances of the Consumer Credit Cards and reduced the Credit Lines from $2,950.46 to $262.23. The First Loan required 60 monthly payments of $853.00.

[1] It is not clear from the record as to what portion of this debt relates to the UNFCU Visa credit card or to the UNFCU line of credit.

Shortly after having received the First Loan, the Debtor resumed use of the Consumer Credit Cards, which resulted in debts to Citibank, AT&T, and Chase in the amounts of $18,160.00, $16,356.00, and $13,506.00, respectively.[3]

On April 4, 2002, the Debtor submitted to the UNFCU an application for an additional loan of $25,000.00 for the stated purpose of purchasing securities for investment. However, the UNFCU advised the Debtor that the UNFCU does not extend loans for investment purposes. Shortly thereafter, the Debtor resubmitted his application and restated the purpose as purchasing home furniture. He provided copies of furniture purchase orders, invoices, and receipts totaling $17,256.06. Based on the resubmitted loan application, the UNFCU issued the additional loan in the amount of $17,256.06. The Debtor, however, as he admits it, used the proceeds of this loan, at least in large part, for investment purposes, which was inconsistent with the stated purpose of the loan.

On April 11, 2002, the Debtor requested an additional loan for $25,000.00 (the "Furniture Loan"), which would pay off the loan in the amount of $17,256.06 and to purchase more furniture, for which the Debtor provided additional receipts. The UNFCU granted the Debtor the Furniture Loan in the amount of $25,000.00, and paid off in full the loan in the amount of $17,256.06. The Debtor used what was left over at least in large part to invest in the stock market, which was inconsistent with the stated purpose of the loan.[4]

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[3] The Debtor also obtained new accounts with Bergdorf Goodman, Bloomingdale's, Capital One, Discover, First Premier Bank and Macy's sometime after having obtained the First Loan. *See* Transcript of Debtor's Deposition taken on June 4, 2003 at 21:5-21, 26:9-25, 27:2-3.

[4] It is clear from the Debtor's various responses to the Motion to Dismiss and the Motion for Partial Summary Judgment, and from his answers to the interrogatories, that "the bulk of loans (was) invested in the stock market," Answer to Motion for Partial Summary Judgment, pg. 5 entitled "Memorandum of [L]aw in Support of Credit Union's Motion," and that none of the furniture on the purchase orders provided to the UNFCU was actually purchased. The Debtor admits these facts because he claims that investing in the stock market is "consistent" with the purpose of the Furniture Loan as well as the loan in the amount of $17,256.06. The Debtor argues that the UNFCU knew that he was going to use the proceeds of both loans to buy stock and not furniture. In fact, the Debtor argues that it was at the UNFCU's suggestion that he indicate on the application of the loan of amount $17,256.06

On April 24, 2002, the Debtor requested an additional loan of $8,000.00 for the stated purpose of buying a television set for an overseas relative as a wedding gift. In addition to requesting the $8,000.00 loan, the Debtor requested a four-month deferment on the payments of all his loans to the UNFCU. The Debtor's deferment request was based on his alleged inability to make payments until he received his final United Nations entitlements and pension pay out. The UNFCU alleges that this was the first time it had become aware that the Debtor was retiring from the United Nations. Therefore, the UNFCU denied the Debtor's request for a deferment and his loan application for $8,000.00.

On April 30, 2002, the Debtor requested additional monies from the UNFCU so that he could meet his monthly obligations in light of his anticipated reduction in income. However, the UNFCU denied such request.

In total, the Debtor incurred approximately $108,843.00 in debt from the UNFCU between February 1, 2002 and April 30, 2002, plus interest totaling $11,562.57 through December 15, 2003, from the First Loan, the Furniture Loan, as well as the Credit Lines. The Debtor also incurred approximately $81,928.00 in debt from the Consumer Credit Cards between February 1, 2002 and December 31, 2002. The Debtor stated that he predominantly used such debt to fund his investments.

Between March 1, 2002 and May 30, 2002, according to the statements provided by the Debtor, the Debtor made hundreds of stock trades.[5] In addition to investing in the stock market,

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that the purpose of the loan was to purchase furniture and not for its actual use - the purchase of stock. The UNFCU denies that any of its representatives would have "suggested" to the Debtor to make a false representation regarding the stated purpose of the loan in the amount of $17,256.06. Other than the Debtor's statement regarding his allegations, he offers no other evidence to support his contentions.

[5] The Court notes that the Debtor alleges that he bought the stocks from Pershing Brokerage, which according to the Debtor, is located in the same office as the UNFCU. The Debtor argues that representatives of the UNFCU saw the Debtor go to the office of Mr. James Burns, a representative from Pershing Brokerage, on various occasions and that they were aware of his daily activities of buying stocks. The Court also notes that the Debtor purchased 39,000

the Debtor also purchased $21,728.00 worth of assorted gold coins between March 15, 2002 and March 27, 2002.

The Debtor stated in his Petition that his monthly income was $3,626.73, which consisted of $3,276.73 in retirement income and $350.00 in part-time income as a reviser. The Debtor listed his total unsecured debt as $190,768.00 on Schedule F. The Debtor initially listed his assets as totaling $14,126.00 of which $13,776.00 was claimed to be exempt pursuant to section 522(b) of the Bankruptcy Code. On January 10, 2003, the Debtor purchased an annuity at a cost of $5,000.00. The annuity is claimed as one of his exempt assets. On March 20, 2003, however, the total value of the assets was amended to $17,271.00, but the amount of the claimed exemptions remained at $13,776.00.

The United Nations offers a repatriation grant as part of its retirement package. Under the retirement package, the Debtor would become eligible to receive a $19,000.00 repatriation grant after retiring and upon the decision to return to his home country. Although eligible to opt for this repatriation grant,[6] the Debtor did not include the value of the repatriation grant among his assets. The Debtor stated in his answer to the Motion to Dismiss that he asked his former counsel if he had to mention the amount of the repatriation grant, but counsel advised him not to mention the amount because it was contingent upon a decision or action in the future. The UNFCU presents no evidence to the contrary, nor does it dispute the Debtor's explanation.

The Debtor listed as part of his assets in the Statement of Financial Affairs, one safe deposit box that contained documents. However, on March 20, 2003, the Debtor, on his own, amended the Statement of Financial Affairs to reflect an additional three safe deposit boxes-one

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shares of Enron stock after the filing of its Chapter 11 case for a total of $10,298.18 between February 27, 2002 and March 4, 2002.

[6] It is not clear from the record whether the Debtor has received these funds. In addition, the record does not provide any explanation as to the procedure for obtaining such a grant. Therefore, when the UNFCU makes reference to this grant, it is only assuming that the Debtor received the grant.

of which contained jewelry, the value of which was undisclosed and the other two were empty. Yet at the deposition held on June 4, 2003, the Debtor testified that he in fact had six safe deposits boxes; that is two more safe deposit boxes than previously disclosed but the Debtor alleged that the two safe deposit boxes previously unmentioned contained only documents and some personal possessions.

Furthermore, the amendment to the Statement of Financial Affairs on March 20, 2003 also added three bank accounts located outside of the United States, which had at that time a total value of $3,145.00 (Arab Investment Bank-savings account ($2,020.00); Bank of Alexandria-checking account ($125.00); and Arab Investment Bank-Egyptian Bond Certificate ($1,000.00)).

During the three years prior to filing the Petition, the Debtor earned $317,000, of which $89,000.00 was earned in 2002. During the year immediately preceding the filing of the Petition, the Debtor purchased at least $158,379.39 worth of various stocks from February 27, 2002 through May 31, 2002. In June 2002, the Debtor closed two brokerage accounts totaling $109,000.00 and transferred the proceeds to an internet stock trading company known as E-Trade, the value of which is listed as $300.00 on Schedule B.

From 1994 to 2002, the Debtor sent money on several occasions out of the country by wire transfer to various relatives and others to Egypt totaling $2,231.00. In addition, the Debtor supports his ex-wife Melanie Rodriguez by giving her $200.00 every month, and he also provides his girlfriend Norma Ruiz with $400.00 every month.

IV. Discussion

The UNFCU is seeking partial summary judgment pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure. In the First and Second Causes of Action, the UNFCU objects to the dischargeability of certain debts pursuant to section 523(a)(2)(A) of the Bankruptcy Code,

and in the Third and Fifth Causes of Action, the UNFCU objects to the Debtor's discharge pursuant to section 727(a)(2)(A) and section 727 (a)(4)(A) of the Bankruptcy Code, respectively. The UNFCU argues that the Debtor's answers to these causes of action do not expressly deny any of the allegations in the Complaint but rather attempt to explain his actions, and in some instances expressly admits pleaded facts. It concludes that since there are no issues of material fact raised by the Debtor, no trial is necessary and summary judgment should be granted as to the First, Second, Third, and Fifth Causes of Action of the Complaint.

The Debtor contends that there are material issues of fact that preclude summary judgment on the First, Second, Third, and Fifth Causes of Action of the Complaint. Therefore, the Debtor requests that the Court deny the UNFCU's Motion for Partial Summary Judgment regarding these causes of action.

A. Summary Judgment Standard

The basic principles governing a motion for summary judgment are well settled. Rule 56 of the Federal Rules of Civil Procedure (hereinafter each rule entitled the "Rule"), made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, governs summary judgment motions. Summary judgment may only be granted when there is no genuine issue of material fact remaining for trial and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). Rule 56(c) provides in pertinent part

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under governing law." *Id.* at 248.

The burden is upon the moving party to clearly establish the absence of a genuine issue as to any material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The court, however, must resolve all ambiguities and draw all reasonable inferences in the light most favorable to the non-moving party. *See United States v. Rem*, 38 F.3d 634, 643 (2d Cir. 1994). The movant can meet its burden for summary judgment by showing that little or no evidence may be found to support the non-movant's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In addition, because the Debtor is *pro se*, the Court reads the Debtor's papers "liberally and interpret them to raise the strongest arguments that they suggest." *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999). "Once a movant has demonstrated that no material facts are genuinely in dispute, the non-movant must set forth specific facts indicating a genuine issue for trial exists in order to avoid granting of summary judgment." *Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir. 1990). The non-movant cannot escape summary judgment with mere conclusory allegations, speculation or conjecture. *See id*. The non-movant, in fact, must do more than simply show that there is some "metaphysical doubt" about the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Therefore, if no reasonable jury could find in favor of the non-movant because evidence to support its case is slight, there is no genuine issue of material fact and a grant of summary judgment is proper. *See Gallo v. Prudential Residential Servs. Ltd. P'ship.*, 22 F.3d 1219, 1224 (2d Cir. 1994). In the contrary, if there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper. *See Chambers v. TRM Copy Ctrs Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

B. Causes of Action Based on Section 523(a)(2)(A) of the Bankruptcy Code

Section 523 of the Bankruptcy Code defines a number of exceptions to the general grant of discharge provided by section 727 of the Bankruptcy Code. Among these exceptions, section 523(a)(2)(A) of the Bankruptcy Code provides that

> (a) A discharge under sections 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.

11 U.S.C. § 523(a)(2)(A).

Exceptions to discharge are construed narrowly and in favor of the debtor in order to effectuate the Bankruptcy Code's objective of providing "the debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Fleet Credit Card Servs. v. Macias (In re Macias)*, 324 B.R. 181, 187 (Bankr. E.D.N.Y. 2004) (quoting *Cazenovia Coll. v. Renshaw (In re Renshaw)*, 222 F.3d 82, 86 (2d Cir. 2000)); *Red Ball Interior Demolition Corp. v. Palmadessa,* 908 F.Supp. 1226, 1237 (S.D.N.Y. 1995). "To be actionable, the debtor's conduct must involve moral turpitude or intentional wrong; mere negligence, poor business judgment or fraud implied in law (which may exist without imputation of bad faith or immorality) is insufficient." *Charell v. Gonzalez (In re Gonzalez)*, 241 B.R. 67, 71 (S.D.N.Y. 1999). In seeking an exception to discharge, the creditor bears the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Although the statute does not list the elements which a creditor must prove in order to establish nondischargeability of a debt under section 523(a)(2)(A) of the Bankruptcy Code, courts have looked to the common law of torts, as embodied in the RESTATEMENT (SECOND) OF TORTS SECTION 525, in construing the elements of section 523(a)(2)(A). *Weiss v. Alicea (In re*

Alicea), 230 B.R. 492, 500 (Bankr. S.D.N.Y. 1999) (citing *Field v. Mans*, 516 U.S. 59, 70 (1995); *Palmacci v. Umpierrez*, 121 F.3d 781, 786 (1st Cir. 1997); *In re Apte*, 96 F.3d 1319, 1324 (9th Cir. 1996)). The elements a creditor must establish in order to sustain a cause of action under section 523(a)(2)(A) of the Bankruptcy Code are as follows (1) the debtor made a representation; (2) at the time the representation was made, the debtor knew it was false; (3) the debtor made the representation with the intention of deceiving the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor sustained loss or damage as the proximate consequence of the false, material misrepresentation. *Bank of Am. v. Jarczyk*, 268 B.R. 17, 21 (W.D.N.Y. 2001) (citations omitted); *see also Fellows, Read & Assocs. v. Rieder*, 194 B.R. 734, 737 (S.D.N.Y. 1996).

a. First Cause of Action

The UNFCU argues that the debt owed to the UNFCU in the sum of $95,583.39, plus interest and reasonable attorneys' fees and costs of collection, should be exempted from the Debtor's discharge pursuant to section 523(a)(2)(A) of the Bankruptcy Code, and that a judgment should be entered for said nondischargeable sum.

The UNFCU alleges that with respect to the First Loan and the Credit Lines that the Debtor obtained money from the UNFCU through false pretense, false representation or actual fraud.

Of the five elements cited above that are necessary to except a debt from discharge under section 523(a)(2)(A), only elements 1, 2, and 3 are in dispute, to wit, whether the debtor made a representation, falsity of representation and intent to deceive.

The UNFCU asserts that at the time of each and every transaction subsequent to the First Loan and the Credit Lines, the Debtor knew or should have known that he did not have the

ability to repay the debt from his assets or current salary, or that he incurred the debt with reckless disregard as to the belief that he could repay the debt. The UNFCU bases its arguments on the implied representation theory, which holds that each time a credit card holder uses the card to obtain credit, he impliedly represents that he intends to repay the debt incurred. The UNFCU argues that the Debtor made a representation, albeit implied, when he obtained the First Loan and the Credit Lines. The UNFCU asserts that the focus is on the Debtor's state of mind when he accessed the First Loan and the Credit Lines and that since the Debtor knew his income would soon end or be drastically reduced, he therefore knew he would be unable to repay his debt through earned income.

The UNFCU further alleges that by the Debtor obtaining new credit after the First Loan and incurring the Credit Lines debt, the Debtor caused himself to become insolvent at the time of the post-retirement purchases and did not have the present ability or realistic future possibility to pay the UNFCU's debt. In addition, the UNFCU maintains that the Debtor does not deny these allegations in his Answer, therefore, the UNFCU argues that the Debtor admits he obtained the First Loan by false pretenses through his admission that he accessed new credit at a time when (1) the debtor knew his income was about to be drastically reduced, and (2) he was nevertheless loading up on debt while involved in heavy stock trading. The UNFCU concludes that the Debtor obtained money from it through false pretenses, false representation or actual fraud, that caused damages to the UNFCU, which constitutes an exception to discharge pursuant to section 523(a)(2)(A) of the Bankruptcy Code.

The Debtor argues that he did not make any false representation to the UNFCU regarding the First Loan or the Credit Lines. The Debtor argues that he was optimistic about investing in the stock market and that he thought that he could easily repay his debts and make a profit. The

Debtor admits that he used the funds mostly to invest in the stock market. The Debtor also maintains that although there is "no guarantee to gain in the [stock] [m]arket . . . it is not prudent and not fair to assume that everyone will lose." (Debtor's Answer, pg. 4). The Debtor further asserts that when he started to invest in the stock market on February 27, 2002, the only funds available to him were the funds borrowed since his retirement pension could not be available to him until three months after his retirement. Lastly, the Debtor contends, "I accepted the loans on the premises that the Market would move upward after [a] very long downturn and that I would be able to pay my creditors." *Id.*

1. First Loan

With regard to the First Loan, the Court must first address whether the Debtor made a representation. The Debtor made a representation that he would repay the UNFCU when he executed the loan. "As a rule, one who undertakes to perform an obligation, such as to pay a debt impliedly represents that he intends to perform." *In re Mitchell*, 227 B.R. at 50-51 (internal quotation marks omitted). Here, the Debtor undertook an obligation to repay the debt when he executed the First Loan. Thus, the Debtor made a representation to the UNFCU that he would repay the First Loan.

The next element becomes whether the representation was made with the knowledge that it was false at the time it was made. In determining a debtor's knowledge of the falsity of the representation, courts consider the knowledge and experience of the debtor. *Fed. Trade Comm'n v. James Duggan (In re James Duggan)*, 169 B.R. 318, 323 (Bankr. E.D.N.Y. 1994). "A false representation made under circumstances where a debtor should have known of the falsity is one made with reckless disregard for the truth, and this satisfies the knowledge requirement." *Id.* (citations omitted). The UNFCU alleges that the Debtor made the following false

representations (1) once the Debtor *obtained* the First Loan he immediately accrued new debt to other creditors at a time when he knew his income would be drastically reduced and also knew, or should have known, that he would be unable to pay the loans when due; (2) the Debtor alleged that "credit card companies lured me into accepting new loans . . . [a]t that time I was involved to my neck in trading in the stock market, therefore, the Debtor accessed new credit when (a) he knew his income was going to be reduced and (b) he was incurring debt while involved in heavy stock trading; and (3) the Debtor obtained the First Loan when he knew his income was going to be reduced. However, the Debtor counters that he believed that he could repay the loan from the gain from the stock trading even though after his retirement his salary would be reduced. Here, there are genuine issues of material fact. The Court must examine the totality of the circumstances to assess whether the Debtor knew or should have known of the falsity or proceeded with reckless disregard for the truth to satisfy the knowledge requirement under section 523(a)(2)(A) of the Bankruptcy Code.

The final element in dispute is whether the representation must be made with the intent to deceive. The Debtor argues that at the time of obtaining the First Loan he had the intention to repay such loan. The Debtor states that the purpose of the First Loan was to enable him to consolidate his loans at the time and to allow him to save on interest.

"A representation of the maker's own intention to do a particular thing is fraudulent if he does not have that intention at the time he makes the representation." *Id.* (citations omitted). A debtor makes a false representation, "[i]f, at the time he made his promise, the debtor did not intend to perform . . . and the debt that arose as a result thereof is not dischargeable (if the other elements of section 523(a)(2)(A) are met). If he did so intend at the time he made the promise, but subsequently decided that he could not or would not so perform, then his initial

representation was not false when made." *In re Alicea*, 230 B.R. at 501 (citing *Palmacci v. Umpierrez*, 121 F.3d at 787). Whether a debtor intended to defraud a creditor is measured by the debtor's "actual state of mind . . . at the time the charges were incurred." *Field v. Mans*, 516 U.S. at 70-72.

Here, the Court notes that the first two alleged false representations asserted by the UNFCU focus on the Debtor's intent after having already received the First Loan and does not focus on the Debtor's intent at the time the Debtor obtained such loan. Furthermore, the UNFCU misstates the Debtor's allegation that he was lured by credit card companies to accept new loans during the time he was heavily involved in trading in the stock market at the time he obtained the First Loan. The Debtor in fact states that "[*a*]*fter* consolidation [(the First Loan)], credit card companies lured me into accepting new loans by offering 0% loans for six month[s] and blank che[ck]s for any purpose I wanted. *At that time*, [(meaning after the First Loan was obtained)], I was involved to my neck in trading in the Stock Market." Debtor's Answer to Complaint, pg. 4 (emphasis added). Accordingly, the representations in connection with the UNFCU's first and second allegations were not made with the intent to deceive at the time he obtained the First Loan.

A creditor must set forth sufficient evidence to show that the "debtor knew full well that any professed intention to repay was false or was known by the debtor not to be well-grounded, and that he or she nonetheless deliberately used the [loan] to obtain goods he or she knew were beyond his or her ability to pay." *In re Johnson*, 313 B.R. at 129. "Because few men will admit to a fraudulent intent, such intent must be established by circumstantial evidence." *Id.; see also Murphy*, 190 B.R. 333-34 (The question is "whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent."). A court should

assess on a case-by-case basis the totality of the circumstances surrounding the debtor's subjective intent. Courts have considered many factors to discern a debtor's subjective state of mind, such as (1) the length of time between the charges and the filing of the bankruptcy, (2) whether an attorney has been consulted concerning the filing of bankruptcy before the charges were made, (3) the number of charges, (4) the amount of the charges, (5) the financial condition of the debtor when charges were made, (6) whether the charges exceeded the credit limit of the account, (7) whether there were multiple charges on the same day, (8) whether the debtor was employed, (9) the financial sophistication of the debtor, and (10) whether the debtor's spending habits suddenly changed; and whether the purchases were made for luxuries or necessities. *In re Johnson*, 313 B.R. at 129-30 (citing *Manufacturers Hanover Trust v. Dougherty (In re Dougherty)*, 143 B.R. 23, 25 (Bankr. E.D.N.Y. 1992)).

Courts have also taken into consideration the debtor's ability to repay at the time the debt was incurred. *Id.* (citing *Jarczyk*, 268 B.R. at 23 ("a complete lack of ability to repay is one factor that may be considered in determining the debtor's subjective state of mind . . ."); *In re Dougherty*, 143 B.R. at 25 (same); *Chase Manhattan Bank, USA, N.A. v. Giuffrida (In re Giuffrida)*, 302 B.R. 119, 125 (Bankr. E.D.N.Y. 2003) (same); *In re Leventhal*, 194 B.R. at 30 (same); *see also In re Alicea*, 230 B.R. at 501 ("Intent may be inferred, however, if the promisor knew or believed that he would be financially unable to perform.") (citing *Palmacci v. Umpierrez*, 121 F.3d at 789; RESTATEMENT SECOND OF TORTS section 530 cmt. d; *cf. Hotel Constructors, Inc. v. Seagrave Corp.*, 574 F. Supp. 384, 388 (S.D.N.Y. 1983) (plaintiff stated fraud claim against defendants who promised to perform construction work for the plaintiff but already had made so many prior contractual commitments to do similar work on other projects that they could not possibly have intended to perform as promised)). However, case law has held

that in the context of dealing with a summary judgment motion to deny a discharge, relying on inferences alone in determining the debtor's intent is not proper. *In re Adrienne Halperin*, 215 B.R. 321, 330 (Bankr. E.D.N.Y. 1997).

The UNFCU alleges that the Debtor obtained the First Loan when he knew his income would be reduced thereby making a false representation. The Debtor argues that he had the intention of repaying the debt by the gain of stock trading at the time he obtained the First Loan. Here, there are genuine issues of material fact, which preclude granting summary judgment. The Court must, under the totality of the circumstances, assess whether the Debtor made a representation with knowledge that it was false and with intent to deceive at the time he obtained the First Loan.

2. Credit Lines

With regard to the Credit Lines, the UNFCU made identical allegations as to the Debtor's alleged false representations. The UNFCU claims that once the Debtor *obtained* the First Loan he immediately accrued new debt to other creditors at a time when he knew his income would be drastically reduced and also knew or should have known that he would be unable to pay the loans when due. The Debtor argued that "credit card companies lured me into accepting new loans . . . [a]t that time I was involved to my neck in trading in the stock market, therefore, the Debtor accessed new credit when (a) he knew his income was going to be reduced and (b) he was incurring debt while involved in heavy stock trading. The UNFCU argues that a complete lack of ability to repay a debt may be considered in determining the debtor's subjective state of mind. The UNFCU contends that each time the Debtor accessed credit he made the representation, albeit implied, that he intended to repay the debt and that a lack of ability to repay the debt be considered to determine the Debtor's subjective state of mind. *See* UNFCU Mem. of

Law, pg. 4. The Debtor maintains that he used the proceeds of the Credit Lines and the other loans to purchase stocks in the stock market, with the intention of using any profits made to repay the Credit Lines and the other loans.

Different issues, however, are raised by the UNFCU's argument that each time the Debtor accessed credit, he made an implied representation that he had the intent and ability to repay the debt. In the context of credit card debt such as the Credit Lines, the decisions interpreting section 523(a)(2)(A) have been numerous and to a certain extent conflicting. *In re Leventhal*, 194 B.R. 26, 28 (Bankr. S.D.N.Y. 1996). The conflict comes more so from the application of the traditional elements of fraud because there is no express representation by a debtor to the credit card issuer at the time of the transaction. Rather, the credit card transaction is usually between the credit card holder and a merchant or an automatic teller machine. *See Jarczyk*, 268 B.R. at 21; *MBNA Am. v. Parkhurst (In re Parkhurst)*, 202 B.R. 816, 821 (Bankr. N.D.N.Y. 1996).

As a result, varying analytical approaches to the dischargeability of credit card debt has occurred. The majority of courts have adopted the "implied representation" theory, which as stated previously holds that each time a cardholder uses his credit card, he impliedly represents to the creditor that he intends to repay the debt. *In re Giuffrida*, 302 B.R. 119, 125 (Bankr. E.D.N.Y. 2003); *see also Jarczyk*, 268 B.R. at 21 (citing *In re Mercer*, 246 F.3d at 401-07; *In re Rembert*, 141 F.3d at 281; *In re Anastas*, 94 F.3d at 1285; *In re Parkhurst*, 202 B.R. 816; *In re Leventhal*, 194 B.R. 26). However, courts have reached different conclusions regarding whether when a debtor accesses credit this debtor is implying that he/she has both the intent and the ability to repay the debt as opposed to just having the intent to repay the debt. This Court agrees with the analysis proffered in *In re Johnson, supra,* in which the court stated as follows

> [T]his [c]ourt is persuaded that a debtor does not make an implied representation as to his or present ability, as opposed to intent, to repay a debt when he or she makes a credit card charge or takes a cash advance . . . This conclusion is consistent with the circumstances under which many debtors may turn to consumer credit instruments such as credit cards and convenience checks. As at least one court has pointed out, 'an implication of an ability to pay is contrary to the notion of credit.' . . . In fact, 'one of the principal reasons people rely on credit is a present lack of ability to pay . . . Further, implying a representation of an ability to pay 'has been criticized for improperly shifting the burden of proof, making the debtor a guarantor of her financial condition.' . . . And finally such a representation 'is not actionable under § 523(a)(2)(A) because it excludes from its scope a statement respecting the debtor's financial condition. (citations and internal quotation marks omitted).

In re Johnson, 313 B.R. at 128. Thus, the fact that the Debtor lacked the ability to repay the debt at the time he used the Credit Lines does not establish, by itself, that credit was extended based upon a false representation or an intent to deceive.

Therefore, as with the First Loan, the Court must assess the Debtor's intent at the time he used the Credit Lines. The Debtor maintains that he intended to repay the debt, not with his earned income, but with the proceeds from his investment in the stock market. There are genuine issues of material fact. The Court must examine the totality of the circumstances to assess the intent of the Debtor at the time of his representation and whether the Debtor should have known of the falsity with reckless disregard for the truth to satisfy the knowledge requirement under section 523(a)(2)(A) of the Bankruptcy Code. Thus, an evidentiary hearing is necessary to resolve these issues.[7]

[7] The UNFCU requests in the Complaint that the Debtor shall be responsible to pay its attorneys' fees and costs of collection under the First Loan documents. The Supreme Court held that section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge all liability arising from fraud, including attorneys' fees and costs of collection. *Cohen v. De La Cruz (In re Cohen)*, 523 U.S. 213, 215 (1988). In the context of motion for summary judgment, because the Court has found that the UNFCU has failed to establish the elements required by section 523(a)(2)(A), including the Debtor's intent to deceive, the Court will not address the attorneys' fees or collection costs in connection with the First Cause of Action.

In sum, finding whether the Debtor had the requisite intent to repay requires a consideration of all the circumstances to determine the Debtor's intent in connection with the First Loan and Credit Lines, and is not generally susceptible to motion for summary judgment in the absence of actual evidence to show such intent. Under the circumstances, there are genuine issues of material fact as to the Debtor's intent to repay the debts and whether the Debtor made a false representation at the time he incurred these debts. Based on the foregoing reasons, the UNFCU has failed to establish essential elements of its case to which he has the burden of proof. Therefore, the UNFCU's motion for summary judgment under section 523(a)(2)(A) of the Bankruptcy Code with respect to the First Cause of Action is denied.

b. Second Cause of Action

The UNFCU argues that the debt owed to the UNFCU in the sum of $25,000.00 plus interest and reasonable attorneys' fees and costs of collection, resulting from the Furniture Loan, should be exempt from the Debtor's discharge pursuant to section 523(a)(2)(A) of the Bankruptcy Code, and that a judgment should be entered for said nondischargeable sum. The UNFCU asserts that the Debtor had a specific intent to defraud the UNFCU by stating that the purpose of the Furniture Loan was to purchase home furniture; however, he used the Furniture Loan to purchase stocks rather than home furniture. It asserts that the Debtor made the false representation with the intent to deceive the UNFCU and to induce it into giving the Furniture Loan and that the false representation was material to the UNFCU's decision to give such a loan. The UNFCU concludes that the Debtor obtained money from it through false pretenses, false representation or actual fraud; as a result, the Debtor caused damage to the UNFCU, which constitutes an exception to discharge pursuant to section 523(a)(2)(A) of the Bankruptcy Code.

The UNFCU adds that it has been obliged to employ counsel to represent its interest and that the various loan documents specify that the Debtor has to pay the UNFCU reasonable attorneys' fees and costs of collection in such instance. It argues that such fees and costs should be exempted from the Debtor's discharge pursuant to section 523(a)(2)(A) of the Bankruptcy Code, and included in the judgment for said nondischargeable sums.

Regarding the debt owed to the UNFCU in the sum of $25,000.00 plus interest the Debtor asserts that the purpose of the Furniture Loan was to purchase stocks and that he made that clear to the UNFCU. He further asserts that the UNFCU knew of that purpose because it was listed in the first application of the loan in the amount of $17,256.06. He also asserts that had it not been for the UNFCU's understanding of that purpose, the UNFCU would not have granted the Furniture Loan because it knew that at the time the Debtor applied for the Furniture Loan, the Debtor's monthly debts exceeded his monthly income. Lastly, the Debtor states that the UNFCU "was betting on [him], gambling side by side with [him]," and that the UNFCU violated simple principles of credit by letting him accumulate more debt than he actually could repay with his monthly income at that time.

1. Furniture Loan

Of the five elements as stated above a creditor must establish in order to sustain a cause of action under section 523(a)(2)(A) of the Bankruptcy Code, only elements 3 and 4 are in dispute, to wit, the debtor's intent to deceive the creditor, and the creditor's reliance on the representation. The Debtor does not dispute that he made a representation with the knowledge that it was false when he submitted the application for the Furniture Loan.

Shortly before the Furniture Loan was granted, the UNFCU issued to the Debtor a loan in the amount of $17,256.06 in connection with the purchase of the furniture. Despite the purpose

of the loan was stated as purchasing furniture, the proceeds of the loan in the amount of $17,256.06 were largely used to buy stocks. However, the loan in the amount of $17,256.06 was paid off in full from the proceeds of the Furniture Loan, and there is no claim upon the loan in the amount of $17,256.06.

The Debtor admits that none of the furniture on the purchase orders provided to the UNFCU to obtain the $17,256.06 loan was actually purchased. *See* Transcript of the Debtor's Deposition taken on June 4, 2003 at 82:2-5. But, as indicated above, the Debtor asserts that the actual purpose of the loan was to purchase stocks and that he made that clear to the UNFCU on April 4, 2002. The disputes remain whether the Debtor made false representation with intent to deceive and whether the UNFCU relied on the Debtor's representation to issue the Furniture Loan.

On April 4, 2002, the UNFCU actually rejected the Debtor's application because the Debtor intended to use the loan to purchase securities. The record shows that the Debtor knew that any loan used for investment purpose would not be approved by the UNFCU. Thus, the Debtor submitted the furniture purchase orders, invoices or receipts to the UNFCU to support his application for the Furniture Loan. Supported by the submitted furniture receipts, the Debtor stated the loan would be used to purchase the furniture, rather than other purposes, including investment. However, the proceeds of the Furniture Loan were used to invest in the stock market, rather than the stated purpose, to purchase home furniture. The Debtor incurred the Furniture Loan with the intent not to purchase furniture, which is inconsistent with his promise to perform before the UNFCU. The *In re Alicea* court held that "[I]f, at the time he made his promise, the debtor did not intend to perform . . . and the debt that arose as a result thereof is not dischargeable . . . ." 230 B.R. at 501. Further, records show that the UNFCU would not have

extended the Furniture Loan to the Debtor, had he not submitted the furniture receipts and stated that the loan was for the purchase of the furniture. In this context, the UNFCU loan officers indeed relied on his statement and the furniture receipts when they made the loan decision. Based upon these facts, the UNFCU has established a *prima facie* case under the section 523(a)(2)(A). The Court finds that there is sufficient evidence to demonstrate that the Debtor incurred the Furniture Loan through fraud with the intent to deceive his creditor and the UNFCU relied on the Debtor's fraud representation.

Indeed, upon the establishment of a *prima facie* case, the burden of coming forward with a credible explanation of the alleged facts shifts to the debtor. *Union Bank of the Middle East, Ltd. v. Luthra (In re Luthra),* 127 B.R. 514, 518 (E.D.N.Y. 1991); *Gans v. Schwalbe,* 75 B.R. 474, 483 (S.D.N.Y. 1987). Therefore, the Debtor must provide evidence to demonstrate that despite the stated purpose of the loan and furniture receipts, the UNFCU knew and approved that the Furniture Loan could be used for investment purposes.

The Debtor, however, has not set forth sufficient facts to support his argument. On the contrary, the Debtor alleges that the UNFCU loan officers knew his purpose to use the Furniture Loan to buy securities when the initial application for the loan in the amount of $17,256.06 was rejected on April 4, 2002 because in that application he made clear that the loan would be used to buy securities. The Court finds this fact does not support the Debtor's allegation. Instead, such fact weighs in favor of the UNFCU since it demonstrates that the UNFCU's loan policy does not allow a borrower to use the loan for investment. Evidence clearly shows that the Debtor submitted the furniture receipts and promised to use the loan to purchase the furniture pursuant to the UNFCU's loan policy. Based upon the evidence, it is no reason to question the UNFCU's motive to lend in the absence of further evidence, *i.e*. the UNFCU recklessly disregarded a

borrower's fraud. Additionally, the Debtor alleges that the UNFCU loan officers saw him go to the office of a representative from Pershing Brokerage on various occasions. In the absence of further evidence, such as the testimony from these UNFCU loan officers, the Court cannot infer, based on this allegation alone, that the UNFCU was aware of his daily activities of buying stocks at the time when it extended the Furniture Loan to the Debtor. The Court cannot accept mere conclusory allegations, speculation or conjecture from the Debtor when considering the motion for summary judgment. *Cifarelli*, 93 F.3d at 51.

Moreover, the sole fact that the UNFCU knew that at the time the Debtor applied for the Furniture Loan, that the minimum monthly payments for the loans and credit cards plus rent exceeded the Debtor's monthly income is certainly disconcerting, but is far from constituting proof of the UNFCU's knowledge as to the fact that the proceeds of the loan would be used for investment purposes. Thus, the UNFCU has established sufficient evidence that the elements required by section 523(a)(2)(A) are met. The UNFCU is entitled to summary judgment of nondischargeability in connection with the Furniture Loan plus related interest.

2. Interest, Attorneys' Fees and Costs of Collection

The UNFCU seeks the motion for summary judgment on nondischargeability of the Furniture Loan. The relief includes the principal and accrual interest, attorneys' fees and costs of collection. The UNFCU asserts that the loans documents specify that the Debtor should be responsible to pay the UNFCU reasonable attorneys' fees and costs of collection if it becomes necessary to employ counsel to represent the UNFCU's interests. The UNFCU argues without further explanations that pursuant to section 523(a)(2)(A) of the Bankruptcy Code, summary judgment should be entered for these attorneys' fees and costs of collection.

The Court finds that the Supreme Court held that section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge all liability arising from fraud and encompasses attorneys' fees and costs of collection. *In re Cohen*, 523 U.S. at 215. Because the Court has found that there is no genuine issue of material fact in connection with the Second Cause of Action, the attorneys' fees and costs of collection arose from the Debtor's fraud are entitled to except from discharge.

With respect to post-petition interest on nondischargeable debt, the Court finds that case law supports the proposition that the debtor personally is liable for accrued post-petition interest on debt that is nondischargeable pursuant to section 523. *Maureen Nickolas v. Thomas A. Boccio (In re Thomas A. Boccio)*, 281 B.R. 171, 175. (Bankr. E.D.N.Y. 2002) (citations omitted); *see also Bruning v. United States*, 376 U.S. 358, 362-63 (1964) (citing that "the basic reasons for the rule denying post-petition interest as a claim against the bankruptcy estate are avoidance of unfairness as between competing creditors and the avoidance of administrative inconvenience. These reasons are inapplicable to an action brought against the debtor personally."). The reason underlying the *Bruning* decision has been applied to different types of nondischargeable debts. *In re Thomas A. Boccio*, 281 B.R. 175 (citations omitted). The Court has found that the Furniture Loan is not exempted from discharge under section 523(a)(2)(A) of the Bankruptcy Code, the accrual interest, including the portion of the post-petition interest, is, therefore, not dischargeable.[8]

In sum, there is no genuine issue of material fact in connection with the Second Cause of Action except that although the interest, attorneys' fees and costs attributable to the Furniture Loan are not dischargeable, a hearing needs to be held on the amount of each item. Therefore,

[8] Even if the Court finds that the Debtor used part of the Second Loan proceeds to pay back the previous $17,256.06 loan, the $25,000.00 amount of the Second Loan plus interest, attorneys' fees or other related collection costs is exempted from discharge because the Court finds that there is sufficient evidence to establish that the Debtor made false representation with the intent to deceive his creditors at the time he applied for the $17,256.06 loan and the Second Loan.

subject to further proceeding on determining the amount of relief with respect to interest, attorneys' fees and costs, the UNFCU's motion for summary judgment under section 523(a)(2)(A) of the Bankruptcy Code regarding the Furniture Loan is granted.

D. Third Cause of Action

The UNFCU argues that the Debtor's discharge should be denied pursuant to section 727(a)(2)(A) and (B) of the Bankruptcy Code. It asserts that the Debtor made wire transfers to friends and relatives in Egypt for nine years prior to the Petition date, in addition to continuing to send money after he filed his Petition. It further asserts that the Debtor tried to conceal assets located outside of the United States, including safe deposit boxes and bank accounts. It adds that the Debtor had income that was not listed in his statement of "Current Income" (Schedule I). The UNFCU concludes that the Debtor, with the intent to hinder, delay, or defraud creditors or an officer of the estate charged with custody of the property under the Bankruptcy Code, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the estate before and after the date of the filing of the Petition.

The Debtor argues that he is entitled to a discharge. He asserts that his wire transfers to Egypt did not exceed five percent of his income. He further asserts that his former counsel failed to explain to him various points concerning the filing of the Schedules, including his "little" assets in Egypt. He adds that it was him who brought this matter to his counsel's attention and subsequently filed an amendment to the Petition.

The statutory grounds for objections to discharge are found in paragraphs 1 through 10 of section 727(a) of the Bankruptcy Code. These provisions are generally construed liberally in favor of the debtor and strictly against the creditor. *See Glaser v. Glaser (In re Glaser)*, 49 B.R.

1015, 1019 (S.D.N.Y. 1985); *see also Rubin v. Baltic Linen Co., Inc. (In re Baltic),* 12 B.R. 436, 440 (S.D.N.Y. 1981). Therefore, courts have noted, "the reasons for denial of a discharge must be real and substantial rather than technical and conjectural." *Commerce Bank & Trust v. Burgess (In re Burgess),* 955 F. 2d 134, 137 (1st Cir. 1992); *Leimbach v. Lane (In re Lane)* 302 B.R. 75, 81 (Bankr. D. Idaho 2003) (citing *In re Burgess,* 955 F.2d 134, 137)).

Section 727(a)(2)(A) and (B) provides that

> (a) The court shall grant the debtor a discharge, unless-
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-
> (A) property of the debtor, within one year before the date of the filing of the petition; or
> (B) property of the estate, after the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A) and (B). The creditor who objects to discharge under section 727 bears the burden of proving all of the following four elements by a preponderance of the evidence. *In re Adrienne Halperin,* 215 B.R. at 328 (citations omitted). These elements under section 727(a)(2)(A) include as follow

> (1) the act complained of was done at a time subsequent to one year before the date of the filing of the petition; (2) with actual intent to hinder, delay, or defraud a credit; (3) the act was that of the debtor; and (4) the act consisted of transferring, removing, destroying or concealing any of the debtor's property.

Id. (citations omitted). The Court will address each of the bases for relief sought by the UNFCU below.

a. Wire Transfers to Egypt

First, there is no dispute that the Debtor had been doing these wire transfers to Egypt to help relatives and others for many years prior to filing the Petition. Thus, these transfers cannot

be considered to have been done only within one year of the Defendant's filing for bankruptcy. Accordingly, the UNFCU fails to satisfy one of the elements required by section 727(a)(2)(A), in which the complained act was done at a time subsequent to one year before the date of the filing of the petition.

Second, the UNFCU argues that the Debtor intended to hinder, delay, or defraud a creditor or the officer of the estate through wire transfers. "As direct evidence of the debtor's actual intent is often not available, the court may infer the debtor's intent from the surrounding circumstances employing factors known as 'badges of fraud.'" *Id.* at 328-29 (citations omitted).[9] However, by seeking summary judgment that the UNFCU bears the burden of establishing that there are no genuine issues of material fact as to the Debtor's intent. The *In re Adrienne Halperin* court declines to rely on inferences alone in determining the debtor's intent in the application of a summary judgment motion to deny a discharge, when the debtor presents sufficient evidence to raise genuine issues of material fact as to its intent of the acts. *Id.* at 330.

From 1994 to 2002 the amount of the wire transfers listed by the UNFCU in its Complaint is a total of $2,231.00. Further, the Debtor used the UNFCU's service to transfer the sums at issue. Based on these facts, the Court cannot conclude that the Debtor intended to defraud his creditors. An evidentiary hearing is necessary to determine his intent and any inference that may be drawn from circumstances pursuant to factors set forth in footnote 9 of this Opinion. However, the Court notes that a transfer of $2,231.00 over eight year period, does not

[9] The factors include (1) the lack or inadequacy of consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction; (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry. *In re Adrienne Halperin*, 215 B.R. at 329 (citations omitted).

seem to support a finding, or an inference, of intent to hinder, delay or defraud, regarding the Debtor's alleged conduct.

With respect to the UNFCU's allegations regarding post-petition transfers, section 727(a)(2)(B) requires that the UNFCU has a preponderance burden to establish the Debtor's actual intent to hinder, delay or defraud. The courts in the Second Circuit have held that "a determination as to whether the property was transferred with actual intent to hinder creditors involves issues of intent and credibility that were inappropriate for summary judgment and that should be resolved by the fact finder after a trial" under section 727(a)(2)(B) of the Bankruptcy Code. *Anthony Novak v. Gray S. Blonder (In re Gary S. Blonder)*, 246 B.R. 147, 151 (Bankr. D. Conn. 2000) (citing *Citizens Bank of Clearwater v. Hunt*, 929 F.2d 707, 711 (2d Cir. 1991)). Similar to the analysis made by the Court under section 727(a)(2)(A) regarding the wires transfers, the Court finds that the UNFCU has failed to establish the Debtor's actual intent to hinder, delay or defraud under section 727(a)(2)(B).

b. Concealment

Under section 727(a)(2)(A) where concealing of assets was incurred prior to one year before the bankruptcy filing, the doctrine of continuing concealment may be invoked. "Under the doctrine, a concealment within the meaning of section 727(a)(2)(A) can be found to have existed during the year prior to filing even if the initial act of concealment of assets occurred before this one year period; however the debtor must have continued to conceal his or her interest in the property into the critical year." *Id.* at 331 (citation omitted). Further, section 727(a)(2)(A) requires the creditor to show that the debtor had the intent to hinder, delay or defraud creditors *within the relevant one year period*. *Id.* (citation omitted).

Here, the UNFCU has failed to show that the Debtor's concealment of assets has taken place prior to one year or more than one year before the bankruptcy filing under section 727 (a)(2)(A). On the contrary, the UNFCU has demonstrated that the concealments that were incurred post petition are subject to section 727(a)(2)(B).

After his bankruptcy filing, the Debtor failed to list some of the assets in his original Schedules. However, the Debtor thereafter, amended the said Schedules on March 20, 2003 to add certain assets, i.e. some bank accounts and deposit boxes. That amendment was made before both the meeting of creditor held on March 25, 2003 and the Debtor's deposition taken on June 4, 2003. The record, thus, supports the conclusion that he amended his Schedules without any prompting, and not under any pressures or in answer to any inquiries. Therefore, although the Debtor does not provide any support for his contention regarding this point, the Court cannot conclude that the differences in his initial Schedules constitute an "act of concealment" as such term used regarding section 727(a)(2).

The UNFCU contends that even after the Debtor amended his Schedules, the Debtor still failed to account for all of his safe deposit boxes. Here, the Debtor admits that there are two safe deposit boxes unlisted, and he testified that the two boxes contain only "some kind of research paper" and "big dictionaries," and some personal possessions like a flute and a watch. The UNFCU does not establish that the Debtor's failure to account for all of his safe deposit boxes constitutes the intent to hinder, delay, or defraud a creditor or the officer of the estate.

The UNFCU also argues that the Debtor had income that was not listed in his statement of "Current Income" (Schedule I). But, no evidence has been presented to show that at the date of the Petition, the Debtor had income that was not listed in his statement of "Current Income." On Schedule I, the Debtor claimed to have monthly income of only $350.00 income as a part-

time reviser in addition to his pension plan distribution. First, the UNFCU contends that based on the Debtor's bank statements for a period preceding the filing of the Petition, the Debtor received more income than that he claimed on Schedule I. The Debtor explains that this preceding period was a period of extraordinary activity for the United Nations because of Iraq and other matters and thus, this period generated special earning for him. However, there is no evidence in the record that as of February 6, 2003, the date the Debtor filed the Petition, his monthly income as a part-time reviser was greater than $350.00 a month. The date of reference is the date of the Petition and not any preceding period. Indeed, to be "current income" the income at issue has to be earned as of the date of the Petition. In addition, the UNFCU bases its contention on the fact that the Debtor has not disclosed some of his monthly payments. The disclosure of a monthly payment does not, however, necessarily mean that the Debtor has additional income, since the disclosed payment could have been made from the listed income. Therefore, the Court finds that the UNFCU has failed to establish facts sufficient to demonstrate the existence of an undisclosed income.

The UNFCU further argues that the Debtor did not list his repatriation grant in his statement of "Current Income" (Schedule I). The Debtor stated in his answer to the Motion to Dismiss that he asked his former counsel if he had to mention the amount of the repatriation grant, but his counsel advised him not to mention the amount because the grant was contingent upon a decision or action in the future. The UNFCU presents no evidence to the contrary. As mentioned in the November 24th Decision

> while relying on the advice of counsel does not absolve a debtor from the duty to ensure that information is accurate and complete to the best of his knowledge, if the reliance is reasonable it may excuse or explain acts that would otherwise be considered fraudulent or in bad faith. *In re McLauren*, 236 B.R. 882, 897 (Bankr. D. N.D. 1999); *see also In re Sendecky*, 283 B.R. 760, 765 (B.A.P. 8th Cir. 2002) . . . . In this case it was not unreasonable for the Debtor to rely upon the advice of

> his counsel in omitting the repatriation grant from his Schedules. The Debtor [was] not entitled to receive the grant unless and until he returns to his home country.

See November 24th Decision p.9.

With respect to the UNFCU's allegations regarding concealment, section 727(a)(2)(B) requires that the UNFCU has a preponderance burden to establish the Debtor's actual intent to hinder, delay or defraud. The courts in the Second Circuit have held that "a determination as to whether the property was transferred with actual intent to hinder creditors involves issues of intent and credibility that were inappropriate for summary judgment and that should be resolved by the fact finder after a trial" under section 727(a)(2)(B) of the Bankruptcy Code. *Anthony Novak v. Gray S. Blonder (In re Gary S. Blonder),* 246 B.R. 147, 151 (Bankr. D. Conn. 2000) (citing Citizens Bank of Clearwater v. Hunt, 929 F.2d 707, 711 (2d Cir. 1991)). Thus, the Court finds that the UNFCU has failed to establish the Debtor's conduct to be an actual intent to hinder, delay or defraud under section 727(a)(2)(B).

In sum, the Debtor has presented sufficient evidence to raise genuine issues of material fact of his intent under the transactions regarding the Third Cause of Action; an evidentiary hearing is necessary to determine his intent and any inference that may be drawn from factors set forth in footnote 9 of this Opinion. Thus, the UNFCU's motion for summary judgment under section 727(a)(2)(A) and (B) of the Bankruptcy Code with respect to the Third Cause of Action is denied.

E. Fifth Cause of Action

The UNFCU argues that the Debtor's discharge should be denied pursuant to section 727(a)(4)(A) of the Bankruptcy Code. It asserts that the Debtor knowingly and fraudulently executed his Petition, Schedules and Statement Of Financial Affairs as well as his testimony

during examination through a false oath, in that the Debtor's Petition, Schedules and Statement Of Financial Affairs allegedly contained false and misleading information, including the failure to disclose the existence of additional monthly income and expenses, wire transfers made prior to the Petition date, additional assets, including but not limited to the repatriation grant, as well as, the location, and contents of several safe deposit boxes.

Section 727(a)(4)(A) of the Bankruptcy Code provides that

> (a) The court shall grant the debtor a discharge, unless-
> (4) the debtor knowingly and fraudulently, in or in connection with the case-
> (A) made a false oath or account.

11 U.S.C. § 727(a)(4)(A). Pursuant to Federal Rule of Bankruptcy Procedure 4005, the creditor has the burden of proof on the elements necessary to sustain the charge of false oath. See, 5 Collier on Bankruptcy, ¶ 727.04[1][a], at 40 (15th Edition, 2005).

Here, the UNFCU argues that denying a discharge is appropriate under section 727 (a)(4)(A) solely on the ground that the Debtor does not deny that he failed to list assets, bank accounts and safe deposit boxes, the source of additional income, the contingent asset of the repatriation grant and the wire transfers. Supported by the Debtor's failure to deny the false statements and citing *In re Maletta*, the UNFCU contends that the UNFCU has produced persuasive evidence of a false statement under oath, thus, the burden shifts to the Debtor to prove that it was not intentionally false. *Montey Corp. v. Maletta (In re Maletta),* 159 B.R. 108, 112 (Bankr. D. Conn.1993). The Court disagrees that the UNFCU has met its burden required by section 727 (a)(4)(A). The *Maletta* court stated that "the plaintiff must prove that the defendant made a statement under oath; which he knew to be false; with the intent to defraud creditors or the trustee; and which related materially to the bankruptcy case." *Id.* (citation omitted). Accordingly, the UNFCU must establish that three elements to meet its burden (1) the Debtor

knew his statements were false, (2) he made the false statement with the intent to defraud creditors or the trustee, and (3) those false statements are material.

Section 727 unambiguously provides that the acts or omissions complained of to contest a debtor's right to discharge must be done "knowingly and fraudulently." See 5 Collier on Bankruptcy, ¶ 727.04[1][a], at 40. This section does not limit the objects of the debtor's fraudulent intent. The requisite intent may be discovered by inference from the facts. *Id.* "A reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy in answering may rise to the level of fraudulent intent." *Id.* (citations omitted). "[A] false statement resulting from ignorance or carelessness is not one that is knowing and fraudulent." *Id.* at 40-41. However, as the Court discussed before, the *In re Adrienne Halperin* court declined to rely on inferences alone in determining the debtor's intent in the application of a summary judgment motion to deny a discharge. Therefore, an evidentiary hearing is necessary to determine whether the Debtor acted recklessly or carelessly.

With regard to the materiality of false oath or account, the false oath or account must be related to the debtor's business transactions, or the discovery of assets, business dealings or the existence or disposition of the debtor's property. See 5 Collier on Bankruptcy, ¶ 727.04[1][a], at 41. "If the estate would have no interest in property that was omitted from a schedule, the omission is not material . . . ." *Id*. "Similarly, the omission of property of trivial value or property not subject to the claims of creditors has been treated as immaterial." *Id.* The UNFCU fails to advance any argument related to the materiality of false oath or account. For example, the Debtor testified that the two boxes contain only "some kind of research paper" and "big dictionaries," and some personal possessions like a flute and a watch. The UNFCU does not argue whether these personal possessions are material to the bankruptcy.

Further, the Debtor argues that his counsel advised him not to mention the amount of the repatriation grant because it was contingent upon a decision or action in the future. The courts have held that "if items were omitted by mistake or upon honest advice of counsel, to whom the debtor had disclosed all the relevant facts, the declaration will not be deemed willfully false, and the discharge should not be denied because of it." *Id.* at 42. Additionally, with respect to the deposit boxes, the Debtor amended the said Schedules on March 20, 2003 to add the missing assets, i.e. some bank accounts and deposit boxes. The cases have held that "[a] debtor coming forward of his or her own accord to correct an omission is strong evidence that there was no fraudulent intent in the omission." *Id.*

Therefore, the UNFCU has failed to establish sufficient facts for essential elements of its case to which it has the burden of proof on false information in the Debtor's oath, which he knew to be false, with the intent to defraud creditors or the trustee, and which related materially to the bankruptcy case. There are genuine issues of fact precluding summary judgment with respect to the Fifth Cause of Action and the UNFCU's requisite for summary judgment under section 727(a)(4)(A) of the Bankruptcy Code as to this cause of action is denied.

V. CONCLUSION

Based upon the foregoing, the UNFCU's Motion For Summary Judgment is denied (1) on the First Cause of Action, with respect to exempting from discharge the debt owed to the UNFCU in the sum of $95,583.39 plus interest and reasonable attorneys' fees and costs of collection, pursuant to section 523(a)(2)(A) of the Bankruptcy Code; (2) on the Third Cause of Action with respect to denying the Debtor a discharge pursuant to section 727(a)(2)(A) and (B) of the Bankruptcy Code; and (3) on the Fifth Cause of Action with respect to denying the Debtor a discharge pursuant to section 727(a)(4)(A) of the Bankruptcy Code. The UNFCU's Motion

For Summary Judgment on the Second Cause of Action pursuant to section 523(a)(2)(A) of the Bankruptcy Code is granted.

Counsel for the UNFCU is to settle an order consistent with this Court's Opinion.

Dated: December 16, 2005
New York, New York

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE