UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 03-31240
Bonnie J. Ward,	)	Chapter 7
Debtor.	)	Adv. Pro. No. 03-3216
Jasin Funeral Home,	)	Hon. Mary Ann Whipple
Plaintiff,	)	
v.	)	
Bonnie J. Ward,	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on Jasin Funeral Home's complaint to determine dischargeability of a debt owed to it by Defendant/Debtor, Bonnie J. Ward, for her son's funeral. Plaintiff alleges that the debt should be excepted from discharge under 11 U.S.C. § 523(a)(2)(C).

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and the general order of reference entered in this district. Actions to determine dischargeability are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I). This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that the debt in issue is

dischargeable.

FINDINGS OF FACT

In connection with prior summary judgment proceedings, the parties have stipulated to the following facts. On January 22, 2003, Plaintiff and Defendant entered into a Funeral Purchase Contract & Note for funeral services for Defendant's son. Under the contract and note, Plaintiff extended credit to Defendant in the amount of $9,162.72 at 18% interest. Defendant filed for relief under Chapter 7 of the Bankruptcy Code on February 26, 2003. Plaintiff's extension of credit to Defendant occurred within sixty days of Defendant requesting relief from this court.

The Funeral Purchase Contract itemizes the following goods and services purchased by Defendant in connection with her son's funeral:

Basic Services of Funeral Director & Staff	$1195.00	
Embalming	450.00	
Other Preparation of the Body	225.00	
Use of Facilities, Staff & Equipment:		
Funeral Ceremony (conducted at Funeral Home)	425.00	
Visitation/Viewing	425.00	
Transfer of Remains to Funeral Home	225.00	
Automotive Equipment:		
Casket Coach (Hearse)	225.00	
Service Vehicle	50.00	
Casket	3150.00	
Outer Burial Container	2120.00	
Acknowledgment Cards	35.00	
Visitor Register Book	35.00	
Memorial Folders/Prayer Cards	35.00	
Subtotal		$8595.00
Sales Tax	335.94	
Death Certificates	120.00	
Burial/transit permit	3.00	
Toledo Blade charge for obituary (1 day)	108.78	
Subtotal		567.72
Total		$9162.72

[*See* Pl. Ex. 1].

The evidence at trial showed that Defendant is a 72 year old woman. Before his death, her son as well as her grandson lived with her. Her son had been awaiting a liver transplant and was receiving welfare at the time. Nevertheless, he was able to contribute approximately $600 per month towards household expenses. In addition, Defendant's income totaled approximately $1,965 per month and included Social Security, her deceased husband's pension, and wages of approximately $400 per month from working part-time at the Red Cross. Defendant testified that at the time of her son's death, she was paying her bills on time and was current on her mortgage payments.

After her son's death, she met with Robert VanHorn, the funeral director at Jasin Funeral Home, accompanied by her daughter, son-in-law and granddaughter. According to VanHorn, Defendant was very emotional at the time of their meeting. Jasin Funeral Home had handled her husband's funeral several years earlier. At their meeting, VanHorn had her husband's file with him and stated that he assumed she wanted arrangements similar to those she had for her husband. Defendant agreed and VanHorn filled out the Funeral Purchase Contract to include the same services previously provided for her husband. VanHorn testified that this was his usual procedure if the funeral home had previously handled a funeral for the family. Defendant was then instructed to choose a casket from a room in which a number of caskets were displayed. She testified that she left the actual task of choosing the casket to her daughter but, nevertheless, went into the display room. Although she was in the room only a short time, she testified that the caskets she viewed were all close in price. She testified that there was one wooden casket that she was told she would not want because it would be susceptible to "worm holes."

VanHorn testified that the funeral for Defendant's son could have been done less expensively if Defendant had chosen only one day of visitation and selected less expensive merchandise, namely the casket and outer burial vault. VanHorn testified regarding the price range of caskets and burial vaults. Caskets start at $500 with higher end caskets made of hardwood, copper or bronze selling for as high as $8,000. The casket chosen for Defendant's son was made of stainless steel and sold for $3,150. VanHorn also testified that a minimal burial vault, consisting of a concrete, non-sealed container, costs $495. But David Jasin, President of Jasin Funeral Home, testified that if the vault is not sealed, water will seep in. There is no evidence regarding the upper range of burial vaults or the lowest price for a vault that is sealed. The

stainless steel vault chosen for Defendant's son cost $2,120. Both VanHorn and Jasin testified that the cost of the funeral for Defendant's son was a high average cost.

When meeting with a decedent's family, VanHorn testified that there is no financial information taken or requested to determine the ability to pay for the funeral. Regarding Defendant's ability to pay for her son's funeral, she testified that her son had previously told her that his funeral would be covered by welfare. She testified that her daughter called "welfare" and was told to call again in ten days. Although Defendant did not know the extent to which welfare would cover any funeral costs, she testified that she assumed Jasin Funeral Home would allow her to pay for the funeral in the same manner that she paid for her husband's funeral. The funeral home had accepted partial payment from life insurance proceeds and allowed Defendant to make monthly payments of $100 until paid in full, which she successfully accomplished. She testified that at the time she made the funeral arrangements she assumed that welfare would pay some portion of the funeral cost and that she would pay the balance by making monthly payments. As it turned out, welfare would not cover any of the cost of the funeral.

Defendant testified that she met with her attorney on January 31, 2003, hoping to obtain assistance in reducing her debt payments. Instead, counsel advised her to file a Chapter 7 bankruptcy petition, which she did on February 26, 2003. Defendants bankruptcy schedules reveal unsecured debt totaling $21,400 and income and expenses that leave little room for an additional payment for her son's funeral expense.[1] [Case No. 03-31240, Doc. #1].

LAW AND ANALYSIS

Plaintiff alleges that the debt owed to it by Defendant for the funeral expenses of her son are nondischargeable under § 523(a)(2)(C). Plaintiff has the burden of proving the debt should be excepted from Defendant's discharge by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661 (1991). Section 523(a)(2) provides in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt–

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[1] The parties agreed that the court should take judicial notice of the bankruptcy schedules filed in Defendant's Chapter 7 bankruptcy case.

> . . . .
> (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.
>
> . . . .
>
> (C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,150 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,150 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act.

Courts have emphasized that § 523(a)(2)(A) addresses not only fraudulent misrepresentations but also "actual fraud" as a concept broader than misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000); *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873 (B.A.P. 6th Cir. 2001). "Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud." *Vitanovich*, 259 B.R. at 877 (quoting *Gerad v.Cole (In re Cole)*, 164 B.R. 951, 953 (Bankr. N.D. Ohio 1993)). Fraudulent intent exists when a debtor makes a purchase on credit with a subjective intent to not repay the debt. *Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998).

But if the debts involve a consumer debt owed to a single creditor, a creditor is entitled to a presumption of fraud if the creditor can prove that the charges (1) total more than $1,150.00, (2) were for "luxury goods" and (3) were obtained within 60 days before the bankruptcy petition was filed. 11 U.S.C. § 523(a)(2)(C). "Congress' motive for adding § 523(a)(2)(C) to the Bankruptcy Code in 1984 was to rectify a perceived practice by debtors of 'loading up,' or going on credit buying sprees in contemplation

of bankruptcy." *FCC National Bank v. Orecchio (In re Orecchio)*, 109 B.R. 285, 289 (S.D. Ohio 1989) (citing S. Rep. No. 98-65, 98th Cong. 1st Sess. 58 (1983)). The statute "presumes a debtor has incurred debts covered by that subsection without intending to repay them or knowing he cannot repay them." *Id.* This presumption is rebuttable and once it has been invoked, "[t]he burden is upon the debtor to demonstrate that the debt was not incurred in contemplation of

discharge in bankruptcy and thus a fraudulent debt." S. Rep. No. 98-65, 98th Cong., 1st Sess. 58 (1983).

Plaintiff relies solely on the presumption provided in § 523(a)(2)(C) as proof of Defendant's fraudulent intent in incurring the debt to finance her son's funeral. There is no dispute that the debt involved is a consumer debt for more than $1,150 and was incurred within sixty days before Defendant's bankruptcy petition was filed. But Plaintiff has not met its burden of proving that the debt incurred by Defendant for her son's funeral was for "luxury goods or services."

The Bankruptcy Code does not define "luxury goods or services" except to provide that they "do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor." 11 U.S.C. § 523(a)(2)(C). Consequently, courts must look to the circumstances surrounding the purchase to determine whether it should be classified as a luxury item or service, taking into consideration, among other things, "whether the item purchased served any significant family function and whether the transaction evidenced some fiscal irresponsibility." *American Express Travel Related Serv. Co. v. Tabar (In re Tabar)*, 220 B.R. 701, 704 (Bankr. M.D. Fla. 1998); *Nissan Motor Acceptance Corp. v. Ferrell (In re Ferrell)*, 213 B.R. 680, 688 (Bankr. N.D. Ohio 1996)(indicating that the court must consider the entire circumstances surrounding the purchase). Goods or services need not qualify as necessities to escape being classified as a luxury. *Shah v. Shaw (In re Shaw)*, 294 B.R. 652, 655 (Bankr. W.D. Pa. 2003); *Montgomery Ward & Co. v. Blackburn (In re Blackburn)*, 68 B.R. 870. 873-74 (Bankr. N.D. Ind. 1987)(indicating that although § 523(a)(2)(C) excludes necessities from the definition of "luxury goods or services," the provision neither states nor implies that non-necessities automatically constitute "luxury goods or services").

There is no doubt that, as in this case, the purchase of funeral arrangements serves a significant family function of providing a proper burial for an immediate family member. Nevertheless, Plaintiff offered

evidence that Defendant could have purchased a less expensive funeral, reducing the cost by $3,000 to $4,000. Specifically, Defendant could have chosen only one day of visitation and could have chosen a less expensive casket and outer burial vault. The fact, however, that Defendant did not purchase the least expensive option available does not necessarily mean that the purchase was for a luxury item or service. *See, e.g., In re Ferrell*, 213 B.R. at 688 (stating that because a Saab is not an inexpensive car and could, in appropriate circumstances,

constitute a luxury item, does not mean that it must necessarily be a luxury item); *In re Shaw*, 294 B.R. at 655 (holding that luxuries within the meaning of § 523(a)(2)(C), as a matter of law, are limited to things that constitute extravagances or self-indulgences).

The evidence indicates that the price of caskets range from $500 to $8,000 and that Defendant chose a casket in mid-range costing $3,150. According to Defendant, the caskets she viewed were all close in price. Although there was a less expensive wooden casket available, the fact that Defendant did not choose it after being told that it was susceptible to worm holes does not result in her choice being considered a luxury item. Likewise, the fact that she did not choose the least expensive burial vault that would allow water to seep in does not result in her choice being elevated to luxury status. Plaintiff offered no evidence regarding the price range of outer burial vaults or of the lowest price for a vault that is sealed. Finally, there is no testimony regarding any discussion with Defendant at the time of the funeral arrangements regarding the cost of a two day versus a one day visitation. VanHorn simply asked her if she would like to include the same services previously provided for her husband and Defendant agreed. On these facts, Plaintiff has failed to prove by a preponderance of the evidence that the funeral items and services purchased by Defendant constitute such extravagances as to be considered luxury items and services.

Moreover, even if the funeral purchased by Defendant could be considered "luxury items and services," Defendant has rebutted any presumption under § 523(a)(2)(C) that she incurred the debt without intending to repay it. Before he died, Defendant's son told her, and she believed, that his funeral would be covered by "welfare." In the event it was not fully covered, she had planned on making monthly payments in the same manner as she had successfully done in paying for her husband's funeral in 2001. It was not

until after the funeral that Defendant learned that no part of the funeral would be paid by "welfare." While perhaps Defendant should have considered the loss of her son's contribution to the household expenses at the time she made the funeral arrangements and its impact on her ability to pay the funeral debt, the court does not find that her failure to do so is evidence of fraudulent intent, especially in light of her understandably and admittedly emotional state at the time of the funeral. Rather, the court finds that Defendant incurred the funeral expense fully intending to repay the debt.

CONCLUSION

Having found that Plaintiff has failed to meet its burden of proof under 11 U.S.C. § 523(a)(2), the debt owed to it by Defendant is dischargeable. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.

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Mary Ann Whipple
United States Bankruptcy Judge