

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
DANIEL & PAULA RUFFCORN,)	CASE NO. BK93-81735
)	A94-8006
<u>DEBTOR(S)</u>)	
)	CH. 7
MICHAEL HUGHES d/b/a)	
Kelly's Carpets,)	Filing No.
Plaintiff(s))	
vs.)	<u>ORDER</u>
)	
DANIEL M. RUFFCORN d/b/a)	
Ruffcorn Construction,)	
)	DATE: October 26, 1994
<u>Defendant(s)</u>)	HEARING DATE: September
)	29, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding ADVERSARY COMPLAINT.

APPEARANCES

Robert Krafka, Attorney for debtor
Michael Lustgarten, Attorney for plaintiff

Applicable Law

This case concerns a complaint objecting to the dischargeability of a debt under 11 U.S.C. § 523(a)(2)(A) because credit was granted to debtor based on statements by debtor that were the equivalent of false pretenses, false representations or fraud.

In order to establish an exception from discharge under Section 523(a)(2)(A), the creditor has the burden of proof to establish by a preponderance of the evidence that:

1. The debtor made a false representation;
2. At the time of the false representation, the debtor knew the representation to be false;
3. The debtor made the representation with the intention and purpose of deceiving the creditor;
4. The creditor relied upon such representation; and

5. The creditor sustained damages as a result of the representation.

In re Ophaug, 827 F.2d 340, 342 no. 1 (8th Cir. 1987). To provide a basis for accepting a debt from discharge, the debtor's alleged fraud must have existed at the time the debt was incurred. In re Scarlotta, 127 B.R. 1004 (N.D. Ill. 1991); In re Fontana, 92 B.R. 559 (Bankr. M.D. Ga. 1988).

Facts

Prior to filing a chapter 7 bankruptcy, the debtor was in the residential construction and remodeling business. In the spring of 1993, he had a remodeling job in Missouri Valley, Iowa. His customers ordered floor covering from the plaintiff, using his name as the contractor. There was no written contract between the debtor and the plaintiff nor between the plaintiff and the customer. However, there were separate invoices prepared by the plaintiff at the time the floor covering was ordered. The documents representing the agreement between the parties is Exhibit No. 1. That document lists the name of the purchaser as Ruffcorn Construction and names the debtor's customers. It gives phone numbers for both entities and then describes the floor covering. It also lists the total price, including tax.

In that portion of the document where the sales person would mark the manner of payment, the word "bill" was circled.

The bottom of the document states, "A finance charge of 1.5% per month will be charged on all overdue balances. Please pay from this invoice--no statement will be sent." There is nothing else on the document which indicates the terms, except a phrase, handwritten on the top of the document that states: "Net 30 days--less 10%." Two pages of the document are dated April 27, 1993, and one page is dated June 4, 1993.

The evidence is that the floor covering was delivered in early May and installed by the debtor. No payment was made until August 18 of 1993 and that payment was by cashier's check from the debtor in the amount of \$4,000.00. That amount was applied to the debt leaving a balance of over \$7,000.00.

The debtor testified that in addition to delivering a \$4,000.00 cashier's check to the plaintiff on August 18, 1993, he also delivered, through the mail or by hand delivery by his bookkeeper, a post-dated check for the amount of the balance due. According to his testimony, the post-dated check was dated to be effective on September 10, 1993, a date when he anticipated having sufficient funds on hand to make the check good. In contrast to his testimony, the three representatives of the plaintiff testified that they did not receive a post-dated check on August 18, 1993; that their policy was not to accept post-

dated checks; and that the check they actually did receive was delivered in early September of 1993 and by the time it was presented to the bank, the debtor had stopped payment on it.

It is the position of the plaintiff that the issuance of the check in September of 1993 and then directing the bank to stop payment on the check is the equivalent of a false representation that monies would be paid and that the debt should be deemed nondischargeable under Section 523(a)(2)(A).

In this case, the debtor made no representations when the debt was incurred that could be construed as a misrepresentation of his intent to pay or his ability to pay. There is no evidence that there were even discussions between the debtor and any employee of the plaintiff with regard to the debtor's intent or ability to pay. There is no evidence of any false representation at any time prior to the incurrence of the debt.

There is also no evidence that the creditor relied on any representation by the debtor granting the credit. Mr. Hughes, the owner of the plaintiff, testified that he makes all credit decisions and that he does so based upon general knowledge of the contractors in the vicinity and contacts he makes with other suppliers to determine the credit worthiness of a contractor. He made no specific representations that any inquiry was made about the financial wherewithal of the debtor at the time the credit was granted. He also provided no testimony that he had any discussion with the debtor at the time the credit was granted concerning the debtor's intent or ability to pay.

Even if it is a fact that the debtor, several months after granting of the credit and the delivery of the materials, upon request of or pressure by Mr. Hughes, delivered a check for the amount of the balance due and then stopped payment on the check, such fact is not evidence of an intent to defraud and is not a misrepresentation on which a finding of nondischargeability can be made. There is no evidence that the plaintiff relied upon the issuance of that check when granting the credit. Nor is there evidence that as a result of the receipt of the check the plaintiff altered its position in any way.

Conclusion

Based upon the above findings of fact and conclusions of law, judgment is entered in favor of the debtor and against the plaintiff. The debt is deemed to be dischargeable in this Chapter 7 bankruptcy proceeding.

Separate journal entry to be entered.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*LUSTGARTEN, MICHAEL 346-8566

Copies mailed by the Court to:

Robert Krafka, 1010 North Bell Street, Fremont, NE 680925
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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DANIEL M. RUFFCORN d/b/a)	
Ruffcorn Construction,)	
)	
Defendant)	

JOURNAL ENTRY

Judgment is entered in favor of the defendant and against the plaintiff and the debt which is the subject matter of this adversary proceeding is deemed dischargeable in this Chapter 7 case.

DATED: October 26, 1994

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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