

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
 GLENN W. ADKINS,) CASE NO. BK87-2827
) A87-453
 DEBTOR) CH. 7
)
 NORWEST BANK DES MOINES, N.A.,)
)
 Plaintiff)
 vs.)
)
 GLENN W. ADKINS,)
)
 Defendant)

MEMORANDUM

Trial on plaintiff's complaint under Section 523(a)(2)(A) and (C) was held on September 21, 1988. Appearing on behalf of plaintiff was Daniel L. Johnson of Latenser & Johnson, Omaha, Nebraska. Appearing on behalf of debtor/defendant was John Wynkoop, Omaha, Nebraska. This memorandum constitutes findings of fact and conclusions of law as required by Bankr. R. 7052.

Findings of Fact

Debtor is an individual who operated a retail shoe store as a sole proprietorship. The shoe store, located in Omaha, Nebraska, was opened in 1984. Also in 1984 debtor obtained a Mastercard credit card from plaintiff after delivering to plaintiff a financial statement on which debtor claimed gross annual income of \$35,000 per year.

In 1986 the credit limit on debtor's Mastercard was increased to \$5,000 upon debtor signing a statement that his gross monthly income was \$3,500.

From early 1987 through the date of the filing of the Chapter 7 bankruptcy petition by debtor, September 17, 1987, the shoe business suffered from decreasing sales which decreased cashflow. Beginning in late July of 1987, debtor was unable to service the trade payables, rent payments and overhead items for the shoe store and, at the same time, was unable to draw any cash from the business for his own personal living expenses. He, therefore, began to use the Mastercard for the purchase of business and personal items such as display materials and a desk for the business, and meals, airline tickets, clothing and other items for personal use.

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Judith M. Napier
Clerk, U.S. Bankruptcy Court

By _____ Deputy

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On August 3, 1987, debtor met with his attorney to discuss his business problems. Again on August 21, 1987, debtor met with his attorney and specifically discussed filing Chapter 7 bankruptcy. Three days thereafter debtor traveled to Kansas City, Missouri, for a several-day buying trip during which he reviewed shoes that would be available for sale in the spring of 1988.

After his return, he received news that his grandfather in Fort Wayne, Indiana, was dying. Since he had a close personal relationship with his grandfather who had raised him as a child, he wanted to be with his grandfather. He flew to Fort Wayne, Indiana, and stayed for approximately ten days during the final illness, death and funeral of his grandfather. All travel expenses for the trip were charged on the Mastercard.

Between July 22, 1987, and September 17, 1987, he charged a total of \$4,221.67 of goods and services including \$1,500 worth of clothing, travel expenses and food during the three weeks prior to filing bankruptcy on September 17, 1987. On the date he filed bankruptcy, the balance on the Mastercard was approximately \$6,700, \$1,700 in excess of his credit limit.

Debtor admits that he used the Mastercard during the last two months before bankruptcy for almost all of his ordinary expenses because he had no other source of cash as a result of the financial condition of his business. However, he argues that he had no intention of filing bankruptcy until the day he actually signed the papers. In support of the argument, he shows the Court that he went on a buying trip to Kansas City in August, he continued to keep the business open with employees working until early to mid-September and operated the business in the ordinary course during the same time period in which he was using the Mastercard extensively.

The Court finds as a fact from the schedules filed by debtor and the information provided in the Court file, of which the Court has taken judicial notice at the request of the plaintiff, that debtor took an inventory on September 7, 1987, and that the business was effectively closed on September 11, 1987. The Court further finds as a fact that debtor had no ability to repay the Mastercard charges which were incurred from July 22 through September 16, 1987. There was insufficient cashflow from the business to provide him with any funds, either in August or September. Moreover, the business did not generate sufficient cashflow to pay the September rent when due, and it was unpaid when the bankruptcy petition was filed.

The evidence is insufficient to permit the Court to make a factual finding concerning either the number of purchases or the dollar amount which were directly related to luxury items.

Discussion and Conclusions of Law

The Bankruptcy Code at 11 U.S.C. § 523(a)(2)(A) provides that an individual debtor does not receive a discharge from any debt 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"

The Code also excepts from discharge "consumer debts owed to a single creditor and aggregating more than \$500 for 'luxury goods or services' incurred by an individual debtor on or within forty days before the order for relief" 11 U.S.C. § 523(a)(2)(C).

The evidence presented is insufficient for this Court to make a specific finding concerning the "luxury goods" section of the statute, 523(a)(2)(C). However, the Court has no difficulty in finding that the total amount of debt incurred between July 22, 1987, and September 16, 1987, of \$4,221.67, together with interest, costs and reasonable attorney fees, to be nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Although it is difficult for plaintiff to prove that debtor had the specific, actual, conscious intent to defraud it, all of the surrounding circumstances indicate to this Court that the incurrence of the debt was at a time when debtor knew he could not pay the resulting bills. He knew that his business was collapsing. He knew that he had no cash that he could withdraw from the business for personal use to make any payments on the bills. He significantly increased the use of the credit card from approximately three uses per month to more than forty uses during the last two months prior to filing bankruptcy. Further, more than one month prior to filing the bankruptcy, and during a time he was using the credit card for significantly larger purchases, he discussed with his attorney the possibility of filing Chapter 7 bankruptcy.

All of the above factual matters leave this Court convinced that this debtor received an extension of credit from plaintiff by false pretenses and false representation. Other courts, on similar facts, have made similar findings. See In re Senty, 42 B.R. 456 (Bkrcty. S.D.N.Y. 1984); In re Lipsey, 41 B.R. 255 (Bkrcty. E.D. Penn. 1984); In re Kramer, 38 B.R. 80 (Bkrcty. W.D. La. 1984); Matter of Ratajczak, 5 B.R. 583 (Bkrcty. M.D. Fla. 1980).

Therefore, judgment shall be entered in favor of plaintiff and against defendant in the amount of \$4,221.67 plus interest from petition date plus costs and reasonable attorney fees. Such debt and judgment are nondischargeable.

Separate journal entry shall issue.

DATED: September 23, 1988.

BY THE COURT:

James J. McElroy
Chief Judge