

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
CRAIG & KELLY ACKERMAN,) CASE NO. BK98-82124
) A98-8098
DEBTOR(S).)
_____) CH. 7
OMAHA CITY EMPLOYEES)
FEDERAL CREDIT UNION,)
Plaintiff(s))
vs.)
)
CRAIG & KELLY ACKERMAN,)
)
Defendant(s).)

MEMORANDUM

Hearing was held on September 28, 1999, on the adversary complaint. Appearances: Chris Arps for the defendant/debtor and Donald Roberts for the plaintiff. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Background

This is a case concerning dischargeability of a debt incurred by the use of a credit card to obtain cash advances. At the end of all of the evidence, judgment was entered in favor of Mrs. Kelly Ackerman and her obligation, if any, on the debt in question is discharged. The question concerning the dischargeability of the obligation with regard to Mr. Craig Ackerman was taken under advisement.

Facts

In February of 1998, the credit card had a balance in excess of the \$4,500.00 credit limit. The debtors had obtained this credit card in 1995 from the Omaha City Employees Credit Union ("Credit Union"), the plaintiff. The debtors had a long-term relationship with the Credit Union and had numerous loans from the Credit Union. In February of 1998, the outstanding loans included two automobile loans, overdraft protection, and this credit card.

The debtors, both of whom had good jobs, and a net monthly income of over \$3,000.00 per month, had, in February of 1998, monthly household expenses in excess of their net monthly income. They were unable to meet all of their monthly payments.

In February of 1998, Mr. Ackerman contacted the Credit Union and requested a loan for the purpose of paying off the credit card debt. According to Mr. Ackerman, the Credit Union loan officer told him that the most that it could loan Mr. Ackerman was approximately \$4,900.00 to pay off the credit card, plus an additional \$500.00 for his own use. In response, Mr. and Mrs. Ackerman accepted the loan, signed the loan documents, and the credit card obligation was paid off.

On February 22, 1998, within days of paying off the credit card balance, Mr. Ackerman used the credit card to obtain a \$100.00 cash advance at an automated teller machine ("ATM"). Between February 22, 1998, and March 1, 1998, a period of eight days, Mr. Ackerman obtained cash advances in the total amount of \$1,240.00 and used the card to purchase personal items in the amount of \$136.05.

The monthly statement for the card, with a closing date of March 3, 1998, and a payment due date of March 30, 1998, had an ending balance of \$1,376.05 and required him to pay a minimum payment of \$69.00 in March. On March 19, 1998, he made a payment of \$100.00. During the month of March, 1998, he obtained additional cash advances in the total amount of \$2,360.00 and used the card for purchases or payments, incurring an additional \$155.00 in charges. Of the amount charged in March, \$1574.25 was incurred prior to the \$100 payment made by Mr. Ackerman on March 19, 1998.

At the end of March, the credit card balance was \$3,837.01. The credit card statement dated April 2, 1998, with a payment date of April 27, 1998, informed Mr. Ackerman that, due to some special program offered by the Credit Union, no minimum payment was due. He, therefore, made no payment during the month of April, 1998.

The credit limit on the card remained at \$4,500.00 after it had been paid off by the loan from the Credit Union in the middle of February, 1998. During the month of April, 1998, Mr. Ackerman obtained cash advances in the amount of \$1,211.00. Since no payments had been made, the April cash advances brought his outstanding balance above the credit

limit and he was also charged an over limit fee of \$10.00, leaving a balance shown on the monthly statement, dated May 4, 1998, in the amount of \$5,109.43. The payment due date was May 29, 1998, and the minimum payment was \$865.43. After March, Mr. Ackerman did not make the minimum payment and did not make any other payments on the outstanding balance. In addition, after April 29, 1998, he did not make any additional charges, nor obtain any additional cash advances. The Credit Union continued to charge him an over limit fee and a late payment fee up to the time he filed this Chapter 7 bankruptcy case in August, 1998.

Of the total amount of debt shown on the credit card statement for use of the card from February 22, 1998, through April 29, 1998, \$2,191.00 of the debt represented cash advances and service charges at ATMs located at LaVista Keno and the Kaneshville Queen, two gambling facilities located in LaVista, Nebraska, and Council Bluffs, Iowa. Most of the remaining cash advance amounts were obtained at ATMs within a very short distance from LaVista Keno.

Mr. Ackerman admits that, during the time frame in question, he did spend a considerable amount of money gambling at LaVista Keno and the Kaneshville Queen. Although he would not admit that all of the cash advances were used for gambling, he had no adequate explanation for the reason he obtained multiple cash advances at non-gambling facilities on the same day that he obtained cash advances at gambling facilities. It is reasonable to conclude that almost all of the cash advances obtained by Mr. Ackerman from February 22, 1998, through April 29, 1998, were used for gambling.

Mr. Ackerman knew, on February 18, 1998, the day that he obtained the loan from the Credit Union to pay off the credit card, that he not only did not have sufficient funds available on a monthly basis to pay his then outstanding financial obligations, but he knew that he had no additional funds available to pay the cash advances that he was about to obtain from the use of the Credit Union credit card. Although he knew all of the facts concerning his financial circumstances and his inability to pay his debts, he, nonetheless, used the credit card and obtained almost \$5,000.00 in cash advances within seventy days, while making one payment in the amount of \$100.00.

Mr. Ackerman testified that he always had the intention to repay the Credit Union and that he anticipated he would be

able to do so either by obtaining additional work or by winning at gambling. He presented no evidence that he attempted to obtain additional work and he presented no evidence that he ever won anything at gambling. His subjective belief that he would be able to pay off the debt and his intention to do so was based on an unrealistic view of his financial condition, his gambling addiction, and his true situation.

Mr. Ackerman did make a payment on the credit card debt of \$100.00 on March 19, 1998. It appears that, at least as of the time he made the March payment, Mr. Ackerman believed, however misguided his belief was, that he could and would repay the credit card or at least make the minimum payments in order to keep the account current. In fact, Mr. Ackerman paid more than the minimum amount due when he made his March payment. Timely payment in an amount above the minimum required is an indication that Mr. Ackerman did intend to repay the balance. However, there is no credible evidence that he thereafter had any intent to repay the debt. He made many charges on the same day, he made no payments on the card after March, and he had no means to repay the loan or even make minimum monthly payments. See *Citibank of South Dakota v. Dougherty (In re Dougherty)*, 84 B.R. 653(9th Cir. BAP 1988).¹ After the March 19th payment there was no objective basis for his assertion at trial that he intended to repay the credit card debt at the time it was incurred. Therefore, his "intent to repay" cannot be given any credence and it is a finding of fact that Mr. Ackerman not only did not have the ability to repay at the time he took any and all of the cash advances, but he had no true intent to repay after March 19th, 1998.

¹The court in Dougherty lists twelve factors to be evaluated concerning a debtor's intent. The factors are: (1) length of time between charges and the bankruptcy filing, (2) whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made, (3) the number of charges made; (4) amount of the charges, (5) the financial condition of the debtor at the time the charges were made, (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment, (10) the financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether purchases made were luxuries or necessities. Dougherty, 84 B.R. at 657.

The Credit Union justifiably relied on Mr. Ackerman's apparent good faith and intention to repay. When it loaned Mr. and Mrs. Ackerman the money to pay off the credit card in February of 1998, it took a loan application and obtained a credit report. The credit report showed that all outstanding credit accounts were current and that only one credit account had been more than thirty days delinquent in the several years prior to February of 1998. The experience of the Credit Union, after dealing with the debtors on numerous loans, was that they had not been delinquent on any of their loans. It is true that the credit card, at the time the new loan was made, was over the limit set by the credit card company, but Mr. and Mrs. Ackerman, upon realizing the over limit situation, immediately contacted the Credit Union to attempt to resolve the problem by obtaining a consolidation loan. The Credit Union also obtained information concerning the current monthly income of the debtors and found that it was significant. Paraphrasing the words of the President of the Credit Union, the credit report on the debtors was excellent.

To protect itself from Mr. Ackerman's misuse of the credit card, the Credit Union, after obtaining the credit report, making a determination concerning how much money should be made available to the debtors, and making the loan to pay off the credit card, should have deactivated the card. However, the Credit Union had no early warning sign concerning Mr. Ackerman's activities. During the first month of the use of the card, Mr. Ackerman made a payment in excess of the minimum monthly payment. No red flags were raised at the Credit Union during March of 1998, because all of the loans made to Mr. and Mrs. Ackerman were kept current and the credit card monthly obligation was timely paid. There is nothing that the Credit Union could have done to protect itself from the situation Mr. Ackerman has caused, other than cancel the card.

Conclusions of Law and Discussion

A. Intent to Repay

The Bankruptcy Code, at 11 U.S.C. § 523(a)(2)(A), prohibits the discharge of a debt "for money. . .to the extent obtained by false pretenses, or false representation, or actual fraud. . . ." Every time a credit card holder uses his card, he represents to the creditor that he intends to repay. *Advanta National Bank v. Kong(In re Kong)*, 1999 WL 787089, __B.R.__(9th Cir. BAP 1999) As discussed by Judge Minahan in

Matter of Irene K. Frowning, 222 B.R. 614 (Bankr. D. Neb. 1998), the courts have determined that the use of a credit card by an individual implies a representation by the user to the card issuer that the charges or advances will be paid when due. When those charges are not paid and the user files bankruptcy, the bankruptcy court must determine whether this implied representation to pay was false when made. In this case, based upon the facts recited above, it has been found as a fact that the debtor neither had the ability nor the intention to pay after the March 1998 payment was made to the Credit Union.

Although Mr. Ackerman knew, or should have known, that he was unable to pay his debts, such knowledge is not determinative of the discharge issues. Chevy Chase Bank FSB v. Kukuk (In re Kukuk), 225 B.R.778 (10th Cir. BAP 1998); General Electric Capitol Consumer Card Co., v. Janecek (In re Janecek), 183 B.R. 571 (Bankr. D. Neb. 1995) In attempting to repay the debt he incurred through February and the early part of March, Mr. Ackerman evinced his intention to repay at that time. However, after the March payment was made he continued to run up the balance on the credit card account while not making even the minimum payments under the card. Although no payment was required in April because of a special program the Credit Union was running, the special program did not prohibit Mr. Ackerman from making a payment.

B. Justifiable Reliance

In addition to finding that such an implied representation of an intent to repay was false when made, the bankruptcy court is charged with determining whether or not the credit card issuer justifiably relied upon the implied representation when it allowed the debtor to use the card. Field v. Manns, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed 2d 351 (1995). To determine whether the issuer justifiably relied on the implied representation, the case law suggests the court should look closely at the actions taken by the issuer, either at the time the card was issued or at the time the charges were made.

As recited above, the Credit Union obtained a loan application for a consolidation loan to pay off the credit card balance. It obtained a credit report that showed that the debtors had sufficient gross monthly income to enable them to support the credit which was being applied for, plus other installment payments and regular monthly expenses. The Credit

Union had a history of the debtors and had no delinquency record or any other adverse credit conditions which would raise red flags with regard to the credit worthiness of the debtors. Therefore, the Credit Union was justified in relying on the representation of the debtor in this case.

From the facts as recited above concerning the actions taken by the Credit Union to protect itself, it appears that the reliance upon the implied representation to pay is justified.

Conclusion

Based upon the conclusion that the implied representation of intent to pay the credit card charges was false, from and after March 19, 1998, and that the Credit Union justifiably relied upon such false implied representation, Mr. Ackerman's obligation to the Credit Union on the credit card charges incurred after March 19, 1998, plus accumulating interest, late charges and fees is deemed nondischargeable in this Chapter 7 bankruptcy case.

The Credit Union shall calculate the principal balance due after deducting the pre-March 19, 1998, charges, and add to such balance the accumulated interest from and after March 19, 1998, plus late charges and over limit fees up to and including November 8, 1999. Such figures shall be submitted to the court and to counsel for Mr. Ackerman. A judgment shall then be entered. This memorandum is not a final, appealable order. The judgment, when entered, shall be such order.

Separate journal entry to be filed.

DATED: October 27, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

78 ARPS, CHRIS

15 ROBERTS, DONALD

Copies mailed by the Court to:

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.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF: |) | |
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| CRAIG & KELLY ACKERMAN, |) | CASE NO. BK98-82124 |
| |) | A98-8098 |
| <u>DEBTOR(S).</u> |) | |
| |) | CH. 7 |
| OMAHA CITY EMPLOYEES |) | |
| FEDERAL CREDIT UNION, |) | Filing No. |
| Plaintiff(s) |) | |
| vs. |) | <u>JOURNAL ENTRY</u> |
| |) | |
| CRAIG & KELLY ACKERMAN, |) | DATE: October 27, 1999 |
| <u>Defendant(s).</u> |) | HEARING DATE: September 28, 1999 |

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Adversary Complaint.

APPEARANCES

Chris Arps, Attorney for defendant/debtor
Donald Roberts, Attorney for plaintiff

IT IS ORDERED:

Mr. Ackerman's obligation to the Credit Union on the
credit card charges and accumulating interest, late charges
and fees is deemed nondischargeable in this Chapter 7
bankruptcy case. See memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
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15 ROBERTS, DONALD

Copies mailed by the Court to:
United States Trustee

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parties (that are not listed above) if required by rule or statute.