

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
DAVID A. BRODERSON,) CASE NO. BK98-80736
)
DEBTOR.) A98-8057
_____)
UNIVERSAL CARD SERVICES,)
) CH. 7
Plaintiff,)
vs.)
)
DAVID A. BRODERSON,)
)
Defendant.)

MEMORANDUM

Hearing was held on the above adversary proceeding.
Appearances: Jennifer Amen for the plaintiff and Thomas Blount for the defendant/debtor. 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 adversary proceeding was brought by the plaintiff in an attempt to obtain an order denying the dischargeability of certain debts incurred by the debtor by the use of a credit card. The statutory authority for the complaint is 11 U.S.C. § 523(a)(2)(A). That section provides that an individual debtor is not relieved from any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

Facts

In this case, the debtor had been granted the use of a credit card by this creditor several years prior to the bankruptcy filing. However, the card had not been used for a number of years until September of 1997. During September of 1997, the debtor charged \$260.24 and obtained a cash advance

of \$100.00. He then received a bill which informed him that his minimum payment on such amount was \$10.00. The payment was due on October 13, 1997, but was not paid until October 17, 1997, resulting in a notice on the next billing that his payment was delinquent.

From September 20, 1997, through October 15, 1997, the debtor used the card and incurred \$2,117.51 in "purchases" debt and obtained a \$50.00 cash advance. None of the purchases were for luxury items or in significantly high amounts. The highest charge was \$234.26 to J.C. Penney Co. on October 4, 1997.

The debtor received a bill reflecting both the previous balance and the balance after the purchases in the amount of \$2,117.51 and the cash advance of \$50.00. His minimum payment was to be \$54.00 after deduction of the late paid \$10.00 minimum payment from the prior month.

He did not timely pay the minimum payment and, from October 17 through November 7 of 1997 he charged another \$287.98 for purchases.

He did not make any further charges, but he did make payments in the amount of \$27.00 on January 12, 1998, and \$27.00 on January 27, 1998. In other words, from the first date any minimum payment was due, October 13, 1997, he made a total of \$64.00 in payments when his actual minimum payment obligation was a total of \$313.00 from the first date any amount was due.

After his November payment was late, he was contacted by the creditor and he informed the creditor that he had made arrangements to pay the credit card company through Consumer Credit Counseling Service, a nationwide organization with local offices that works with debtors to make payments to creditors, often helping debtors avoid bankruptcy. The first contact made by the credit card company to the debtor concerning Consumer Credit Counseling Service was on December 11, 1997. On December 24, 1997, he was once again contacted by the creditor. The debtor advised that he had made one or more payments to the Consumer Credit Counseling Service and that it was supposed to be in contact with the credit card company. By January 14, 1998, the credit card company had received a proposal from Consumer Credit Counseling Service that would have permitted the debtor to pay \$27.00 per month.

However, that offer was rejected. The credit card company demanded at least \$58.00 per month. It is clear from the evidence that the proposal from the Consumer Credit Counseling Service was dated October 24, 1997, although it was not received by the credit card company until January 14, 1998.

As has been indicated above, the debtor did make two \$27.00 payments during the month of January. Those payments are consistent with the amount proposed in his payment plan by Consumer Credit Counseling Service. On February 3, 1998, the debtor was first advised by the credit card company that his proposal through Consumer Credit Counseling Service had been denied. The debtor was directed to contact the credit card company. There was a telephone conversation between a representative of the credit card company and the debtor on February 7, 1998, and the debtor agreed to talk to Consumer Credit Counseling Service about another proposal. A similar conversation took place on February 17, 1998. Other conversations, in a similar vein, took place both on February 26, 1998, and on February 27, 1998. On March 7, 1998, apparently another conversation occurred at which either the original or a second Consumer Credit Counseling Service proposal was rejected. On March 29, 1998, in another telephone conversation, the debtor promised to mail \$313.00 by April 1st. On April 3, 1998, the creditor received notice of the Chapter 7 bankruptcy filing.

In the year 1997 and in several years prior, the debtor earned approximately \$19,000.00 from his main employment and a few thousand more from additional jobs that he performed. He was, up until October 1, 1997, married and living with his spouse. Her annual income was approximately \$22,000.00. Prior to their separation, his spouse was responsible for paying all the bills from the joint incomes of the parties. At the time the credit card charges which are the subject matter of this litigation were incurred, the debtor had no knowledge of the exact amount of the bills, the minimum payments due, nor the financial impact of the separation and eventual divorce.

Discussion

In a Section 523(a)(2)(A) nondischargeability action the creditor bears the burden of proving the following elements:

- (1) that the debtor made the representations;

- (2) that at the time he knew they were false;
- (3) that he made them with the intention and purpose of deceiving the creditor;
- (4) that the creditor relied on such representations;
- (5) that the creditor sustained the alleged loss and damage as a proximate result of the representations having been made.

Anastas v. American Savings Bank (In re Anastas), 94 F.3d 1280, 1284 (9th Cir. 1996).

When considering the element of the representation in cases involving credit card use, it is conceptually difficult to assess whether particular charges and cash advances have been obtained by virtue of false pretenses, false representations, or actual fraud because of the lack of an express representation to the creditor at the time of the charge. As a result, courts must consider whether an implied representation was made with intent to defraud the credit card issuer by the very use of the card.

In considering a debtor's intent, the court should consider twelve non-exclusive factors including:

- (1) The length of time between the charges made and the filing of bankruptcy;
- (2) Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;
- (3) The number of charges made;
- (4) The amount of the charges;
- (5) The financial condition of the debtor at the time the charges are 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) Financial sophistication of the debtor;
- (11) Whether there was a sudden change in the debtor's buying habits; and
- (12) Whether the purchases were made for luxuries or necessities.

General Electric Capitol Consumer Card Co. V. Janecek (In re Janecek), 183 B.R. 571, 574 (Bankr. D. Neb. 1995) (citing Citibank South Dakota v. Dougherty)(In re Dougherty), 84 B.R. 653, 657 (9th Cir. BAP 1988)).

Plaintiff correctly stated in its trial brief that the plaintiff must prove the debtor, at the time of making the purchases, had no intent to repay.

It is clear from a review of the above articulated Dougherty considerations that this debtor did not exhibit the requisite intent to deceive the credit card issuer. Evidence at trial showed that the debtor's final purchase was made at the beginning of November, 1997, yet he did not file bankruptcy until the following February; the debtor made no charges after consulting an attorney regarding filing bankruptcy; the number and amount of the charges appeared within what the debtor understood to be his ability to repay and did not exceed the credit limits established by AT&T; the debtor was not particularly sophisticated regarding finances and up until the time of his divorce, his spouse had handled all of the bills; the debtor was employed during the entire time in question; and the purchases did not necessarily reflect a change in buying habits nor were they luxury items.

In other words, virtually all of the factors weigh in favor of the debtor and against the creditor regarding the essential element of the intent to repay. This fact considered in conjunction with the debtor's attempts to propose a payment plan through Consumer Credit Counseling Service lead this Court to the conclusion that the debtor did in fact intend to repay the debt incurred on his AT&T credit card.

Conclusion

The credit card debts at issue in this case are dischargeable.

Separate journal entry to be filed.

DATED: April 22, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

copies faxed by the Court to:

BLOUNT, THOMAS

292-9817

Copies mailed by the Court to:

Jennifer Amen, 1228 So. 6th St., Lincoln, NE 68502
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

IN THE MATTER OF:)
)
DAVID A. BRODERSON,) CASE NO. BK98-80736
) A98-8057
DEBTOR(S).)
)
UNIVERSAL CARD SERVICES,) CH. 7
) Filing No.
Plaintiff(s))
vs.) JOURNAL ENTRY
)
DAVID A. BRODERSON,)
)
Defendant(s)) DATE: April 22, 1999
HEARING DATE: March 17,
1999

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

APPEARANCES

Jennifer Amen, Attorney for Universal Card Services
Thomas Blount, Attorney for defendant/debtor

IT IS ORDERED:

The credit card debts at issue in this case are
dischargeable. See memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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