

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
DENNIS L. HYDOCK,) CASE NO. BK78-0-787
BANKRUPT)
AVCO FINANCIAL SERVICES OF)
NEBRASKA, INC.,)
Plaintiff)
vs.)
DENNIS L. HYDOCK,)
Defendant)

MEMORANDUM OPINION

In this adversary proceeding, plaintiff's first cause of action alleges the indebtedness due it from the defendant is nondischargeable pursuant to the false financial statement in writing exception of §17a(2)[11 U.S.C. §35a(2)]. Plaintiff's second cause of action seeks a determination that a portion of the indebtedness due it is nondischargeable pursuant to the willful and malicious conversion of property of another excepted of the same statutory subsection.

On March 13, 1978, the defendant by a telephone conversation applied for a new loan with plaintiff. During the telephone conversation, the defendant gave to a representative of the plaintiff information regarding his financial condition which apparently neglected to include the information that he owed debts to the Omaha Police Credit Union, to Dial Finance Company and to Local Loan Company, all of Omaha, Nebraska. The plaintiff attempted to verify various items of information given to them orally by the defendant through checking with the defendant's employer and through a check of the Lender's Exchange, an information agency which shows other debts due to finance companies in the area. The employment verification was made and the check with the Lender's Exchange failed to indicate the debts of the defendant due Dial Finance Company and Local Loan Company. On the same date, defendant also signed a statement of indebtedness which also failed to list the three debts mentioned above. The defendant was granted his loan on the same date as his oral application.

The evidence before me fails to indicate the amount due to Omaha Police Credit Union but the evidence does indicate that the indebtedness due to Dial Finance Company on March 13, 1978 was \$720.00 with monthly payments of \$30.00 and the amount due

Local Loan Company on the same date was \$2,100.00 with monthly payments of \$70.00.

On April 24, 1978, defendant applied for an additional loan. He again apparently failed to inform the plaintiff of the three above-mentioned loans and signed a statement of indebtedness which also failed to disclose them. Again, the plaintiff checked with the Lender's Exchange and received information that the defendant had made inquiries regarding loans with a Beneficial Finance office and a Household Finance office but that these were inquiries only. Apparently the Lender's Exchange showed no other loans with finance companies. Defendant's request for an additional loan of money was granted the same day as the application and the pre-existing loan was rewritten to encompass the fresh cash advanced. On that date, the defendant owed Dial Finance \$659.54 and Local Loan Company the sum of \$2,030.97.

Although there is testimony before me of reliance upon the statements of indebtedness given to plaintiff by the defendant, I am unpersuaded that the plaintiff did, in fact, rely upon the statements of indebtedness but rather am forced to the conclusion that the plaintiff relied upon its check with the Lender's Exchange which showed no other indebtedness due a finance company. The statutory language requires reliance upon the false statement in writing and I conclude that plaintiff has failed to meet its burden with regard to this statutory element.

I need not, therefore, explore the issue of whether the defendant omitted these debts with the requisite guilty intent to deceive.

Nevertheless, the foregoing does not resolve the question of whether or not the omission of the indebtedness due the Omaha Police Credit Union renders the indebtedness nondischargeable. The testimony before me would indicate that the Lender's Exchange would not show an indebtedness due to a credit union but rather would indicate only an indebtedness due another finance company.

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The testimony by the defendant with regard to his reason for omitting this indebtedness was that he believed that the plaintiff was making its decision to grant or refuse the loan based upon his net (as opposed to his gross) monthly take-home pay. The defendant's obligation to pay the Omaha Police Credit Union monthly payments was being deducted from his salary so that his net take-home pay was not obligated on the obligation, it having previously been deducted. The documents in evidence before me indicate on the loan application that the budget analysis which was made was, in fact, based upon his net monthly income. I am persuaded that the plaintiff was making the decision to make the loan based upon the net monthly income and, having seen the defendant testify, I conclude that his explanation of the omission of this indebtedness is believable. Accordingly, I conclude that the omission by the defendant of the debt was done without the requisite guilty intent as required by the statute.

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The plaintiff's second cause of action seeks a determination that the sum of \$500.00 due the plaintiff from the defendant is nondischargeable by virtue of the conversion by the defendant of a TV set. However, the testimony before me is that the defendant gave or loaned the set to his son upon his son's moving to Nevada. If there is a conversion present, and it is difficult based on the evidence to conclude that there is conversion, I cannot conclude that the conversion is of the willful and malicious

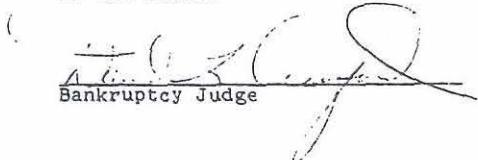
type required by the statute. See Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934); Robertson v. Interstate Securities Company, 435 F.2d 784 (8th Cir. 1971); Countryman, The New Dischargeability Law, 45 American Bankruptcy Law Journal 1 (1971); In Re Elias, BK74-0-1059 (D. Neb. 1975, Hon. Robert V. Denney); 1A Collier on Bankruptcy, Section 17.09.

I should add that in relation to the discussion above regarding reliance, in addition to relying upon its check with the Lender's Exchange, the documentary evidence before me would suggest that the plaintiff relied heavily in making its loans on the thirteen-year employment record of the defendant and the security interest which it took in household goods.

My finding is in favor of the defendant and against the plaintiff. A separate order is entered in accordance with the foregoing.

DATED: January 5, 1979.

BY THE COURT:


Bankruptcy Judge

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