

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

ELLIOTT LOUIS BATHEN,)

BANKRUPT)

FIRST WEST SIDE BANK,)
A Nebraska Banking Corporation,)

Plaintiff)

vs.)

ELLIOTT LOUIS BATHEN,)

Defendant)

CASE NO. BK78-0-1118

MEMORANDUM OPINION

In this adversary proceeding, plaintiff seeks a determination that an indebtedness due it from the defendant is nondischargeable pursuant to the false pretenses or false representations exception of §17a(2) [11 U.S.C. §35a(2)].

The indebtedness here involved results from a loan made by plaintiff to the defendant on July 31, 1978, in the amount of \$1,500.00 plus interest as specified in the promissory note executed by defendant.

Approximately one year prior to the making of the loan presently in dispute, defendant had obtained a prior loan from plaintiff, giving at the time his personal statement of financial condition together with a written credit application. At the time of the making of the loan presently in dispute, a representative of plaintiff inquired of defendant as to whether defendant's financial condition had changed from the time of the making of the prior loan. Defendant indicated generally in the negative. In fact, defendant's financial condition had changed significantly in that he had undergone a divorce, was employed for substantially less compensation than he had been at the prior time, no longer owned real estate and was no longer a part owner of a kuik shop. Defendant further told a representative of plaintiff that the loan in dispute was needed for the payment of taxes, when in fact, he needed the money for living expenses, prior bills, and for the purchase of some other property. Part of the loan proceeds were used for the payment of his attorney in this bankruptcy proceeding.

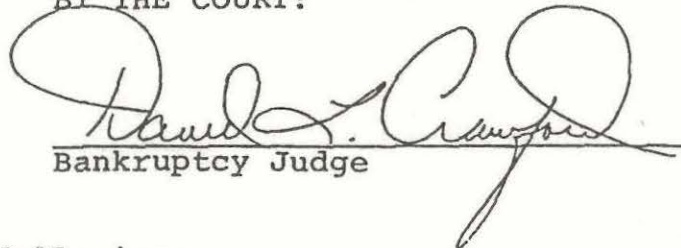
In general, defendant's financial condition at the time of his 1978 loan was that he was insolvent, unemployed or substantially unemployed, two months in arrears on car payments and without significant assets. He had been unable to pay his former wife money which he was required pursuant to the divorce decree to pay. His voluntary bankruptcy petition was filed one month and eight days after the loan.

The Court's conclusion, based upon the evidence before me, is that the defendant obtained the loan from the plaintiff either with the intent not to repay it or with such a reckless disregard for his ability to repay the loan as to amount to the same thing. Implied in his obtaining of credit from plaintiff is the implied representation that he will make the payment. See In Re Engstrom, 1 Bankruptcy Court Decisions 17 (S.D. Iowa 1973); In Re Masek, 1 Bankruptcy Court Decisions 56 (N.D. Iowa 1974); In Re Black, 373 F.Supp. 105 (E.D. Wis. 1974). See and compare Davison-Paxon Co. v. Caldwell, 115 F.2d 189 (5th Cir. 1941) with In Re Boydston, 520 F.2d 1098 (5th Cir. 1975). Resulting from the foregoing is the conclusion that the indebtedness due the plaintiff from the defendant is nondischargeable in this bankruptcy proceeding.

A separate order is entered in accordance with the foregoing.

DATED: May 11, 1979.

BY THE COURT:


Bankruptcy Judge

Copies mailed to each of the following:

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