

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
JIMMY RAY HELMS,)	CASE NO. BK79-L-198
)	
BANKRUPT)	
)	
PEOPLES NATIONAL BANK & TRUST,)	
A Banking Corporation,)	
)	
Plaintiff)	
)	
vs.)	
)	
JIMMY R. HELMS,)	
)	
Defendant)	

MEMORANDUM OPINION

Plaintiff, believing it is the victim of a credit card spree by defendant on the eve of bankruptcy, brought this adversary proceeding for a determination that the indebtedness due it from defendant is nondischargeable pursuant to the "false pretenses or false representations" exception of §17a(2)[11 U.S.C. §35a(2)].

Prior to bankruptcy, defendant possessed a Master Charge card which was obtained through plaintiff. He obtained the credit card at a time when he was living in Kansas. Defendant later moved to Texas where he resided for a brief period of time and ultimately moved to the Grand Island, Nebraska, area. The evidence is not clear as to exactly when the defendant moved to the Grand Island area but it appears to have been around January, 1979. This bankruptcy proceeding was filed April 30, 1979.

When the defendant left Texas for Grand Island, he had no job in the Grand Island area arranged. He had discussed with a union official the prospects of obtaining a job at a power plant south of Grand Island. He thought that he would be able to obtain a job at that construction site. However, he had no promise of a job. As it developed, he was unsuccessful in obtaining a job at that construction site. In fact, during the next several months before bankruptcy, he was successful in obtaining only odd jobs. He moved to the Grand Island area with his common-law wife and several children.

Defendant's use of the credit card during the months prior to bankruptcy are as follows:

<u>billing cycle closing date</u>	<u>monthly purchases</u>
10/4/78	\$ 23.88
11/3/78	\$ 713.80
12/5/78	\$ 106.65
1/4/79	\$ 0.00
2/5/79	\$ 12.15
3/6/79	\$ 0.00
4/4/79	\$2,925.79
4/30/79	\$ 27.42

The documentary evidence before me discloses that for the statements covering billing cycle closing date October 4, 1978, through March 6, 1979, the defendant was making regular payments on the account which were in excess of the minimum payment which was due. It is true that he exceeded his credit limit in his charges during that period but explains that by a conversation which he had with a representative of plaintiff in which he was told that he could keep using the card as long as he made regular payments. However, the last two billings disclose no payments.

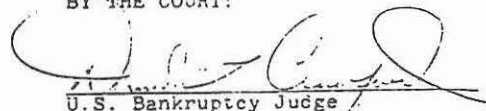
At one time, the generally accepted rule appeared to be that if a bankrupt had made no affirmative representation of his intention to pay, an implied representation by the mere fact of charging merchandise or obtaining credit was insufficient to render the indebtedness nondischargeable. Davison-Paxon Co. v. Caldwell, 115 F.2d 189 (5th Cir. 1941), cert. den. 313 U.S. 56. However, since that decision in 1941, several courts have concluded that the case no longer states a rule which is compatible with the expanded credit industry which has come into being. See, for example, In Re Engstrom, 1BCD 17 (S.D. Iowa 1973); In Re Masek, 1BCD 56 (N.D. Iowa 1974); In Re Black, 373 F.Supp. 105 (E.D. Wis. 1974). Indeed, even the Fifth Circuit has suggested that the rationale underlying Davison-Paxon has been eroded in the modern world of credit transactions. See In Re Boydston, 520 F.2d 1098 (5th Cir. 1975). I conclude, therefore, that the better and more modern rule is that even absent affirmative representation, the implied representation that the indebtedness will be repaid when credit is used is sufficient to render an indebtedness nondischargeable if it is shown that the bankrupt had no intention of repaying the indebtedness at the time of the use of the credit.

Given the regular payments on the account which were in excess of the minimum payment which was due together with the fact that the defendant had been told that he could continue to use the card even though it was over his credit limit if he made regular payments, my conclusion as to the use of the credit card for the billing statements October 4, 1978, through March 6, 1979, was not done with the intention of not repaying the indebtedness. My conclusion as to the use of the credit card as disclosed by the final two billing statements is otherwise.

In view of the fact that the defendant on the eve of bankruptcy charged \$2,953.22 in a brief period of time which was not in keeping with his prior use of the credit card and the defendant's poor employment record during this period of time together with the fact that his bankruptcy occurred shortly thereafter leads the Court to the conclusion that the defendant made the purchases which resulted in the extension of credit either with the intent not to repay the indebtedness or with such an utter disregard for his ability to repay as to amount to the same thing. As to this latter indebtedness my finding is in favor of the plaintiff and against the defendant. A separate order is entered in accordance with the foregoing.

DATED: December 6, 1979.

BY THE COURT:


U.S. Bankruptcy Judge