

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re)	
)	In Bankruptcy
RONALD LEE JONES)	
)	No. 93-31233
Debtor.)	
_____)	
)	
MERCANTILE BANK OF ILLINOIS,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 94-3004
)	
RONALD LEE JONES,)	
)	
Defendant.)	

O R D E R

On June 13, 1994, trial was held on the Complaint of Mercantile Bank of Illinois N.A., Plaintiff, to Determine Dischargeability of Debt.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The Court, upon review of the pleadings, briefs, evidence and arguments of counsel now enters its findings of fact and conclusions of law pursuant to Fed. R. Bank. P. 7052.

FINDINGS OF FACT

1. Plaintiff issued a credit card, account no. 4209 725 078 023 051, to Defendant on October 8, 1992.

2. At the time of filing bankruptcy on November 23, 1993, Defendant had a balance on the account of \$5,596.68 on his \$5,000.00 credit limit.

3. All charges, but one, made by Defendant during the time in question were cash advances.

4. Defendant made sporadic, minimal payments on the account with his last payment made January 21, 1993.

5. Defendant continued to charge through February 19, 1993, despite being notified on prior monthly billing statements of the past due status of the account.

6. Defendant engaged in a similar practice of increasing balances significantly with other credit card accounts listed in Schedule F of his bankruptcy schedules, during this time period.

7. From the time Defendant opened this credit card account until he filed bankruptcy on November 23, 1993, Defendant's net monthly pay was approximately \$1,066.00 per month. Defendant's net monthly expenses as reflected in his bankruptcy schedules was \$1,160.00 leaving a net monthly disposable income to pay on the unsecured indebtedness of (-\$94.00).

However, during this period, Defendant's wages and expenses were not static. In December, 1992, Defendant was demoted at work and his wages were reduced as a result of absenteeism caused by an ongoing back problem. In January, 1993, his living expenses increased unexpectedly when he became obligated to pay the cost of utility services which his father had previously shouldered.

8. The expenses listed in his schedules did not include any payment on Defendant's unsecured indebtedness listed in Schedule F, any medical expenses for his ongoing back problem or any expenses for his consistent legal fees and fines for regular citations for driving with a suspended license.

Further, these were conditions and expenses which existed both before and after the charges in issue were incurred.

CONCLUSIONS OF LAW

Plaintiff's claim is based on 11 U.S.C. § 523(a)(2)(A) which excepts from discharge "any debt for money...or any 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." The elements to be proved by Plaintiff are:

1. A representation made by the debtor;
2. Which the debtor knows or should have known was false;
3. Made with intent to deceive;
4. Which was relied upon by the creditor;
5. And which was the proximate cause of damage or loss to the creditor.

In re Shurbier, 134 B.R. 922 at 925 (Bankr. W.D. Mo. 1991).

The burden of proof on each of the aforementioned elements is on the creditor In re Danns, 558 F.2d 114 (2nd Cir. 1977), with the standard of proof being a preponderance of the evidence. Grogan v. Garner, 498 U.S. ___, 111 S. Ct. 654, 112 L. Ed.2d 755 (1991).

Turning to the five elements mentioned above, the Court acknowledges that a debtor impliedly represents that he has both the ability and the intent to repay the debt at the time he presents the card. In re Matejka, Bankr. No. 92-70953, Adv. No. 92-7155 (Bankr. C.D. Ill. 1993); In re Williams, 85 B.R. 494 at 496 (Bankr. N.D. Ill. 1988); and In re Vermillion, 136 B.R. 225 at 226 and 227 (Bankr. W.D. Mo. 1992). This is an ongoing and continuous representation every time the debtor makes a charge which requires a separate determination of intent as to each and every transaction on the account. While some charges on the account may be dischargeable, others may not. It is not an all or nothing proposition.

When a debtor incurs charges on a credit card and either knows that he is unable to make the payments or has no intent to do so, the debtor is obtaining money through false pretenses as defined under § 523(a)(2)(A). In re Wellen, 95 B.R. 497 (Bankr. N.D. Ohio 1989). Further, the debtor must show intent to repay based upon some true ability to repay, and a debtor's mere hope to repay or reliance on unrealistic or speculative sources of income are insufficient to show that the debtor had a true intent to repay. In re Clagg, 150 B.R. 697 (Bankr. C.D. Ill. 1993).

As to the element of intent, it is the intent to deceive, not the intent to repay, which is the issue. The Courts have even broadened the intent element to include a debtor's reckless disregard for his financial circumstances. See Vermillion.

The requisite intent to deceive may be inferred from debtor's conduct, In re Bartlett, 128 B.R. 775, at 778 and 779 (Bankr. W.D. Mo. 1991), and may be shown by circumstantial evidence. In re Van Horne, 823 F.2d 1285 (8th Cir. 1987). Further, a debtor cannot overcome an inference of an intent to deceive with an unsupported assertion of honesty. In re Black, 373 F.Supp. 105 (E.D. Wis. 1974) and Van Horne at 1287-1288.

The following factors, though not exclusive have consistently been used to determine a debtor's intent to deceive:

1. Length of time between the charges made and the filing of bankruptcy;
2. Whether 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 type of goods or services purchased, i.e. luxuries or

necessities;

6. The financial condition of the debtor at the time the charges were made;
7. Whether the charges were above the credit limit of the account;
8. Whether multiple charges were made on the same day;
9. Whether the debtor was employed;
10. The debtor's prospects for employment;
11. Financial sophistication of the debtor;
12. Whether there was a sudden change in the debtor's buying behavior;
13. Debtor's payment record.

See In re Brawner, 124 B.R. 762 (Bankr. N.D. Ill. 1990) and Vermillion, 136 B.R. at 226 and 227 (Bankr. W.D. Mo. 1992).

While the factors listed are not exclusive, it is also not necessary for all factors to be present to prove fraudulent intent. A finding of nondischargeability may be based on the presence of just one or two factors if sufficiently egregious. In re Williams, 85 B.R. 494, 499 (Bankr. N.D. Ill. 1988). Proof of fraudulent intent may be implied from the totality of the circumstances In re Niemies, 60 B.R. 737 (Bankr. N.D. Ill. 1986).

CONCLUSION

Having applied the law to the facts in this case, the Court finds from the evidence that the Debtor did not open this account initially with the intent to defraud anyone. This is shown by the low balances on his various credit lines reflected on the credit report obtained by the Plaintiff at the time the account opened and by the amount and type of initial charging activity.

It is also clear, however, that the situation changed at some

point during the life of the account, though it is impossible to say exactly when. Nevertheless, the Court finds that beginning in January, 1993, Defendant acted knowingly and fraudulently by make charges, despite the fact that his hourly wage had been reduced, his back problem was resulting in the loss of hours and he was continuing to receive traffic citations for driving with a suspended license on a regular basis. At that point, Defendant had to know that there was no way he could repay this indebtedness and the additional charges he was continuing to make. The Court finds that the sum of \$1,870.00 is determined to be nondischargeable.

IT IS THEREFORE ORDERED that the debt due from the Debtor/Defendant, Ronald Lee Jones, to Plaintiff, Mercantile Bank of Illinois N.A., to the extent of \$1,870.00 is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and Judgment is entered in favor of Plaintiff and against the Debtor/Defendant, Ronald Lee Jones, for the sum of \$1,870.00 plus interest from date of Judgment at the Illinois judgment rate and court costs.

ENTERED: August 3, 1994

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

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MERCANTILE BANK OF ILLINOIS,)	
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v.)	Adversary No. 94-3004
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RONALD LEE JONES,)	
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Defendant.)	

J U D G M E N T

Judgment be and is hereby entered in favor of Mercantile Bank of Illinois N.A. and against Ronald Lee Jones in the sum of \$1,870.00, plus interest at the Illinois judgment rate from date of Judgment and court costs and the debt is declared nondischargeable.

ENTERED: August 3, 1994

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE