

## UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE: )

) Chapter 7

STEVEN RONALD FISHER, )

) Bankruptcy No. 03-00811

Debtor. )

  )

FIRST NATIONAL BANK )

OF OMAHA, )

) Adversary No. 03-9121

Plaintiff, )

vs. )

STEVEN RONALD FISHER, )

Defendant. )

**ORDER RE COMPLAINT SEEKING EXCEPTION TO DISCHARGE**

This matter came before the undersigned on February 24, 2004. Plaintiff First National Bank of Omaha was represented by attorney Ryan Tang. Debtor Steven Fisher appeared with attorney Michael Mollman. After hearing evidence and arguments of counsel, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

**STATEMENT OF THE CASE**

The Bank seeks to except its claim from discharge under § 523(a)(2)(A). It asserts Debtor made charges to a credit card account with no intent to repay. Debtor asserts when he made the charges he intended to repay.

**FINDINGS OF FACT**

Debtor filed his bankruptcy petition on March 12, 2003, including the Bank as a creditor on his schedules. Debtor had a credit card account with the Bank. Prior to the November 2002 statement his account was in good standing with a balance of \$3,992.53 and a credit limit of \$25,000. The November 1, 2002 statement shows charges and cash advances, mostly related to gambling. During that billing period, new transactions totaled \$9,343.10 and the new balance increased to \$13,732.74, including finance charges. Debtor subsequently made a charge of \$304.22 in November and \$15.00 in December. He also made payments of \$225 in November and \$221 on January 2, 2003. The total amount due by the end of March 2003, including finance charges and late fees, was \$14,533.70. The Bank seeks to except from discharge indebtedness of \$9,662.23 and requests a judgment against Debtor in that amount plus interest and costs.

The parties stipulate that the Bank was justified in its reliance upon Debtor's representation of intent and ability to repay. Debtor testified that he made the charges with every intent to pay the Bank back. The Bank argues that the circumstances indicate Debtor made the charges with no intent to repay.

Debtor testified regarding when he approached Attorney Mollman to prepare his bankruptcy petition. He paid Mr. Mollman's fees with a check dated January 14, 2003. He was unsure what date he met with Mr. Mollman in his office. The Court finds Debtor wrote Mr. Mollman a check in January and met with him in his office one time on a date within 30 days prior to filing the petition on March 12, 2003.

Prior to September 2001, Debtor and his wife, Georgena Fisher, were team drivers for CRST, a semi-truck company. At that time, Mrs. Fisher broke her hip and was off work for seven months. Debtor took three months unpaid family medical leave to help care for his wife in October, November and December 2001. Prior to that time, Debtor and Mrs. Fisher each earned approximately \$40,000 per year. While she was off work, Mrs. Fisher received workers compensation benefits of \$577 per week.

Mrs. Fisher returned to work in April 2002. By October, she was having major problems with her hip and both her hands. She had surgery in November 2002 to remove hardware from her broken hip. In January 2003, she had double carpal tunnel surgery on her hands. During this time, Debtor again took three months of unpaid family medical leave to help care for his wife between November 2002 and February 2003. Mrs. Fisher returned to work in March 2003 but continued to have difficulty with her hands. By June 2003, she could no longer drive. She is now off work and receiving worker's compensation benefits.

Mrs. Fisher testified that before she injured her hip, she and Debtor would gamble occasionally but not on a steady basis. She indicated that her husband was a little out of control with his gambling for about one month, and money was tight for them then. Debtor testified that he was hoping to pay debts with gambling winnings. He then realized that was a mistake and quit. He testified that he and his wife had no money problems prior to Mrs. Fisher's hip injury. He made minimum payments and always intended to pay off the credit card debt. Debtor testified that this became impossible because the couple had lost half their income. During the time of their money problems, Debtor and Mrs. Fisher also took withdrawals from their 401(k) plans which they must pay back on a weekly basis.

#### CONCLUSIONS OF LAW

The Bank asserts its claim is nondischargeable under § 523(a)(2)(A). Section 523(a)(2)(A) excepts a debt from discharge if it is obtained by "false pretenses, a false representation, or actual fraud." The Bank must satisfy five elements, by a preponderance of the evidence, before a debt will be excepted from discharge under § 523(a)(2)(A). Grogan v. Garner, 498 U.S. 279, 290 (1991). The elements are: (1) the debtor made false representations; (2) the debtor knew the representations were false at the time they were made; (3) the debtor made the representations with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representations, Field v. Mans, 516 U.S. 59, 72 (1995); and (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987). Exceptions to discharge are narrowly construed against the objecting creditor and liberally viewed in favor of the debtor. In re Miller, 228 B.R. 237, 240 (Bankr. W.D. Mo. 1998).

Most credit card cases turn on whether the debtor misrepresented the intent to repay and whether the creditor justifiably relied on that representation. In re Meseck, 284 B.R. 901, 906 (Bankr. N.D. Iowa 2002). Debtor's intent to repay is the only issue in this case as the parties stipulate that the Bank justifiably relied under § 523(a)(2)(A). The use of a credit card constitutes an implied representation to the card issuer that the cardholder has the intention to pay the charges incurred. In re Weiss, 139 B.R. 928, 929 (Bankr. D.S.D. 1992). The first three elements of nondischargeability for fraud are met by showing that the debtor did not have the intent to repay the credit card charges incurred. In re McVicker, 234 B.R. 732, 737 (Bankr. E.D. Ark. 1999).

"Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred." In re Moen, 238 B.R. 785, 790 (B.A.P. 8th Cir. 1999). Some of the circumstances courts consider to determine intent include: (1) the length of time between the charges and the bankruptcy filing; (2) whether the debtor consulted an attorney about filing bankruptcy before the debtor made the charges; (3) the number of the charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time of the charges; (6) whether the charges exceed the limit on the account; (7) whether the debtor made multiple charges on one day; (8) whether the debtor was employed; (9) what the debtor's prospects were for employment; (10) the debtor's financial sophistication; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the debtor purchased luxuries or necessities. Meseck, 284 B.R. at 906-07. The factors enumerated are nonexclusive; none is dispositive, nor must a debtor's conduct satisfy a certain number in order to prove fraudulent intent. In re Grause, 245 B.R. 95, 101-02 (B.A.P. 8th Cir. 2000). Instead, the creditor must show that on balance, the evidence supports a finding of fraudulent intent. Id. at 102.

### ANALYSIS

Based on the record presented, the Court concludes the Bank has failed to prove by a preponderance of the evidence that Debtor did not have the intent to repay at the time he incurred the credit card charges. The relevant charges occurred in September 2002 and were mostly made at casinos. This was four to six months before Debtor contacted an attorney to file for bankruptcy protection. The charges did not cause Debtor to exceed the limit on his credit card account. Debtor's finances at the time were tight, but he had continued to make monthly payments on the account. Debtor was employed at the time, as was his wife. Soon thereafter, however, in November 2002, Debtor took unpaid leave for three months to care for his wife after hip surgery in November 2002 and carpal tunnel surgery in January 2003.

Debtor admits that he made a mistake in thinking he could win at gambling and get himself out of debt that way. The record shows he gambled between September 13 and September 28, 2002, ringing up more than \$8,000 of charges. Debtor discontinued the gambling at that time. A few months later, his wife required more surgery and he went on unpaid leave to care for her. On this record, the Court cannot find that Debtor did not have the intent to repay the credit card charges at the time they were incurred. Thus, the Bank's request to except the debt from discharge must be denied.

**WHEREFORE**, the Complaint Seeking Exception to Discharge Pursuant to 11 U.S.C. § 523(a)(2)(A) is DENIED.

**FURTHER**, the debt owed to the First National Bank of Omaha is discharged.

**SO ORDERED** this 1st day of March, 2004.

PAUL J. KILBURG  
CHIEF BANKRUPTCY JUDGE