

In the United States Bankruptcy Court

for the Northern District of Iowa

SANDRA K. DAVIS
f/k/a Sandra K. Lumsden
Debtor(s).

Bankruptcy No. X91-01771F

Chapter 7

MANUFACTURERS HANOVER TRUST
COMPANY
Plaintiff(s)

Adversary No. X91-0251F

vs.

SANDRA K. DAVIS
Defendant(s)

ORDER RE: DISCHARGEABILITY OF DEBT TO MANUFACTURERS HANOVER TRUST COMPANY

Manufacturers Hanover Trust Company (COMPANY) seeks a determination that the debt owed to it by Sandra K. Davis (DAVIS) is non-dischargeable under 11 U.S.C. § 523(a)(2)(A). It also seeks judgment for the amount owed. Company claims that Davis obtained a cash advance using her Company-issued Mastercard but that she had no intention of repaying the advance. Trial of the matter was held August 12, 1992, in Fort Dodge; it is a core proceeding (11 U.S.C. § 157(b)(2)(I)).

FINDINGS OF FACT

In August, 1989, Sandra K. Davis purchased Andy's, a restaurant and lounge located in Fort Dodge, Iowa. Prior to the sale, she had worked there as a waitress. To obtain Andy's, she paid the owner, Don Anderson, \$1,900.00 for the inventory and she paid Edith Ward \$5,000.00 for "blue sky." There was no evidence introduced as to the nature of Ward's interest in the business. When she took over the restaurant and lounge, Davis had to pay for a restaurant license, a liquor license, deposits, and other "start-up" costs. Her total outlay to obtain the business and pay these costs was approximately \$15,000.00. To finance the purchase and subsequent operation, she borrowed from three people--Pete Peterson, Bob Howard and Richard Davis. Her initial loan from Peterson was \$10,000.00. During the ensuing 11 months that she operated the lounge, she borrowed an additional \$11,000.00 from Peterson. Over the same period, she borrowed approximately \$2,700.00 from Davis and \$3,200.00 from Howard. She used the money to operate the restaurant.

The business did not do well; she closed it in July, 1990. Davis did not make payments on any of the three loans until April, 1991. At that time, under pressure from Peterson, Howard and Davis, she obtained cash advances on five credit cards. The advances were obtained at different locations in Fort Dodge, but all on the same day--April 22, 1991.

One advance was obtained from Boatmen's Bank through the use of a Mastercard issued to her by Company. The advance was for \$3,885.00. The amount requested took into consideration Davis, credit limit of \$4 000.00 and her understanding that there would be a small transaction charge. Davis obtained advances in various amounts from four other cards: Chase Manhattan Mastercard, Chase Manhattan Visa, CitiBank Mastercard, and First Card. At trial, Davis did not recall the exact amounts of the four other advances. She made no payments on any of the accounts and by the

time of her bankruptcy filing, in September, 1991, the balances on the five credit cards, including interest, were as follows:

Manufacturers Hanover Trust Mastercard	\$ 4,211.27
Chase Manhattan Mastercard	5,466.40
Chase Manhattan Visa	2,731.24
CitiBank Mastercard	1,901.78
First Card	
Total	\$18,455.38

The advances from the five credit cards were used to repay Howard and Martin and to pay other bills associated with the failed restaurant venture.

Davis testified that prior to taking the advance from Company, she called Company and confirmed her ability to obtain the money. Also, she asked for an estimate of the amount of her monthly repayments on the advance. This was estimated to be \$85.00. Davis did not ask the other credit card lenders to estimate monthly repayment figures. She testified that she made the calculations herself. She did not recall the calculations for each credit card advance but she estimated at trial that they would probably total four hundred to five hundred dollars per month for the five cards.

Davis said she believed she could repay the Company and intended to do so. Since the closing of Andy's, she had begun work as a breakfast cook at Hy-Vee supermarket in Fort Dodge. It was a minimum wage job from which she earned approximately \$120.00 per week before tax deductions. She was also trying to get a second job, at a Casey's General Store; it would pay the minimum hourly wage for 10 to 13 hours per week to start. However, she had applied for that job in January, 1990, but sometime later was told she would not be hired because she was not a high school graduate. There is insufficient evidence to show when she learned she would not be hired.

Davis had married in 1988. She has a 14-year old son from a previous relationship. Her husband is unemployed; he receives social security disability income payments. The couple have agreed to keep their financial affairs separate. Although Mr. Davis pays rent for the home and basic food costs, he does not fully support Mrs. Davis and her son. She buys additional food, pays upkeep and insurance on her car, and pays for her son's clothing and his telephone line. At the time she took the cash advance from Company, her food costs were approximately \$40.00 per week, or the equivalent of \$173.00 per month. Costs and upkeep on her car were the same money amount. She paid car insurance premiums twice per year with each payment being \$125.00. This annual expense is the equivalent of approximately \$21.00 per month. If the court selects the low end of her estimate on the costs of clothing for her son, this cost would be approximately \$87.00 per month. The phone cost was \$16.00 per month. These expenses alone total \$470.00 per month without consideration of other unquantified living expenses which Davis says she was incurring at the time and without consideration of other consumer debts owed by her, including a debt to a hospital for \$300.00 to \$500.00. Davis admits that at the time of the advances she was in poor financial condition. Nonetheless, she said she intended to repay the advances, but was unable to because in May, 1991, Hy-Vee began reducing her hours. In July, 1991, she left her job at Hy-Vee because of personal conflicts with fellow employees.

Davis received her credit card from Company after filling out and returning a pre-approved credit card application. The application was sent to her addressed with her maiden name, Sandra Lumsden. She signed the application using her maiden name and returned it to Company on February 19, 1991.

According to Anthony Galluzzi, an assistant manager at Company, the Company's standards for issuing pre-approved applications are quite stringent. Potential recipients of the applications are obtained from marketing lists purchased by Company. Company "screens out" or eliminates from its mailing any consumer which cannot show a current payment record on existing credit accounts. Had the debtor's history shown any delinquent payments, the card would not have been sent.

Davis first consulted an attorney about bankruptcy in September, 1991, and filed her chapter 7 petition on September 30, 1991. By that time, her debt to Company was \$4,293.70. The interest rate charged by Company on her account is

19.80 per cent per year.

An examination of Exhibit No. 2 indicates that the accrual of interest is at the daily rate of \$2.11. Since Davis filed bankruptcy, an additional 326 days of interest have accrued. As of the date of this order, this additional interest would total \$687.86; the total debt would be \$4,981.56.

DISCUSSION

Company claims that Davis took the cash advance on Company's Mastercard with no intent of repaying it. It contends that at the time of the advance, given her financial condition, Davis could have had no reasonable belief that she could repay the advance. Davis says she fully intended to "eventually" repay the advances, but was unable to do so because she had begun earning less at her Hy-Vee job, a job which she later left. Davis' counsel argues also that the company is to a large degree to blame for its loss because it sent Davis an unsolicited, preapproved credit card without sufficient investigation as to whether Davis had the ability to repay any debt incurred through the use of the card.

To prevail, Company must show by a preponderance of the evidence that Davis obtained money or an extension of credit by means of fraud or false representation. In cases involving the dischargeability of credit card obligations, this court has adopted the "totality of the circumstances" test. First Deposit National Bank v. Coates (In re Coates), Adv. No. L-90-0137C, slip op. at 7 (Bankr. N.D. Iowa, April 1, 1991). In applying this test, the court considers several factors in determining whether a debtor has made credit card charges with no intention at the time of repaying them. Id. at 7; Citibank South Dakota v. Dougherty (In re Dougherty), 84 B.R. 653, 657 (9th Cir. BAP 1988). Where charges are made with such intent, the debt is nondischargeable. Citibank at 657, citing In re Faulk, 69 B.R. 753, 753-54 (Bankr. N.D. Ind. 1986).

The factors considered include but are not limited to the following: (1) the length of time between the charges and the bankruptcy filing; (2) whether the debtor consulted an attorney about filing bankruptcy before debtor made the charges; (3) the number of 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 exceeded the credit limit on the account; (7) whether the debtor made multiple charges on the same day; (8) whether the debtor was employed; (9) the debtor's prospects 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. Coates, slip op at 7.

Not all of the factors described are relevant to this case. Some are obviously related to credit or charge card use to obtain goods. Consideration of the circumstances of this case leads the court to the conclusion that Davis obtained the cash advance on her Company Mastercard knowing she had no realistic prospect of repaying the advance. Such conduct has been held to demonstrate a reckless disregard for the truth, a legal equivalent for a subjective intent to deceive.

Nordstrom, Inc. v. Borste (In re Borste), 117 B.R. 995, 996-97 (Bankr. W.D. Wash. 1990). The facts most strongly militating against discharge of this debt are these. At the time of the advances, Davis' living expenses almost completely consumed her weekly income. What little surplus she might have enjoyed would not have enabled her to pay \$85.00 per month to Company, much less pay minimum payments to the other four creditors from whom she had obtained advances on April 22. She knew the minimum monthly payment to Company as a result of the advance; she was quite clear on that point at trial. So it cannot be said that she did not realize the monthly strain on her income that the advance would create. She knew she was in poor financial condition. She was at the time having difficulties in paying her bills. She was being pressured by the three men who had lent her money for the restaurant operation. She took five advances from five different credit cards on the same day. At trial, at least, she estimated that the total of the monthly payments on the five would have been \$400.00 to \$500.00. Based on the loan balances of the five at the time of bankruptcy and the amount due on Company's card in relation to its advance, the court has no reason to doubt that estimate. The court could not reasonably find that she believed she was going to be able to pay Company \$85.00 per month, yet this is what she expects the court to believe.

Davis contends that certain of the factors favor her. Her counsel argues that she is an unsophisticated person, a lady with an eleventh grade education, with minimal mental ability. Having observed her at trial, the court cannot find this to be so. She is a woman with at least average intelligence, one capable of realizing that her income was insufficient to cover her living expenses and the payment of this new indebtedness. There is no evidence that she contacted an attorney to

discuss bankruptcy before taking the advances, but that factor is not dispositive in her favor. Nor is the fact that the five advances were taken approximately five months prior to filing.

Davis testified that she intended to repay the advances, but this self-serving expression of good intention is not sufficient to enable the court to find this debt dischargeable. This especially is so given Davis' demeanor at trial. She was an uncooperative witness, almost belligerent. This conduct belied her protestations that she had good intentions but bad luck.

The court, therefore, finds that Davis obtained a \$3,885.00 cash advance using the Manufacturers Hanover Trust Mastercard when she knew or should have known that she could not repay it. The court thus concludes that her debt to Manufacturers Hanover Trust should be excepted from discharge pursuant to 11 U.S.C. 523(a)(2)(A). Accordingly,

IT IS ORDERED that Manufacturers Hanover Trust Company shall recover from Sandra K. Davis the sum of \$4,981.56 plus the costs of this action. This debt is excepted from discharge pursuant to 11 U.S.C. S 523(a)(2)(A). Judgment shall enter accordingly.

SO ORDERED this 21st day of August, 1992.

William L. Edmonds
Chief Bankruptcy Judge