

In the United States Bankruptcy Court

for the Northern District of Iowa

THOMAS J. STANTON
Debtor.

Bankruptcy No. 94-21843KD
Chapter 7

AT&T UNIVERSAL CARD SERVICES
Plaintiff

Adversary No. 95-2031KD

vs.

THOMAS J. STANTON
Defendant.

RULING

On December 13, 1995, the above-captioned matter came on for trial pursuant to assignment. Plaintiff AT&T Universal Card Services ("AT&T") appeared by its representative, Thomas Nigl and its attorney, Les Stokke. Debtor/Defendant Thomas J. Stanton appeared in person with his attorney, Brian Peters. Evidence was presented after which 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

AT&T's adversary complaint arises out of a credit card transaction. AT&T asserts that Debtor obtained a cash advance at a time when he had neither the intent nor the ability to repay. It requests the Court determine that this obligation is excepted from discharge under 11 U.S.C. 523(a)(2).

The facts establish that Debtor/Defendant Thomas J. Stanton is 45 years old and single. He has an Associate of Arts degree and is a bid-preparer for an electrical contractor in Dubuque, Iowa. Over the past several years, Debtor's income has ranged from \$22,000 to \$24,000. Debtor testified that during 1994, he was paying his bills timely and was meeting his obligations. However, he co-signed two loans for his brother, Paul. One was to GMAC for a vehicle and the other was to Dupaco as a consolidation loan. During this time, Debtor's brother began to make frequent requests from Debtor for living expenses as he was frequently unemployed. Debtor, to accommodate his brother, made numerous cash advances on his First Bankcard Visa. This credit card is not the credit card in question in this adversary.

Debtor's first contact with AT&T occurred on July 9, 1994. In response to a solicitation letter from AT&T, Debtor contacted the company and requested a credit card. In due course, AT&T issued the credit card as well as a series of convenience checks. Debtor did not use the convenience checks nor did he make any charges against this credit card. On July 20, 1994, Debtor contacted AT&T headquarters and requested that it cancel this card. According to the company records, Debtor told them that he did not want this card because he had too many cards at the present time. Debtor asserts, in reply to this comment, that although he may have said that, he only had the one other credit card at that time.

On August 1, 1994, AT&T received a second request from Debtor for a credit card in response to another solicitation. AT&T sent a card as well as three convenience checks numbered 9935 to 9938. On August 17, 1994, check no. 9935 was posted to Debtor's account in the amount of \$6,500 payable to First Bankcard. AT&T sent these convenience checks as a part of the credit card package. They are sent with every new credit card and were not sent at the request of Debtor.

An introductory letter was sent to Debtor at the time the AT&T card was issued. A fair reading of this letter indicates that AT&T was encouraging Debtor to utilize the convenience check at no cost, to pay off other credit cards or high interest loan balances. The final paragraph of the letter states: "I encourage you to take advantage of this opportunity now. The sooner you write your checks, the sooner you start saving."

Debtor did, in fact, use the one convenience check to write a draft in the amount of \$6,500 to pay off his other credit card. Debtor explains this transaction by stating that he had co-signed for his brother on several loans. His brother was a cross-country truck driver who was on and off disability and periodically was unable to meet his obligations. His brother's financial picture grew worse during the last quarter of 1993 and into 1994. More and more frequently Debtor's brother was borrowing money from him to meet obligations including the loans for which Debtor had co-signed. In order to help his brother, Debtor borrowed money against his First Bankcard credit card with the expectation, as in the past, that his brother would soon repay these debts. During the summer of 1994, it became apparent that Debtor's brother was not going to be able to immediately pay back the obligations which he owed Debtor. When Debtor saw the application for the AT&T credit card, he realized that the interest rate on the AT&T credit card was lower. He decided to request the new card to pay off the old card because of the lower interest rate.

Debtor testified that when he received the card and utilized the convenience check, he was generally meeting his own financial obligations. It was not until several months later, when his brother had defaulted on the Dupaco and GMAC loans, that Debtor realized he could not make those payments and meet his own obligations. It was then that he met with an attorney for the first time.

According to Debtor's testimony, at the time he got the new credit card, he did not feel his finances were that precarious. He was not considering bankruptcy at the time he wrote the check and felt that he could meet his own financial obligations. He testified that he made the first monthly payment at the time of the receipt of the first billing statement. He has not made any payments since that time. Debtor states that he did not incur this obligation in a reckless manner but did so in order to pay off his obligations. He testified that he was essentially following AT&T's advice by lowering his effective interest rate to make his payments more tolerable.

CONCLUSIONS OF LAW

AT&T labeled its complaint as arising under 523(a)(2)(B). The parties' pretrial statement states that discharge should be denied as to the AT&T debt pursuant to 523(a)(2)(A). The Court will analyze the facts under both subsections. AT&T must prove the elements of both 523(a)(2)(A) and (B) by a preponderance of the evidence. Grogan v. Garner, 111 S. Ct. 654, 659 (1991).

Section 523(a)(2)(A) excepts a debt from discharge if it is obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." A five part test must be satisfied before a debt will be excepted from discharge under 523(a)(2)(A). 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, 116 S. Ct. 437, 446 (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).

In the context of credit card debt, it is the use of the credit card which creates the contract whereby the credit card company promises to pay the obligation incurred and the cardholder in return promises to pay the charges incurred in the transaction. In re Walderbach, Adv. No. 92-1135LC, slip op. at 3 (Bankr. N.D. Iowa Aug. 31, 1993); Garber v. Harris Trust & Savs. Bank, 432 N.E.2d 1309 (Ill. App. Ct. 1982). Bankruptcy law provides that the use of a credit card constitutes an implied representation to the card issuer that the cardholder has both the ability and the intention to pay for the charges incurred. In re Stewart, 91 B.R. 489, 495 (Bankr. S.D. Iowa 1989); In re Weiss, 139 B.R. 928, 929 (Bankr. D.S.D. 1992). Therefore, a 523(a)(2)(A) misrepresentation can occur at the time of the use of a credit card.

Once the law implies a representation as to the ability and the intention to pay by a card holder, the first three elements of the test under 523(a)(2)(A) all interlock and are resolved either affirmatively or negatively based upon the Court's determination as to the cardholder's ability and intention to pay for the charges incurred. Debtor's intent is the most critical element of the entire analysis. In assessing intent, most Courts, including the Northern and Southern Districts of Iowa, have adopted a totality of the circumstances approach based on a number of factors. In re Davis, No. X91-01771F, slip op. at 7 (Bankr. N.D. Iowa Aug. 21, 1992); Stewart, 91 B.R. at 495. These factors include but are not limited to: (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. Davis, slip op. at 7.

Under 523(a)(2)(B), a debt is excepted from discharge to the extent it is obtained by "use of a statement in writing; (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit, reasonably relied; and (iv) that the debtor caused to be made to be published with intent to deceive." The elements of proof for this provision require that: (1) the false financial statement be a writing respecting the debtor's financial condition; (2) the financial statement be materially false; (3) the debtor intended to deceive; and (4) there be reasonable reliance on the part of the creditor. In re Mutschler, 45 B.R. 482, 490 (Bankr. D.N.D. 1984). Again, the issue of the debtor's intent is critical. In addressing this issue, the courts have stated that intent can be gleaned from surrounding circumstances. Courts have considered certain indicia, such as whether there was a clear pattern of purposeful conduct and whether the Debtor was intelligent and had experience in financial matters.

While the appearance of a single draft check in the amount of \$6,500 may initially raise some suspicion, more close scrutiny establishes that Debtor followed a procedure which was authorized by the credit card company and, in fact, encouraged by them. In other words, AT&T encouraged debtors to pay off their other credit card companies by using the convenience checks which were designed specifically for this function. This is, in fact, what Debtor did.

Debtor did not overtly benefit in any manner from this series of transactions. While this transaction may ultimately enure to the detriment of Plaintiff, the fact that Debtor did not purchase goods or other items for his own personal benefit is substantial evidence that Debtor did not have any improper motive or intent at the time this credit card was acquired and the transfer made. The transaction is more consistent with Debtor's testimony that a lower interest rate would allow him to more easily repay the cash advances which he had made for his brother's benefit.

It is the conclusion of this Court that AT&T has failed to establish by a preponderance of evidence that Debtor has violated the provisions of 11 U.S.C. 523(a)(2). There is little, if any, evidence in this record to establish that Debtor presented other than a true financial picture. There was nothing in the paperwork to indicate Debtor provided any incorrect financial information to AT&T. The Court concludes that Debtor sought and obtained the credit card for a legitimate financial purpose without the intent to deceive or without the intent to obtain the credit card under false

pretenses. There is little, if any, evidence in this record to establish that Debtor knew at the time he obtained the cash advance that he would be unable to pay off this obligation in the future, though obviously from the state of the record, it was apparent to him that repayment would take some time. The Court concludes that the debt to AT&T is dischargeable.

In his answer to AT&T's complaint, Debtor asserts that he is entitled to attorney fees and costs under 523(d). That section provides that if a creditor requests a determination of dischargeability and the debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. 523(d). In order to be "substantially justified", the complaint must have a reasonable basis in law and fact in light of the factors relevant to the claim of nondischargeability. FCC Nat'l Bank v. Dobbins, 151 B.R. 509, 512 (W.D. Mo. 1992). A creditor is not substantially justified when it proceeds to trial knowing that it lacks sufficient evidence to sustain its burden of proof and then fails to establish a single necessary element of its claim. Manufacturers Hanover Trust Co. v. Hudgins, 72 B.R. 214, 220 (N.D. Ill. 1987). The stated purpose for 523(d) is to discourage creditors from commencing actions in an effort to obtain a settlement from an honest debtor who may not be able to pay for an attorney to handle an adversary proceeding. Stewart, 91 B.R. at 497.

A finding of substantial justification under 523(a)(2) is made upon the facts peculiar to each case. In this case, Debtor ordered the credit card on August 1, 1994. He made one charge on the card by using the convenience check in the amount of \$6,500 on August 14, 1994. Debtor made only one minimal payment of \$197.74 in September. He filed his bankruptcy petition on November 14, 1994.

An analysis of the facts in this case establishes to the Court's satisfaction that the considerable charge of \$6,500 made by Debtor, which was essentially a cash advance, was sufficiently suspicious to justify AT&T's exploration of a complaint under 523. It is the conclusion of this Court that applying the law to the facts in this case, AT&T was substantially justified under 523(a)(2) in pursuing this claim. Award of attorney's fees under 523(d) is not warranted.

WHEREFORE, the debt to AT&T Universal Card Services is determined to be dischargeable.

FURTHER, Debtor is not entitled to a judgment for attorney fees and costs under 523(d).

FURTHER, AT&T's complaint is DISMISSED.

FURTHER, judgment shall be entered for Debtor/Defendant Thomas J. Stanton and against Plaintiff AT&T Universal Card Services.

SO ORDERED this 10th day of January, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge