

In the United States Bankruptcy Court

for the Northern District of Iowa

G. JOHN ANDERSON

Debtor(s).

Bankruptcy No. 97-00895-W

Chapter 7

LIND-WALDOCK & COMPANY

Plaintiff(s)

Adversary No. 97-9144-W

vs.

G. JOHN ANDERSON

Defendant(s)

ORDER RE MOTION TO DISMISS

On August 13, 1997, the above-captioned matter came on for hearing pursuant to assignment. Plaintiff appeared by Attorney Mark McCool. Defendant appeared by Attorney Paul Demro. The matter before the Court is Defendant/Debtor's Motion to Dismiss this adversary complaint. The parties argued their respective positions after which the Court took the matter under advisement. The parties were granted until August 22, 1997 within which to submit supplemental briefs. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

STATEMENT OF THE CASE

The file reflects that Plaintiff Lind-Waldock & Co. is a commodities broker. Debtor G. John Anderson was a customer of Plaintiff and involved in commodities trading. Allegedly, on July 11, 1996, Debtor incurred a deficit of \$9,942.80 in his account because of certain trading transactions. Plaintiff alleges that because Debtor failed to pay the account balance, Plaintiff was obligated to cover these losses resulting in a charge to Plaintiff in that amount. Defendant sent a check in the amount of \$16,000 which Plaintiff received and tried to deposit on July 23, 1996. This check was returned because of insufficient funds. Plaintiff subsequently sued and obtained a judgment against Debtor in the amount of \$10,137.80. In the present complaint, Plaintiff alleges Debtor knew at the time the check was sent there were insufficient funds on deposit to cover this check. Plaintiff asserts this obligation is nondischargeable under 11 U.S.C. § 523(a)(2).

Debtor filed his Chapter 7 bankruptcy petition on March 31, 1997. Plaintiff filed its adversary complaint on July 11, 1997. Debtor filed a Motion to Dismiss this complaint on July 22, 1997, asserting that the true obligation in question is the deficit in the brokerage account which occurred prior to the tender of the insufficient funds check. Debtor asserts the obligation is a civil debt which resulted from commodities trading losses and is, therefore, by its nature not fraud and is not within the purview of § 523(a)(2).

CONCLUSIONS OF LAW

Debtor moves to dismiss under Fed. R. Civ. P. 12(b)(6), asserting that the complaint fails to state a claim upon which relief can be granted. In considering a motion to dismiss, the court must construe the complaint liberally and assume all factual allegations to be true. WMX Technologies, Inc. v. Gasconade County, 105 F.3d 1195, 1198 (8th Cir. 1997). "Dismissal should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts that would entitle relief." Id. (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Plaintiff filed this complaint objecting to discharge of its claim under § 523(a)(2)(A). A debt is excepted from discharge pursuant to § 523(a)(2)(A) if it is incurred through "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A).

Before a debt will be excepted from discharge pursuant to § 523(a)(2)(A), a test comprised of five elements must be satisfied. These five elements provide that: (1) the debtor made false representations; (2) the debtor knew these representations were false at the time they were made; (3) the debtor made these 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). Plaintiff must prove these elements by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). This Court has previously found that a debt arising from insufficient funds checks may be excepted from discharge under § 523(a)(2)(A). In re Kaufman, Adv. 94-2070KD (Bankr. N.D. Iowa Sep. 18, 1995).

Debtor focuses on the fifth element of § 523(a)(2)(A) in his assertion that the complaint fails to state a claim. He argues that Plaintiff has failed to allege that it sustained an injury as a proximate result of his insufficient funds check. In In re Couch, 154 B.R. 511, 513 (Bankr. S.D. Ind. 1992), the court found that a complaint failed to state a claim because there was no allegation that the debtor obtained anything for the alleged bad check. "If . . . a debtor simply tenders a bad check in payment of a preexisting debt and obtains nothing from the creditor in exchange for the bad check, this will not support a finding of nondischargeability under § 523(a)(2)." Id.

Another court has stated that an otherwise dischargeable debt does not become nondischargeable when a debtor attempts to pay the debt with an insufficient funds check. In re Preston, 47 B.R. 354, 358 (E.D. Va. 1983). The rights between the parties remained the same after the check was dishonored; the creditor sustained no loss and the debtor derived no benefit from the check. Id. at 357. Based on this, the court concluded that the debt was not excepted from discharge under § 523(a)(2)(A). Id.

Plaintiff's complaint alleges that it became obligated to cover Debtor's losses of \$9,942.80 after several unsuccessful attempts to obtain payment from Debtor. Subsequently, Debtor sent Plaintiff the bad check. Plaintiff charged Debtor's account a fee of \$15 when the check was dishonored. Later, Plaintiff obtain a judgment based on the debt. Other than the \$15 returned check fee, the complaint does not allege that any of Plaintiff's judgment was caused by the bad check.

Plaintiff's Response to Motion to Dismiss states that if Debtor had not sent the bad check to Plaintiff, Debtor's account would have immediately been closed. Plaintiff has not alleged any injury arising out of the account remaining open. The complaint does not allege that further trading occurred in Debtor's

account or that the deficit in the account increased in any way. The rights of the parties did not change when Debtor tendered the check which was ultimately dishonored.

Construing the complaint liberally and assuming all allegations therein are true, the Court concludes that Plaintiff can prove no set of facts which would entitle it to a finding that its claim is nondischargeable under § 523(a)(2)(A). Plaintiff does not allege that the deficit in Debtor's account was caused by fraud. Plaintiff does not allege it incurred any loss from Debtor's insufficient funds check, other than the \$15 returned check charge. Debtor's Motion to Dismiss must be granted.

WHEREFORE, Debtor G. John Anderson's Motion to Dismiss is GRANTED.

FURTHER, Plaintiff's complaint is DISMISSED.

SO ORDERED this 28 day of August, 1997.

Paul J. Kilburg
U.S. Bankruptcy Judge