In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

THEODORE J. FELDHACKER and DIANE A. FELDHACKER *Debtor(s).*	Bankruptcy No. 96-50892XS Chapter 7
AT&T UNIVERSAL CARD SERVICES *Plaintiff(s)* vs. THEODORE J. FELDHACKER and DIANE A. FELDHACKER *Defendant(s)*	Adversary No. 96-5119XS

DECISION:DETERMINATION OF DISCHARGEABILITY

AT&T Universal Card Services (AT&T) seeks to except from discharge its claim against Theodore J. Feldhacker. Trial was held April 30, 1997 in Sioux City. Mark D. Reed appeared for AT&T. John Harmelink appeared for defendants. At the outset of the trial, plaintiff moved to dismiss Diane Feldhacker as a defendant. That motion will be granted. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Findings

Theodore J. Feldhacker, age 39, and his wife Diane filed their joint chapter 7 petition on April 15, 1996. After graduating from high school in 1976, Feldhacker attended technical school for three years. He has had his own farming operation since 1983. At the time he filed bankruptcy, he was employed also by the Farmers Co-op Elevator in Craig, Iowa. He lives on a rented farm with his wife and five of his six children.

Feldhacker was a borrower at the First National Bank of Akron. He obtained his first agricultural loan from the bank in 1983. From then through 1992, he generally obtained his farm operating loans in the fall for the succeeding farming season. That changed in the fall of 1992. The bank decided it wanted the loan guaranteed in part by the Farmers Home Administration. It took until May 1993 to complete the paperwork for the new loans.

On May 28, 1993, Feldhacker and his wife executed two promissory notes to the bank. One was for the principal sum of $75,000. It was a consolidation of previous loans. Repayment was to be made in six annual installments beginning July 15, 1994 with a balloon payment in May 2000 (Exhibit G). The note was secured by a security interest in personalty. (See Exhibits G and H).

The second note constituted an operating line of credit. It was in the amount of $20,000. For 1993, the bank would make advances from the line of credit as requested. Feldhackers were obligated to pay the loan balance down to $100 by January 31, 1994. New funds would be advanced for the 1994 crop season but only as authorized by FmHA. Bank would provide operating funds in this manner for three operating years beginning in 1993. Besides the notes, Feldhackers' obligations to the bank were memorialized in a two-page agreement, also executed on May 28, 1993. Because of the extra time taken to obtain the FmHA guarantees, 1993 was the first and only year Feldhackers had not lined up their farm financing by the fall of the preceding year--until 1995.

In November 1995, Feldhacker began negotiating with the bank for his line of credit for 1996. He met with a bank representative and the two began preparation of a financial statement. The statement was required by the parties' loan agreement (Exhibit C, ¶ 1). Feldhacker provided information on assets and liabilities. Afterward, the banker supplied pricing information for Feldhackers' livestock and crop or feed inventory and had the proposed statement typed and sent to Feldhackers (Exhibit B). The statement was dated November 27, 1995. They refused to sign it, Feldhacker says, because the pricing information was not correct. He testified that he was concerned that if he signed what he believed was an incorrect financial statement, the bank would use it against him.

A resolution to the problem was not immediately forthcoming. Feldhacker thought the delay was also attributable to FmHA's involvement in the renewal. In 1992-93, its involvement had slowed the loan process, and his loan had not been finalized until May 1993. He said he believed a similar delay was happening again in 1996. Although both Feldhacker and his wife had off-farm jobs, he needed the operating loan to be able to farm.

Feldhacker had several credit cards. He took cash advances from at least two--AT&T and the GM Card. He borrowed $6,700 from the GM Card in two transactions during January and February 1996, and he borrowed $5,000 by "convenience check" from AT&T on February 2, 1996. He used the AT&T cash advance to pay 1995 income taxes in the amount of $4,074.00 and to pay a $929 debt to the Farmers Co-op in Craig. He admits that at the time, his financial situation was such that he had written some checks without sufficient money in his checking account to cover them. Feldhacker says that he had previously taken a cash advance from AT&T to pay his taxes, in either 1994 or 1995.

For three months prior to the cash advance, Feldhacker had had a small credit with AT&T. He had obtained the card in 1992 and since that time, AT&T had experienced no collection problems on the account. His record showed that since as far back as April 1995, he had paid more than minimum payments and that he paid on time. After the advance, he made one payment--$107 on March 25, 1996 (Exhibits 2 and 3).

Feldhacker testified that he expected to be able to come to an agreement with the bank and to get his operating loan for 1996. He said he intended to use a portion of the loan proceeds to pay part of his debt to AT&T and that he would have paid the balance with profits from farming. He gives the same explanation of his plan to pay the cash advances on the GM Card.

Feldhacker was not able to resolve his dispute with the bank over the financial statement. Although Feldhacker had paid off the balance of his 1995 operating loan and was then current on the term loan, the bank served him with a "Notice to Cure Default" (Exhibit F). He received it on or about April 4, 1996. The specified default was Feldhackers' failure to provide the bank with an "approved financial statement." The notice gave Feldhackers until April 23, 1996 either to sign and return the November 27 statement (Exhibit B) or to submit a new one for the bank's approval. The notice stated the following:

> If you do not correct your default by the date stated above, we may exercise rights against you under the law and if the credit transaction is secured by a mortgage or a deed of trust we are entitled to proceed with initiating a foreclosure action or procedure.

(Exhibit F).

Feldhacker says he believed this notice applied both to the term or consolidation loan and to his opportunity for an operating loan. He says he knew when he got the notice that if he did not agree with the bank, his loans were in jeopardy. He knew also that he could not operate the farm without the loan and that it would also be very hard to pay AT&T.

Although he does not remember the date he first contacted his attorney, he believes it was not more than a short time before April 1 when he saw the attorney about preparing a new financial statement. He said that he and his attorney had submitted a new financial statement to the bank. This effort was apparently made before the notice was received. Feldhacker testified that after he received the notice from the bank, he made the decision to file his chapter 7. He signed his petition, statement and schedules on April 8 and filed them on April 17.

The credit agreement between AT&T and Feldhacker was admitted into evidence without objection (Exhibit 1). Patricia A. Saccone, an employee with AT&T, testified that it would have been mailed to Feldhacker at the time the card was sent. She further testified that although the exhibit agreement was dated 1994, it is unlikely that there would have been any significant change from the agreement mailed to Feldhacker in 1992 when his account was opened. Feldhacker does not remember getting an agreement from AT&T. If he did get one, he does not remember reading it. The agreement prohibits using the card for other than personal, family or household purposes (Exhibit 1, ¶ 5). Feldhacker says he was not aware of the prohibition. Irrespective of that, his counsel argues that paying personal income taxes is not a breach of such a provision.

When Feldhackers filed bankruptcy, the balance due AT&T was $5,049.38. Feldhackers' schedules show 11 creditors holding unsecured claims. All are credit card companies or banks who issued credit cards to Feldhacker. The debts aggregate $36,545. For each creditor, the debtors responded as follows to the request for information about when the claim was incurred and what consideration was received by debtors.

> Claim incurred past several years. Primary use of credit card was to pay farm related expenses. Secondary use of credit card was to purchase non-farm products and services.

In the case of AT&T, this was not true. At the time he filed his petition, the first transaction which was part of his debt to AT&T was only 67 days old.

As stated, Feldhacker testified that when he took the cash advance from AT&T on February 2, 1996, he still expected to resolve his differences with the bank and to obtain his 1996 operating line of credit. This is contradicted by his answer to interrogatory number 2 submitted to him by AT&T during discovery. There he stated in part, "On February 2, 1996, [Feldhacker] used the card to obtain a $5,000 cash advance. At or about the same time, the First National Bank of Akron advised him that no credit would be extended for 1996 farming operations."

Feldhacker explains the contradiction by saying that the latter answer meant that the bank had advised him that no credit would be extended for 1996 farming operations--unless he agreed to the bank's terms. He says he was still negotiating with the bank on terms at the time of the advance.

Discussion

AT&T ask that its claim against Feldhacker be excepted from discharge under 11 U.S.C. § 523(a)(2)(A). That section states that

> [a] discharge under section 727 ... of [the Bankruptcy Code] does not discharge an individual debtor from any debt--
>
> 2. for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained by--
>
> A. 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).

In order to establish the nondischargeability of its claim, AT&T must show by a preponderance of the evidence (1) that Feldhacker made to it a materially false representation; (2) that Feldhacker knew the representation was false; (3) that he intended to deceive AT&T; (4) that AT&T relied on the misrepresentation

(5) to its detriment. First Deposit National Bank v. Coates (In re Coates), Adversary No. L-90-0137C, slip op. at 3-4 (Bankr. N.D. Iowa, April 1, 1991). AT&T's reliance must have been justifiable. Field v. Mans, 116 S.Ct. 437, 446 (1995).

Use of a credit card has been construed as an "implied representation to the card issuer that the cardholder has both the ability and the intention to pay for the charges incurred." AT&T Universal Card Services v. Stanton (In re Stanton), Adversary No. 95-2031-KD, slip op. at 3-4 (Bankr. N.D. Iowa, Jan. 10, 1996).

In cases involving the dischargeability of credit card obligations, this court has adopted a "totality of the circumstances" test in examining debtor's knowledge and intent. 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, N.A. 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. Dougherty, 84 B.R. at 657, citing Sears Roebuck & Co. v. Faulk (In re Faulk), 69 B.R. 743, 753-54 (Bankr. N.D. Ind. 1986).

Factors which might be 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. Consideration of these or any other facts which are part of the record is nothing more than an

examination of the evidence in an effort to determine whether a debtor obtained money or property through actions motivated by a fraudulent intent.

It is also arguable that the use of a credit card without intention of repayment of the credit constitutes false pretenses. It has been written that, "[a] false representation requires an express misrepresentation, whereas false pretenses involve an implied misrepresentation or conduct intended to create and foster a false impression." Super Concrete Corp. v. Shipe (In re Shipe), 41 B.R. 584, 586 (Bankr. E.D. Pa. 1984). Use of a credit card, or in this case a convenience check, is arguably conduct. Use of a card has also been held to be a promise to pay. Chevy Chase Bank, FSB v. Briese (In re Briese), 196 B.R. 440, 450 (Bankr. W.D. Wis. 1996). One treatise has said that the distinction does not matter:

> Whether one concludes the making of a charge carries with it an implied representation ... that the debtor has the capacity and will to repay or whether one concludes the absence of such will and capacity is actual fraud is probably a matter of no consequence. Because both false pretentions and fraud are covered, either conclusion satisfies one of the terms of 523(a)(2)(A).

2 Epstein, Nickles & White, Bankruptcy § 7-26 at 347 (1992).

The main focus of the inquiry here is whether Theodore Feldhacker obtained the $5,000 cash advance from AT&T with the intent at the time of not repaying it. If he did, his obtaining the advance would be fraudulent. Karelin v. Bank of America Nat'l Trust & Savings Ass'n (In re Karelin), 109 B.R. 943, 947 (9th Cir. BAP 1990), citing In re Dougherty, 84 B.R. 653, 657 (9th Cir. BAP 1988). See also Ames v. Moir, 138 U.S. 306, 312, 11 S.Ct. 311, 313 (1891) (obtaining goods with intent not to pay for them is fraud in fact, under Bankruptcy Act). Fraudulent intent may be proven by circumstantial evidence. Caspers v. Van Horne (Matter of Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987), overruled on other grounds by Field v. Mans, ___ U.S. ___, 116 S.Ct. 437 (1995).

I have considered the evidence and arguments in this case and find that Theodore Feldhacker obtained the $5,000 advance from AT&T with the intent at the time of not repaying it, and I find and conclude that the advance was obtained by fraud.

Feldhacker took the $5,000 advance on February 2, 1996 and executed his bankruptcy schedules on April 8--just 66 days later. He says that the impetus to his filing was the notice of default received from the bank. The notice was dated April 3, 1996 and if mailed that day, would have been received at the earliest on April 4. Although he says prior to that date he had contacted his attorney for help only in submitting a new financial statement, his bankruptcy papers were signed and ready for filing only four days after he would have received the notice. Yet the notice itself did not put such time pressure on Feldhacker. The notice specified the default--Feldhacker's failure to provide a financial statement--and gave him until April 23, 1996 to cure. Despite his reluctance to sign the statement prepared by the bank in November, he could have cured by submitting his own statement. Rather than resolve the dispute over the statement, he filed bankruptcy. So the speed of the bankruptcy filing is noteworthy.

There are many unanswered questions relating to the supposedly insoluble problem of the financial statement. If Feldhacker submitted a new statement, there is no explanation as to why bank sent the default notice. There is no evidence as to how Feldhacker delivered the statement or as to whether bank received such a statement from Feldhacker before sending its notice. There is no evidence as to what consideration bank may have given the new statement, if received. There is no proof that

Feldhacker or his attorney contacted the bank after Feldhacker received the notice of default. If Feldhacker or his attorney mailed a new statement to the bank around April 1, but nonetheless received a default notice dated April 3, it would be reasonable to question bank as to whether it had received or considered the new statement before sending the default notice. One might have considered that the new statement and the default notice crossed in the mail. Last, if bank received a new financial statement either immediately before or just after sending the notice, why is there no further documentary evidence of the bank's position as to the curative effort of the statement? If one believes Feldhacker, the filed papers would have been prepared in four days, including a Saturday and Sunday. But there was no pressure for such speed. It is likely, therefore, that preparation was begun earlier than the receipt of the notice. I think this is so despite the possibility that the bankruptcy papers could have been prepared so quickly merely because the attorney had already been working on debtors' financial statement.

Timing is also noteworthy when one considers 11 U.S.C. § 523(a)(2)(C). That subsection of the Code presumes nondischargeability when a debtor obtains cash advances aggregating more than $1,000 as consumer credit under open end plans within 60 days of filing bankruptcy. Feldhacker did not sign his petition until 66 days had passed since the advance. He signed his papers on nearly the earliest day after the presumption period had passed.

All of Feldhacker's scheduled unsecured debt was credit card debt. Other than bank, there was no "local debt." The advance by AT&T was used to pay a debt to the Co-op and to pay federal income taxes. He worked for the former; debts to the latter are often nondischargeable. According to Feldhacker, he used other credit card advances to make good checks he had written to other creditors. Such schedules often are a sign that a debtor has arranged his debts before filing.

Feldhacker's description of his debt to the credit card companies is significant for another reason. His Schedules I and J show excess income over expenses of $849 per month. Depending on the amounts of his secured and unsecured debt, excess income in that amount presents the risk that the U.S. Trustee might file a motion for dismissal under 11 U.S.C. § 707(b). Feldhacker's schedules can be viewed as an effort to forestall such action by listing each credit card debt as primarily for farm-related expenses.

Significant also is Feldhacker's testimony that he believed at the time of the AT&T advance that he would still work things out with the bank. This is contradicted by his answer to interro- gatory number 2 asked of him by AT&T. In explaining the factual basis of his defense, Feldhacker said that on February 2, 1996, he used the card to obtain a $5,000 cash advance. At or about the same time, the First National Bank of Akron advised him that no credit would be extended for 1996 farming operations. At trial, he explained this contradiction by saying that he knew then he would get no credit if he did not work things out with the bank, but that he still believed he could obtain a loan. I do not believe this explanation. I find that Feldhacker was not a credible witness.[(1)]

His testimony that when he took the advance he still hoped to obtain a loan from the bank is contradicted also by his actions--the speed of his filing. It appears from his evidence that the only matter that had changed after the advance was the notice of default. But while the notice threatened foreclosure, it still pointed out only that his default was not monetary, but rather his failure to provide an approved financial statement. The notice gave him three weeks to provide one--even one of his own choosing. The notice put a time limit on solving the dispute, but it did not broaden the area of dispute. I do not perceive that the notice alone would have dashed his alleged hopes of coming to a loan agreement with the bank. It is unlikely that the speedy filing was precipitated by the notice.

In considering these events, I come to the conclusion that this bankruptcy was not a speedy solution to a sudden crisis--the notice of default--but rather was a well planned action calculated to eliminate the bank's claim and the claims of credit card creditors. It left untouched other creditors. Standing alone, this is not necessarily objectionable. However, a debtor may not borrow money, promising to repay, yet harboring the undivulged purpose of discharging the resultant debt. Feldhacker's use of the cash advance check was a promise to repay. But I find he had no intent of repaying, because I believe that at the time he had already made the decision to file a chapter 7 bankruptcy. He intended to deceive the bank, as it would not have permitted the continued use of the account or the credit arrangement had Feldhacker divulged his plan to file bankruptcy.

Last, I find that the bank justifiably relied on Feldhacker's misrepresentation of his state of mind. Previous to this event, AT&T had never had a problem with his account. Feldhacker paid on time and usually more than minimum payments. He had never given AT&T cause to be suspicious of his ability or intent to repay. I do not find it unreasonable that credit card lenders do not ask for annual or more frequent financial statements from their customers if their customers' payment records give no cause for concern. In this case, Feldhacker's payment history with the company would not have alerted it to what was to happen. The company justifiably relied on the debtor's payment record in continuing its credit arrangement with Feldhacker. They were damaged in so doing.

IT IS ORDERED that judgment shall enter that the debt owed by Theodore J. Feldhacker to AT&T Universal Card Services, identified as account 5437-0004-1150-8717, is excepted from debtor's discharge under 11 U.S.C. § 523(a)(2)(A).

IT IS FURTHER ORDERED that plaintiff's complaint against Diane A. Feldhacker is dismissed with prejudice.

IT IS FURTHER ORDERED that costs are taxed against Theodore J. Feldhacker.

SO ORDERED THIS 5th DAY OF SEPTEMBER 1997.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to Mark Reed, John Harmelink and U.S. Trustee.

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1. Feldhacker had a selective memory. He seemed to recall clearly helpful facts surrounding his credit card transactions. In particular, he recalled using the AT&T card to pay a previous year's income taxes. This evidence was offered, I believe, to show that his taking the 1996 advance to pay taxes was not an unusual event. But when interrogated by AT&T counsel about other matters regarding his financial affairs, he often did not remember. He did not recall ever getting the credit card agreement from AT&T or reading one. He did not recall exactly when he went to his attorney for the first time or when he paid him. He did not remember if he took cash advances through any cards other than AT&T or GM. He did not remember the minimum payments due on any of his cards at the time he filed bankruptcy. He did not know what farm expenses were due during January through March of 1996. He remembered pertinent facts to his defense, but not one which might be pertinent to the plaintiff's case.