In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

LARRY BROSAMLE *Debtor(s).*	Bankruptcy No. 96-51625XS Chapter 7
FIRST DEPOSIT NATIONAL BANK *Plaintiff(s)* vs. LARRY BROSAMLE *Defendant(s)*	Adversary No. 96-5191XS

ORDER RE: COMPLAINT TO DETERMINE DISCHARGEABILITY

The matter before the court is the final trial of the claim under 11 U.S.C. § 523(a)(2) filed by First Deposit National Bank. Trial was held August 14, 1997 in Sioux City, Iowa. Rebecca A. Nelson appeared for plaintiff Bank. Larry Brosamle appeared pro se. The court now issues its findings and conclusions as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

Larry Brosamle filed a Chapter 7 bankruptcy petition on July 1, 1996. His schedule of unsecured claims included a debt to First Deposit National Bank in the amount of $3,131.62. Brosamle received his discharge on November 21, 1996.

In April 1992, Brosamle filled out an application for a line of credit, called a Capital Cash Account, offered by the Bank. Exhibit 1. The account allowed access to credit by writing checks. Exhibit 3, first unnumbered . Brosamle received three or four blank checks for making charges to the account. He also received a copy of the Account Agreement which included the following provision: "Promise to Pay. You promise to pay us when due all amounts borrowed when you or someone else uses your Account...." Exhibit 3, 2. The account balance remained at zero until 1993 or 1994 when Brosamle used the account to purchase a motorcycle. He paid the balance off over the course of approximately one year.

He next charged the account by writing a check to himself for $3,000 on March 19, 1996. Exhibit 2. His credit line at that time was $4,000. Exhibit 4. He deposited the check in his account at the United Bank in Ida Grove. He wrote checks from this account, including checks to make payments on other credit accounts. Brosamle made no payments on the $3,000 cash advance.

On March 21, 1996, Brosamle received distribution of $13,395.13, his entire interest in his IPERS retirement account, and deposited the money in account no. 213438 at First State Bank. Exhibit 9. An insurance payment of $31.00 to Lutheran Brotherhood was made by automatic withdrawal. Id. Brosamle wrote several checks from the First State Bank account. He said the smaller checks listed in Exhibit 9 were for living expenses such as groceries, and the checks for more than $100 were probably written to transfer money to cover checks written on his account at United Bank. On March 29 and April 1, 1996, he used automatic teller machines to make cash withdrawals from the First State Bank account. Id. He used this money, a total of $440, for gambling.

Early in April 1996, Brosamle consulted an attorney about his debt problems. He said the attorney advised talking with a credit counseling agency; Brosamle did not follow up on that advice. On April 9, 1996, Brosamle paid the attorney $625 for debt counseling or bankruptcy. Pretrial Statement, uncontested facts E. The attorney subsequently prepared a bankruptcy petition and schedules and represented Brosamle in his bankruptcy case.

From May 1979 until November 1995, Brosamle was employed by the Ida County Sheriff's Department where he worked as a deputy. Since December 1995, he has been employed by Rathjen Trucking in Ida Grove. He and his wife divorced in 1995. At the time of the March, 1996 cash advance, he had a total of approximately $60,000 in credit card debt. The monthly minimum payments on this debt totaled between $1,200 and $1,500. His other monthly obligations at that time included $528 for support payments, $471 for insurance for his children, $250 for rent, and $45 to $50 for utilities. Brosamle said his gross income at the time of the cash advance was approximately $1400 per month or $18,000 for the year.

DISCUSSION

Bank seeks a determination that Brosamle's debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A) and (C). Section 523(a)(2)(C) creates a presumption of nondischargeability of debts for cash advances aggregating more than $1,000 obtained within 60 days of filing the petition. Bank is not entitled to this presumption because Brosamle filed his petition on the 104th day after the cash advance. The timing of the advance in relation to his petition will be discussed below as part of the analysis under § 523(a)(2)(A). That section provides that the Chapter 7 discharge does not discharge a debtor from 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).

Bank claims Brosamle obtained money by actual fraud because he took the cash advance knowing he would be unable to repay the debt. To prove actual fraud, Bank must show that: (1) Brosamle made a false representation; (2) at the time made, he knew the representation was false; (3) the representation was made with the intention and purpose of deceiving the Bank; (4) the Bank relied on the representation; and (5) the Bank sustained damage as a proximate result. Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987). The Bank's reliance must have been justifiable. Field v. Mans, ___ U.S. ___, 116 S.Ct. 437 (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), Adv. No. 95-2031-KD, slip op. at 3-4 (Bankr. N.D. Iowa Jan. 10, 1996).

Direct evidence of intent to deceive is rarely available; intent may be proved by circumstantial evidence. Citibank (South Dakota), N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1090 (9th Cir. 1996). Actual fraud in use of a credit card may be established by showing use of the card with no intention at the time of repaying the debt. Citibank South Dakota, N.A. v. Dougherty (In re Dougherty), 84 B.R. 653, 657 (9th Cir. BAP 1988) (quoting Sears Roebuck & Co. v. Faulk (In re Faulk), 69 B.R. 743, 753-54 (Bankr. N.D. Ind. 1986)). In cases involving the dischargeability of credit card obligations, this court has adopted a "totality of the circumstances" test in examining the debtor's knowledge and intent, and in determining whether a debtor has made credit card charges with no intention at the time of repaying them. AT&T Universal Card Services v. Feldhacker (In re Feldhacker), Adv. No. 96-5119XS, slip op. at 8 (Bankr. N.D. Iowa Sept. 5, 1997) (citing First Deposit National Bank v. Coates (In re Coates), Adv. No. L-90-0137C, (Bankr. N.D. Iowa April 1, 1991)).

The circumstances a court may consider include: (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; Dougherty, 84 B.R. at 657.

The most relevant circumstances in this case are Brosamle's financial condition at the time of the cash advance and his use of the money. In March 1996 Brosamle had incurred a total of approximately $60,000 in credit card debt. His minimum monthly payments on the credit card debt alone were roughly equivalent to his income. In addition to his own living expenses, he had substantial obligations arising out of his divorce. Brosamle deposited the $3,000 cash advance in his United Bank account. There was no documentary evidence of the use of this money. Brosamle admitted using the money to write checks to other credit cards. This method of paying has been called credit card "kiting." In re Eashai, 87 F.3d at 1085. There was no evidence to show how long Brosamle had been paying his credit card debt in this manner. His use of the cash advance to pay other credit card debt shows, however, that at the time of the advance he knew he was unable to repay the credit card debt he already had, much less the additional money advanced.

Brosamle's financial condition was not merely a present inability to pay the amount of the cash advance. Cf. Sears, Roebuck & Co. v. Hernandez (In re Hernandez), 208 B.R. 872, 879 (Bankr. W.D. Tex. 1997) (criticizing theory of implied representation of ability to pay; lack of ability to pay current charges is ordinary use of credit cards; credit card issuers desire customers who are unable to repay their bill each month). He did not have the ability to repay the debt in installments under the terms of his credit account agreement with the Bank. He was hopelessly insolvent. Brosamle could have had no reasonable expectation he would repay the debt. His use of the card under these circumstances supports an inference that Brosamle took the cash advance with no intention to repay it. Eashai v. Citibank, South Dakota, N.A. (In re Eashai), 167 B.R. 181, 185 (9th Cir. BAP 1994), aff'd, 87 F.3d 1082 (9th Cir. 1996); Karelin v. Bank of America Nat'l Trust & Savings Assn. (In re Karelin), 109 B.R. 943, 947-48 (9th Cir. BAP 1990).

Brosamle's speed in consulting a bankruptcy attorney also supports an inference of fraudulent intent in taking the cash advance. On April 9, just 21 days after the transaction, he paid the attorney $625. Bank had not yet had time to send the first statement on the advance. See Exhibit 4, statement dated April 22, 1996 (showing zero previous balance).

Brosamle claims he intended to repay the cash advance from his IPERS distribution. He said he began paying bills and the money just did not last. He offered no documentary evidence, however, to show that he voluntarily spent any of the money paying bills. An insurance payment in the amount of $31 was made by automatic withdrawal. The only other identified uses of the money were two cash withdrawals for gambling. Even if Brosamle did pay some bills with his IPERS distribution, he could not have reasonably expected the approximately $13,000 would enable him to pay his credit card debt of over $60,000. There was no evidence he intended to prefer the Bank over his other creditors; he made no payment on the Bank's debt.

Brosamle claims he did not receive a statement from the Bank until after his bankruptcy filing and implies he would have made payments on the debt if he had been billed. He moved at the end of March or beginning of April. He said he did not have the Bank's address to send them his forwarding address. This statement is contradicted by his schedule of unsecured creditors. The court takes judicial notice that the schedule of unsecured creditors filed with Brosamle's petition lists a debt to First Deposit National Bank, 219 Main Street, Tilton, NH 03276, in the amount of $3,131.62. Document 1, Schedule F, Creditor 11. This corresponds, nearly to the penny, to Bank's statement dated May 22, 1996. Exhibit 5.

Brosamle argues he would not have wasted an exempt asset if he had no intent to repay his debts. His spending the money may only indicate he believed the IPERS distribution was not an exempt asset. Brosamle's bare assertions of intent to repay are not sufficient to overcome the inference of fraudulent intent created by his use of the credit without a reasonable prospect of ability to repay the debt.

The court also finds that Bank justifiably relied to its detriment on Brosamle's misrepresentation of his intent to repay the debt. A credit card issuer's reliance is evaluated by examining the debtor's previous payment history. If the issuer has no warning sign of the debtor's intent not to repay, it will be held to have justifiably relied in continuing to extend credit. In re Eashai, 87 F.3d at 1091; In re Feldhacker, slip op. at 14-15. Brosamle wrote one check on his credit account in 1993 or 1994, then paid off the balance. For an extended time his balance was zero. There was no activity prior to the March 1996 cash advance to alert Bank to a problem with the account. The debt to the Bank will be held nondischargeable.

ORDER

IT IS ORDERED that the debt owed by Larry Brosamle to First Deposit National Bank, identified as account 4310-3922-1340-1860 is excepted from his discharge under 11 U.S.C. § 523(a)(2)(A).

SO ORDERED THIS 14th 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 debtor, Rebecca Nelson, U.S. Trustee.