In the United States Bankruptcy Court

for the Northern District of Iowa

RAY A. STANGELAND
Debtor(s).

Bankruptcy No. 97-001525F
Chapter 7

AT&T UNIVERSAL CARD SERVICES
Plaintiff(s)

Adversary No. 97-9172F

vs.

RAY A. STANGELAND
Defendant(s)

CLAIM RE: DISCHARGE

DECISION

AT&T Universal Card Services seeks a judgment that its claim against Ray A. Stangeland is excepted from discharge under 11 U.S.C. § 523(a)(2)(A). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Trial was held April 15, 1998 in Fort Dodge. Mark D. Reed appeared for AT&T Universal Card Services (AT&T). Douglas Cook appeared for Ray A. Stangeland.

Findings

Ray Stangeland is 46 years old. He lives on an 86-acre farm near Jewell, Iowa. Until about six years ago, he was a full-time farmer. Now he farms only part-time while he works a full-time job at a soybean refinery for Archer Daniels Midland. Stangeland married in 1992 and divorced in May 1995. The dissolution decree made him responsible for the couple's $18,000 in credit card debt.

On or about April 22, 1995, Stangeland applied for a credit card with AT&T. Stangeland sent a written application in response to a solicitation by AT&T. The application provided Stangeland's name, social security number, date of birth, home telephone number, business telephone number, his annual income, and Stangeland's choice of a security password. Stangeland listed his annual income as $62,000.00. AT&T granted Stangeland a card with a $3,000.00 credit limit.

Ron Lewis testified on behalf of AT&T. He gave evidence on AT&T's issuance of a credit card to Stangeland and on Stangeland's use of the card. Lewis has been with AT&T for more than six years. He is a senior bankruptcy recovery and litigation specialist. AT&T's solicitation of Stangeland was the result of its normal solicitation process. It obtained a list of prospective customers from a credit bureau. AT&T matched the list against its list of existing customers, its list of persons not wanting to receive solicitations, and its list of persons who may have been involved in fraudulent activity. Names from those three lists were removed from the list of potential customers, and the resulting list was sent to the credit bureau for a second screening. Those persons which remained on the list after the second screening were mailed an offer of credit. The process, through mailing of the offer, takes about six to seven months. It is accomplished by computer. A possible extension of credit is not analyzed by a person until AT&T receives a response to the solicitation.

The screening by the credit bureau is accomplished through the use of a scoring system developed by Fair, Isaacs & Company. The FICO score can range from 300 to 800 or 900 with the higher scores indicating lower risk of the consumer not paying the debt. Factors used in developing the score include the number of open credit accounts, the

amount of credit extended and used, and payment histories. A more comprehensive list of factors used by Fair, Isaacs was given in AT&T Universal Card Services v. Ellingsworth (In re Ellingsworth), 212 B.R. 326, 331 (Bankr. W.D. Mo. 1997):

(1) payment history;
(2) public record and collection items;
(3) delinquencies;
(4) outstanding debts;
(5) number of balances;
(6) average balances across all trade lines;
(7) relationship between total balances and total credit limits;
(8) credit history;
(9) age of oldest trade line;
(10) applications to obtain additional credit;
(11) number of applications and account openings;
(12) time between applications; and
(13) types of credit in use.

The FICO score for Stangeland was generated by the credit bureau used by AT&T. Stangeland had a score of 714. AT&T's minimum score for granting credit was 680. AT&T issued Stangeland a credit card in early May 1995.

Stangeland used the card six times, all for cash advances obtained by using merchant-provided checks. All of the advances were taken at Prairie Meadows race track in Altoona, Iowa. All of the advances were used for gambling. The dates and amounts of the advances were these:

May 12, 1995 $519.99
May 16, 1995 519.99
May 16, 1995 519.99
May 16, 1995 519.99
July 7, 1995 312.99
July 7, 1995 312.99

From June through August 1995, Stangeland made three required minimum payments of $45.00, $50.00 and $60.00. At the time he filed bankruptcy, he owed AT&T $2,918.21.

AT&T received no payments after August 1995. It began efforts to collect the account. AT&T contacted Stangeland on October 16, 1995 and Stangeland referred the caller to his attorney. Stangeland told the AT&T representative that he had gone to the attorney, but that he had not yet fully paid the attorney's required retainer. AT&T determined not to contact the attorney until the retainer was paid. In early November, an AT&T representative was told, either by Stangeland or the attorney, that a bankruptcy filing was likely in December.

Stangeland's attorney contacted AT&T by letter in December 1995 with a settlement offer of 15 per cent of the debt. AT&T declined the offer and countered with 80 per cent. In January 1996, AT&T was told by Stangeland's attorney that bankruptcy would be filed. The chapter 7 petition was filed May 27, 1997. Stangeland in September 1995 first thought about filing bankruptcy. He decided to contact a lawyer in October. He says he filed when he was not able to settle with his creditors, and he was sued by one credit card company.

Stangeland's gambling led to his bankruptcy. Prairie Meadows, a gambling location, opened about 50 miles from Stangeland's home in the spring of 1995. He began gambling there at that time and went about twice a week. Some weeks he went as many as three or four times. He still gambles there about once a week. In 1995, he won about $26,000.00, but he lost $10,000.00 to $20,000.00 more than he won. In April 1995, he owed about $18,000.00 of credit card debt. The credit lines on the cards totaled $50,000.00 to $60,000.00. By August or early September 1995, the credit

card debt had risen to $39,000.00, mostly through gambling. When he filed bankruptcy, he scheduled credit card debt of about $51,000.00.

When he filed, Stangeland listed his monthly income from farming and his job at $3,162.82. He listed his expenses, including $300.00 per month spent gambling, at $3,526.00. The expense total does not include payments on credit card debt. Stangeland's tax returns show $21,953.00 in adjusted gross income for 1994, and $58,228.00 in adjusted gross income for 1995, with $26,000.00 gambling losses.

When Stangeland took his first cash advance from AT&T on May 12, 1995, he had $2,162.44 in his checking account. On May 16, 1995, when he took three cash advances, he had $1,762.44 in his account. On July 7, 1995, when he took the last two advances from AT&T, he had a bank balance of $3,401.04. After July 7, 1995, and through the end of 1995, Stangeland took 36 cash withdrawals from his checking account, all at ATM machines at Prairie Meadows. During 1995, his paychecks from his employer were about $350 to $400 net per week.

Stangeland testified that he started to feel a "financial pinch" in August 1995. His gambling losses had mounted up. In September 1995, he said that for the first time he could not meet his minimum credit card payments. He finally decided that he had incurred more losses than he could repay. After meeting with his lawyer in September 1995, Stangeland closed his credit card accounts. He recalled that his debt to the companies at that time was about $39,000.00. Minimum monthly payments on that amount would have been between $780.00 to $975.00.

Discussion

AT&T asks that its claim against Stangeland be excepted from discharge under 11 U.S.C. § 523(a)(2)(A). It 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....

11 U.S.C. § 523(a)(2)(A).

The parties agree that to come within the exception, plaintiff must prove by a preponderance of evidence that debtor made a knowingly false representation, with the intent to deceive AT&T, and that AT&T justifiably relied on the representation in granting credit (plaintiff's brief, defendant's brief). The crux of the dispute in the proceeding is whether Stangeland took cash advances from AT&T with the subjective intent at the time of the advances not to repay them. Chase Manhattan Bank v. Murphy (In re Murphy), 190 B.R. 327, 333 (Bankr. N.D. Ill. 1995)(§ 523(a)(2)(A) requires subjective test of intent to defraud). The court may consider all of the evidence to determine whether debtor took the advances with an intent not to repay.

It is 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. D. Md. 1984). Use of a credit card, or in this case a convenience check, is arguably conduct. Use of a card has 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 pretensions 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 question is whether Stangeland took the cash advances with the intent at the time of not repaying them. 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 Citibank South Dakota, N.A. v. Dougherty (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, 516 U.S. 59, 116 S.Ct. 437 (1995).

The evidence is insufficient to prove it more likely than not that Stangeland took the cash advances from AT&T with the intent not to repay them. Standing alone, the use of the advances for gambling is not a substitute for showing the subjective intent not to pay. Stangeland, like many other debtors, descended into his financial problems progressively. At the time of the advances, his total credit card debt was about $39,000.00. The monthly minimums, which the companies prescribe, totaled about $780.00. When he took the advances, he had at least this much in his checking account. His gambling increased after the advances from AT&T, and his losses increased also. I believe his testimony that it was not until August or September that he realized he was in trouble. He ceased using his cards when he realized he was in financial difficulty.

Stangeland may have taken advances at a time when his income was insufficient to meet all living expenses and pay all his minimum credit card payments. Even if that is so, it does not conclusively establish the requisite intent. If it did, many bankruptcy debtors would have debts automatically excepted from discharge. In the end, I must find a subjective intent not to repay. I do not find a preponderance of evidence showing such intent. The complaint will be dismissed.

Stangeland has requested fees and costs under 11 U.S.C. § 523(d). I find that AT&T's filing of the complaint was substantially justified and that fees and costs should not be awarded.

IT IS ORDERED that the complaint of AT&T Universal Card Services against Ray A. Stangeland is dismissed.

SO ORDERED THIS DAY OF MAY 1998.

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, Douglas Cook and U.S. Trustee.