In the United States Bankruptcy Court

for the Northern District of Iowa

MARK S. KINKADE *Debtor(s).*	Bankruptcy No. 98-02671-W Chapter 7
JOHN DEERE COMMUNITY CREDIT UNION *Plaintiff(s)* vs. MARK S. KINKADE *Defendant(s)*	Adversary No. 98-9296-W

ORDER

On March 24, 1999, the above-captioned matter came on for hearing pursuant to assignment. Plaintiff John Deere Community Credit Union was represented by Attorney Kenneth Nelson. Defendant-Debtor Mark S. Kinkade appeared in person with his attorney, Don Gottschalk. Evidence was presented after which the Court took the matter under advisement.

The matter before the Court is an adversary complaint filed December 14, 1998 seeking denial of dischargeability of an obligation under the provisions of 11 U.S.C. §§523(a)(2)(A) and 523(a)(2)(B). This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). This ruling constitutes findings of fact, conclusions of law and order pursuant to Fed.R.Bankr.Proc. 7052.

FINDINGS OF FACT

On July 24, 1998, Debtor applied for a loan in the amount of $425 with John Deere Community Credit Union (Creditor) to purchase a guitar. Debtor listed Dan Deery Motors as his employer and specified his monthly gross income as $2000. Debtor submitted a loan application which itemizes outstanding debts owed by Debtor (including Creditor's current $425 loan). Outstanding debts totaled $6815 on which Debtor paid $206.54 in monthly payments. On the loan information sheet, the loan officer commented that Debtor had been on his current job for only one month and had several different employers in the past. The loan officer also noted that Debtor intended to pay off the current loan quickly and had a previous loan with Creditor which had been paid in full.

At trial, Debtor testified that Dan Deery computed commissions similar to those of his past job. Debtor arrived at his gross income on the loan application by estimating that he could achieve the same gross pay earned at his previous employer, also a car dealership. This belief was premised on the fact that supervisors assured him that he could earn at least the same pay if not more based on heavy sales traffic at his new employer. Debtor was unable to recall whether he indicated that Dan

Deery placed him on a 20 day probation period and that he worked on a commission basis. However, he testified that the loan officer never asked about the probation or the commission.

Debtor started the job at Dan Deery on July 9, 1999. He quit about three weeks later. Debtor realized that he was not doing well the first couple of weeks, and concluded the new job would not work out for him. He indicated that the supervisors wanted to fire him, but agreed to let him quit. Debtor earned $609.81 the three weeks that he worked at Dan Deery.

Debtor decided to file for bankruptcy only after talking with his fiancee's father. The father had filed bankruptcy in the past and told Debtor that it would be a good idea since he was still young. At that point, the father recommended an attorney. Debtor filed his voluntary Chapter 7 petition on September 4, 1998.

Creditor objects to the discharge of this debt and requests judgment for $425 plus interest and fees relating to this action. Creditor asserts that the debt in question is nondischargeable pursuant to 11 U.S.C. §523(a). Creditor claims Debtor obtained money by false pretenses, false representations, and fraud and had no intention of repaying debt to Creditor. 11 U.S.C. §523(a)(2)(A). Alternatively, Creditor asserts Debtor obtained money by using a statement in writing, which was materially false, respecting Debtor's financial condition, and that Creditor reasonably relied on the information which Debtor made with the intent to deceive. 11 U.S.C. §523(a)(2)(B)(i-iv).

CONCLUSIONS OF LAW

Plaintiff relies on the following provisions of 11 U.S.C. §523 to support its dischargeability complaint:

> (a) A discharge under section 727...of this title 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;
> >
> > (B) use of a statement in writing-
> >
> > > (i) that is materially false;
> > > (ii) respecting the debtor's or 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 or published with intent to deceive[.] [Emphasis added]

While Plaintiff has alleged the applicability of both §523(a)(2)(A) and §523(a)(2)(B), the ultimate question in this case is whether Debtor misrepresented his financial condition in his loan application. Since the questions presented relate to a statement in writing respecting Debtor's financial condition,

§523(a)(2)(A) is not applicable to this case. Ordinarily, subsections (A) and (B) are mutually exclusive. In re Liming, 797 F.2d 895, 897 (10th Cir. 1986); Berger v. Karr, Adv. No. 94-1082KC, slip op. at 3 (Bankr. N.D. Iowa Apr. 4, 1995). This Court will, therefore, examine the facts as they relate to §523(a)(2)(B) to determine dischargeability.

This Court considers a four-element test when considering whether a debt will be excepted from discharge under § 523(a)(2)(B). The elements are: (1) the false financial statement is a writing respecting the debtors financial condition; (2) the financial statement is materially false; (3) the debtor intended to deceive; and (4) the creditor relied on the statement. In re Mutschler, 45 B.R. 482, 490 (Bankr. D.N.D. 1984); In re Hennings, Adv. No. 92-1269LC, slip op. at 7 (Bankr. N.D. Iowa Dec. 22, 1993). Plaintiff must prove each of the four elements by a preponderance of the evidence. Grogan v. Garner, 111 S. Ct. 654, 659 (1991).

FINANCIAL STATEMENT

The first element of the §523(a)(2)(B) test is satisfied by using a financial statement in writing respecting Debtor's financial condition. In re Shelton, 42 B.R. 547, 548 (Bankr. E.D. Mo. 1984). Debtor submitted a financial statement to Creditor about his financial condition in the form of a loan application. The loan application was in writing. The first element of §523(a)(2)(B) is satisfied.

MATERIALLY FALSE

"A materially false statement" is one which paints a substantially untruthful picture of a financial condition by misrepresenting information of the type which would normally affect the decision to grant credit. In re Walderbach, Adv. No. 92-1135LC, slip op. at 8 (Bankr. N.D. Iowa Aug. 31, 1993) (citing In re Mutschler, 45 B.R. at 490). Based on the entire record, this Court concludes that Creditor has not established by a preponderance of evidence that the loan application was materially false. Debtor indicated that he started his job one month previous to the loan application. Creditor was familiar with Debtor because of a previous loan which was paid in full. In fact, the loan officer wrote that Debtor was "a nice young man" and "plans to pay off loan quickly".

Creditor knew Debtor was previously employed in a similar car dealership with similar terms of employment and payment structure. It is not unreasonable for Debtor to believe that he could earn the same income doing the same type of job. Based on the brief period of time during which Debtor held this job, an estimated monthly salary does not amount to a materially false statement. Additionally, the senior credit consultant indicated during trial proceedings that the loan application takes into account several factors of which salary is only one component. Therefore, while the salary listed in the loan application was incorrect, it does not rise to the level of a materially false statement. Plaintiff has failed to prove this element.

INTENT

"Discharge is barred under §523(a)(2)(B) only if, among other things, the debtor acted with the intent to deceive." In re Jones, 31 F.3d 659, 661 (8th Cir. 1994). "Intent can be gleaned from surrounding circumstances." In re Capps, Adv. 93-2106KD, slip op. at 3 (Bankr. N.D. Iowa Nov. 24, 1993); Walderbach, slip op. at 8. "Some factors persuasive on the issue of intent to deceive include whether the debtor was intelligent and experienced in financial matters, and whether there was a clear pattern of purposeful conduct." In re Francke, Adv. No. 97-9093-C, slip op. at 6 (Bankr. N.D. Iowa Feb. 17, 1998); Capps, slip op. at 3; Walderbach, slip op. at 8-9; see also In re Joyner, 132 B.R. 436, 442

(Bankr. D.Kan. 1991)(considering the omission of significant liabilities and financial statement as strong evidence of intent to deceive).

This Court concludes that Plaintiff has failed to establish that Debtor intended to deceive Creditor. Debtor is not sophisticated in financial matters. This is evidenced by the fact that he solicited his fiancee's father for advice about his financial troubles. It is fair to conclude that Debtor reasonably believed that he could earn the same monthly income if not more at his new job based upon assurances that he could make more money at Dan Deery because of the heavier flow of customers. Also, Debtor did not conceal the fact that he had been on the job for only a month. Creditor has failed to establish Debtor's intent to deceive by a preponderance of the evidence.

RELIANCE

"A two-part test is used to determine whether a creditor reasonably relied on the debtor's false financial statement. The creditor must establish that: (1) the creditor actually did rely on the finance statement; and (2) the reliance was reasonable." Francke, slip op. at 6; Hennings, slip op. at 8 (citing In re Myers, 124 B.R. 735, 742 (Bankr. S.D. Ohio 1991)). "The reasonableness of a plaintiff's reliance should be judged in light of the totality of the circumstances." Jones, 31 F.3d at 662.

Creditor's senior credit consultant testified that Debtor's debt-to-income ratio was one of several factors used when determining whether a loan will be granted. Past loan history also contributed to the analysis which was in Debtor's favor. Similarly, the senior credit consultant stated that check stubs from Debtor's job were not needed, which could readily verify any loan applicant's monthly income, unless self employed.

Creditor testified that the Credit Union relied on other factors including Debtor's past relationship with Creditor. The nature of this transaction must be kept in perspective. In terms of financial transactions, this was a small loan. If Creditor is to rely to a great extent on Debtor's new income, further inquiry is appropriate. It is the conclusion of this Court that Creditor's claims of exclusive reliance on the income figure stated in the loan application is not supported under all of the existing circumstances. Creditor has failed to satisfy the element of reliance.

WHEREFORE, for the reasons set forth herein, Plaintiff's complaint to deny discharge under 11 U.S.C. §523(a)(2)(A) and §523(a)(2)(B) is DENIED.

SO ORDERED this 7th day of May, 1999.

Paul J. Kilburg
U.S. Bankruptcy Judge