

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

11 U.S.C. § 523(a)(2)(A)
11 U.S.C. § 523(a)(2)(B)

USNB v Franz
In re Franz

Adv. No. 96-3421-psh
Bankr. Case No. 396-32554

12/9/96 PSH Unpublished

Bank brought adversary proceeding seeking a determination that credit card debt incurred approximately one year prior to the time debtor filed bankruptcy was non-dischargeable under §523(a)(2)(A) and/or(B). The bank contended that the debtor made charges without the intent to repay them.

The debtor filed responsive pleading but failed to appear at trial. At trial the bank presented evidence that the debtor lacked the financial ability to repay credit card debt at the time he incurred the charges but no evidence as to the debtor's state of mind at the time the charges were made. Additionally, evidence showed that debtor obtained full time employment shortly after last charges were incurred and that the debtor did not file bankruptcy until almost a year after the charges were made. The court held that the evidence failed to show that the debtor lacked intent to pay the charges at the time they were incurred and therefore the debt was not exempted from discharge under § 523(a)(2)(A).

1 that his monthly income was \$14,000. The bank subsequently issued
2 the card to the debtor. The credit limit on the card was \$25,000.
3 On December 15, 1994, the debtor took a cash advance of \$20,000
4 against the credit card. In the five month period between December
5 24, 1994 and May 24, 1995 the debtor incurred \$3,255 in charges on
6 the card and took 31 cash advances totaling \$8,200. Fifteen of the
7 cash advances totaling \$4,100 were taken between April 26, 1995 and
8 May 23, 1995. The debtor made three payments totaling \$2,127 on the
9 card between the months of January and April, 1995. He made no
10 payments thereafter. On April 10, 1996, he filed for protection
11 under Chapter 7 of the United States Bankruptcy Code.

12 Section 523(a)(2)(A) exempts from discharge a debt "for
13 money, property, services, or an extension, renewal or refinancing
14 of credit to the extent obtained by false pretenses, a false
15 representation, or actual fraud, other than a statement in
16 respecting the debtor's or insider's financial condition." The
17 burden of proving that a debt is nondischargeable under section
18 523(a) is on the creditor, who must prove entitlement to an
19 exception from discharge by a preponderance of the evidence. Grogan
20 v. Garner 498 U.S. 279(1991). To prevail in a § 523(a)(2)(A)
21 action

22 "the creditor must show that (1) the debtor made
23 representations; (2) that at the time he knew were false; (3)
24 that he made them with the intention and purpose of deceiving
25 the creditor; (4) that the creditor relied on such
26 representations; (5) that the creditor sustained the alleged
loss and damage as the proximate result of the
representations having been made."

26 In re Anastas, 94 F3d. 1280, 1283 (9th Cir. 1996). The creditor's

1 reliance must be justifiable. Field v. Mans ___ U.S. ___, 116 S.Ct.
2 437, 444 (1995).

3 In the context of a credit card case the

4 "necessary element of a representation made by the debtor is
5 present in the implied representation of an intent to perform
6 the unilateral contract by repaying the amount charged....
7 When the card holder uses the card without an intent to
8 repay, he has made a fraudulent representation to the card
9 issuer.... Thus the central inquiry in determining whether
10 there was a fraudulent representation is whether the card
11 holder lacked an intent to repay at the time he made the
12 charge."

13 Id. at 1285.

14 "A court may infer the existence of an intent not to pay if
15 the facts and circumstances of a particular case present a
16 picture of deceptive conduct by the debtor. In re Eashai, 87
17 F.3d 1082, 1087 (9th Cir. 1996). Factors which may be used
18 to determine whether the debtor intended to repay the debt at
19 the time he incurred the charges are:

- 20 "1) the length of time between the charges made and the
21 filing of the bankruptcy;
- 22 2) whether or not an attorney had been consulted concerning
23 the filing of the bankruptcy before the charges were
24 made;
- 25 3) the number of charges made;
- 26 4) the amount of the charges;
- 5) the financial condition of the debtor at the time the
charges are made;
- 6) whether the charges were above the credit limit on the
account;
- 7) whether the debtor made multiple charges on the same day;
- 8) whether or not the debtor was employed;
- 9) the debtor's prospects for employment;
- 10) the financial sophistication of the debtor;
- 11) whether there was a sudden change in the debtor's buying
habits; and
- 12) whether the purchases were made for luxuries or
necessities."

13 In re Dougherty, 84 B.R. 653, 657 (Bankr. 9th Cir. 1987).

14 However, while these factors are "useful for arriving at a
15 finding of bad faith, the hopeless state of the debtor's financial
16

1 condition should never become a substitute for an actual finding of
2 bad faith." In re Anastas, 94 F.3d 1280, 1285 (9th Cir. 1996).
3 Rather, "the express focus must be solely on whether the debtor
4 maliciously and in bad faith incurred credit card debt with the
5 intention of petitioning for bankruptcy and avoiding the debt." Id.
6 at 1285.

7 In this case the debtor made over 80 charges totaling in
8 excess of \$29,000 over a five month period. Many of the charges
9 were for meals at restaurants or cash advances which are, arguably,
10 luxury items. During that same time he made only three payments
11 totaling \$2,100 toward his account. The debtor made his last
12 payment on his account on April 7, 1995. Thereafter he took an
13 additional 15 cash advances totaling \$4,100. Further, during 1994
14 and 1995, the years the charges were incurred, the debtor had a
15 negative gross income of \$4,000. This evidence supports the
16 inference that the debtor lacked the financial ability to repay the
17 debt he had incurred on this card. However, it does not address the
18 issue of whether the debtor intended to pay the charges and advances
19 at the time he incurred them.

20 All of the charges made by the debtor were made more than one
21 year prior to the time he filed bankruptcy. There is no evidence
22 that he consulted with an attorney regarding bankruptcy prior to
23 incurring the charges. Prior to applying for the credit card at
24 issue the debtor had run a successful Farmer's insurance agency in
25 California. During 1993, the year prior to his move to Oregon, the
26 debtor's net income from his employment was in excess of \$40,000.

1 After moving to Oregon he established a part time relationship with
2 Farmer's while attempting to open a new office in Portland. He
3 finalized an agent agreement with Farmers in June, 1995, shortly
4 after the time he made the last charge on this account.

5 The bank presented no other evidence. This evidence alone
6 does not support an inference that the debtor did not intend to
7 repay the charges at the time he incurred them. Since the bank has
8 failed to establish that the debtor did not intend to pay the
9 charges at the time he incurred them its debt is not exempt from
10 discharge under § 523(a)(2)(A).

11 Alternatively the bank contends that the debt owed by the
12 debtor is nondischargeable under § 523(a)(2)(B). This section
13 exempts from discharge a debt incurred by the use of a materially
14 false financial statement. To prevail in a nondischargeability
15 action under section 523(a)(2)(B), a creditor must prove that a
16 debtor:

- 17 (1) made a written representation of material fact regarding
the debtor's financial condition,
- 18 (2) that the debtor knew at the time to be false,
- 19 (3) that the debtor made with the intention of deceiving
the creditor,
- 20 (4) upon which the creditor reasonably relied, and
- 21 (5) that damage proximately resulted from the
misrepresentation,

22 Field v. Mans ___ U.S. ___, 116 S.Ct. 437, 444 (1995).

23 In this case the "financial statement" submitted by the
24 debtor consisted of a 14 line form credit application. The form was
25 prepared by the bank. The only financial information requested was
26 the name of the debtor's employer, the amount of his monthly income

1 and bank references. The form did not state whether the "income"
2 information requested was gross or net income and did not ask
3 whether the debtor's employment was full or part time. On this form
4 the debtor indicated that he was employed by Farmer's Insurance and
5 had a monthly income of \$14,000. The bank alleges the debtor
6 misrepresented his employment and income because he was unemployed
7 at the time he filed out the application.

8 At his deposition the debtor testified that at the time he
9 submitted his application he was selling insurance for Farmer's
10 Insurance Company on a part time basis. He further stated that
11 since he was in the process of starting a new insurance company he
12 based his monthly income on his average gross monthly income for a
13 similar business for the previous twelve months. Given these facts
14 the court concludes there is insufficient evidence to find the
15 debtor misrepresented his employment and income. Since the bank has
16 failed to prove that the debtor knowingly provided it with false
17 financial information its debt is not exempt from discharge under §
18 523(a) (2) (B).

19 An order and judgment consistent with this memorandum opinion
20 will be entered upon submission of appropriate documents by Mr.
21 Ross.

22 / / / /

23 / / / /

24 / / / /

25 / / / /

26 / / / /

1 This memorandum opinion contains the court's findings of fact
2 and conclusions of law pursuant to Fed. R. Bankr. P. 7052 and they
3 will not be separately stated.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

POLLY S. HIGDON
Bankruptcy Judge