UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
ROBERT W. LLOYD, SR. and JACQUELINE M. LLOYD,	:	Case No. 87-2280-C
		Debtors. :
		Adv. No. 87-0256
NORWEST BANK DES MOINES, N.A.,	:	
Plaintiff,		Chapter 7
v.	:	
ROBERT W. LLOYD, SR.,	:	
Defendant.	:	

- - - - - - - - - - - - - - -

ORDER - TRIAL ON COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On May 16, 1988, a trial was held on the complaint to determine dischargeability of debt. Theodore F. Sporer appeared on behalf of Plaintiff (hereinafter "Bank") and Susan L. Ekstrom appeared on behalf of Defendant.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). The Court, upon review of the pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

FINDINGS OF FACT

1. On April 4, 1986, Defendant executed and

delivered a written promissory note and security agreement to Bank.

2. Defendant represented to Bank that he was purchasing a used 1976 Datsun 280Z for $3,500.00 and wished to borrow money to make the purchase. Defendant advised Bank that he was purchasing the 280Z from a private individual.

3. Bank loaned Defendant $2,500.00 as the loan value on the 280Z. The finance charge was $339.63, and the premium for credit life and disability was $127.49 for a total loan of $2,967.12.

4. Defendant did not make any payments on the note.

5. On June 12, 1986, Bank called Defendant at his home and advised him that he was in default on said note and that he should return the car to Bank because of the default.

6. On July 21, 1986, said 280Z was found in the Financial Center parking lot near Bank's place of business. The car was not drivable and was extensively damaged. Parts were missing, and the upholstery was ripped. The keys were not in the car and Bank was notified that the car was in the parking lot after the car was left there at about 7:54 P.M. on said date. The car was rusty, appeared to be old, and had a value of

approximately $100.00.

7. Bank had previously financed the purchase of another vehicle purchased by Defendant. Defendant had repaid this loan without any problems.

8. On April 7, 1986, Defendant contacted American Family Financial Services of Iowa by phone and stated that he was purchasing a 1980 Oldsmobile Cutlass LS Supreme, 4-door V-8. Defendant gave American Family the mileage of the car, and American Family determined said vehicle had a loan value of $2,825.00. Defendant signed a note and disclosure statement and returned it by mail in the amount of $3,751.56.

9. Defendant did not make any payments on the 1980 Oldsmobile.

10. Representatives of American Family contacted Defendant on June 18, 1986, and advised him that the car should be returned to them since he was in default for failing to make any payments.

11. During the latter part of July 1986, the vehicle was found one morning at American Family's place of business. There was extensive damage to the front end of said vehicle and the interior was very dirty.

12. American Family contacted the previous owner of the vehicle, Bud Mulcahy's AMC-Jeep-Renault, Inc., and determined that Mulcahy had sold the vehicle to Ideal

Auto Sales on December 6, 1985, for $400.00. The sales price was reduced because of the extensive damage to the front end.

13. The 1980 Olds was sold at auction for $405.00 net.

14. On April 9, 1986, Defendant contacted Peoples Finance Company by phone and stated that he was purchasing a 1981 Cadillac Coupe Deville for $8,500.00. A representative of Peoples Finance looked at a 1981 Cadillac and determined it was in "mint" or very good condition. Such a vehicle had a retail value of approximately $8,775.00 and a loan value of $6,900.00.

15. Peoples Finance loaned Defendant $7,544.76 to purchase the vehicle.

16. Defendant did not make any payments on this note.

17. On June 17, 1986, representatives of Peoples Finance contacted Defendant and advised him that he was in default and should return the vehicle.

18. The 1981 Cadillac was not returned immediately but sometime later an employee of Ideal Auto Sales returned a 1981 Cadillac Coupe Deville to Peoples Finance. There was extensive damage to this vehicle, all of which appeared to have existed for a substantial period of time. The 1981 Cadillac returned to Peoples

Finance was not the same vehicle observed by its representative on April 9, 1986.

19. Peoples Finance contacted the prior owner and determined the damage to the returned vehicle existed when it was traded to Bud Mulcahy Motors. The 1981 Cadillac was sold for $1,700.00.

20. Defendant testified that he bought all of the cars in one week and became unemployed after he purchased them. He purchased the 280Z to fix up and sell. He knew Bank would not finance the vehicle if Bank knew it was wrecked. Defendant also testified he did not tell Bank about the condition of the vehicle because he was not asked. He knew the 280Z was not worth $3,000.00 when Bank advised him that the average retail price for such a vehicle was approximately $3,500.00. He could neither remember from whom he purchased the vehicle nor how much he paid for this car. Defendant further testified he had purchased many used cars in the past and had financed the purchase of several of them.

21. On December 4, 1987, Bank filed a complaint alleging that Defendant obtained money, property, and services by false pretenses, false representations, and actual fraud pursuant to 11 U.S.C. 523(a)(2)(A).

22. Defendant filed his answer on December 18, 1987. In said answer, Defendant denied the essential

allegations of the complaint and alleged that said automobile, the collateral involved, was as represented at the time of the execution of the promissory note and security agreement. Defendant further asked the Court to take judicial notice that automobiles depreciate rapidly, and the amount that banks customarily receive from sheriff's sales does not represent the true value of the collateral.

CONCLUSIONS OF LAW

I. Evidence of Other Acts

Rule of 404(b) of the Federal Rules of Evidence provides that evidence of other acts is not admissible to prove the character of a person but it is admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The committee comment to said Rule provides that "evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition."

When a person's conduct is in issue, the fact that

the person engaged in similar conduct on a different occasion at about the same time may be shown as tending to give evidence of intent or some quality of the conduct in question, such as knowledge, motive, and plan. See United States v. Zeidman, 540 F.2d 314, 319 (7th Cir. 1976); United States v. Feinberg, 535 F.2d 1004, 1009 (7th Cir. 1976).

II. Judicial Notice

Defendant asked the Court to take judicial notice of the fact that automobiles depreciate rapidly, and that the amount of recovery banks customarily receive from sheriff's sales does not represent their true value.

Rule 201 of the Federal Rules of Evidence governs the use of judicial notice of adjudicative facts. Pursuant to said Rule, the Court may take judicial notice of those facts which are of such common knowledge that they cannot be reasonably questioned or are capable of certain verification.

It may be reasonably questioned that all automobiles depreciate rapidly and that sheriff's sales do not produce the true value of those items or units being sold. Further, these facts are not capable of certain verification, as so much depends upon the sale involved. Consequently, the Court refuses to take judicial notice of these adjudicative facts.

III. Discussion

Bankruptcy Code section 523 lists 10 exceptions to discharge and provides in relevant part:

> (a) A discharge under section 727... 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).

To prevent discharge because of fraud under section 523(a)(2)(A), a plaintiff must prove actual fraud, not fraud implied in fact. In re Simpson, 29 B.R. 202, 209 (Bankr. N.D. Iowa 1983). The elements of actual fraud include: (1) the debtor made false representations; (2) at the time the representations were made the debtor knew they were false; (3) the debtor made the representations with the intent to deceive the creditor; (4) the creditor relied upon such representations; and (5) the creditor sustained the alleged loss and damages as a proximate result of the false representation. Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987); Simpson, 29 B.R. at

209.

The plaintiff has the burden of proving each of the elements of actual fraud by clear and convincing evidence. Id. Regarding the evidence presented, the Eighth Circuit has stated that it:

> must be viewed consistent with the congressional intent that exceptions to discharge be narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the Code. These considerations, however, "are applicable only to honest debtors."

Van Horne, 823 F.2d at 1287 (citations omitted).

The first two elements of actual fraud are self-explanatory. Concerning the third element, intent to deceive the creditor, the Eighth Circuit recently stated:

> Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred. When the creditor introduces circumstantial evidence proving the debtor's intent to deceive, the debtor "cannot overcome [that] inference with an unsupported assertion of honest intent." The focus is, then, on whether the debtor's actions "appear so inconsistent with [his] self-serving statement of intent that the proof leads the court to disbelieve the debtor."

Id. at 1287-88 (citations omitted).

Although intent to deceive may be inferred from the circumstances of the case, such a finding of intent generally requires a showing that the defendant knew or

should have known of the falsity of his statement. In re Valley, 21 B.R. 674, 679-80 (Bankr. D. Mass. 1982). In assessing the defendant's knowledge and liability for fraud, the court will scrutinize the acumen and experience of the defendant. Matter of Newark, 20 B.R. 842, 857 (Bankr. E.D. N.Y. 1982).

The fourth element of actual fraud is that a creditor's reliance on a false representation must be reasonable. In re Kelley, 51 B.R. 707, 709 (Bankr. S.D. Ohio 1985). The determination of reasonableness is made from a consideration of all the facts and circumstances. In re Martin, 761 F.2d 1163, 1166 (6th Cir. 1985). Relevant facts include the size of the transaction, prior business dealings between the parties, action taken by the creditor to investigate the debtor, and sophistication of the creditor. Id. at 1166-67; see In re Salvatore, 46 B.R. 247, 251 (Bankr. D.R.I. 1984). Reasonable reliance may also be determined by comparing the creditor's normal business practices and the standards of the industry to the existing circumstances. In re Bonefas, 41 B.R. 74, 79. (Bankr. N.D. Iowa 1984).

The fifth and final element, proximate cause, requires that the debtor's action was the act, without which the plaintiff would not have suffered the alleged

loss and damages. Van Horne, 823 F.2d at 1288-1289.

In the case at bar, the evidence is clear and convincing that Defendant made a false representation to Bank when he stated that he was purchasing the 280Z for $3,500.00. Further, Defendant knew this representation was false when he made it.

The evidence is also clear and convincing that Defendant made the representation with the intent to deceive Bank. He knew the Datsun 280Z was not worth $3,500.00, and that Bank would not finance the vehicle if they knew it was wrecked. It becomes clear that the financing of the 280Z was part of a scheme to defraud Bank and finance companies out of monies advanced for the purchase of automobiles and supposedly legitimate motor vehicle purchases: Defendant was very knowledgeable in the procedures and system of automobile financing; the automobiles were all financed within five days; the vehicles were all heavily damaged when financed; no payments were made on any of them; Defendant did not return any of them directly to the financing company; and, they were all delivered to Bank and finance companies in a heavily damaged condition.

Defendant had previously borrowed money from Bank in order to finance the purchase of an automobile. This had been a satisfactory relationship, and Bank reasonably

relied upon Defendant's past credit history with them and his representations as to the purchase of the 280Z. The fact that Bank made it easy for Defendant to commit the fraud does not change the character of his conduct and his intentional wrongdoing.

Finally, there is also clear and convincing evidence that Bank would not have financed the purchase of the 280Z but for Defendant's false representations with the consequent losses.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Defendant obtained the financing and money from the Bank by means of fraud, false pretenses and false representation, pursuant to 11 U.S.C. §523(a)(2)(A).

IT IS ACCORDINGLY ORDERED that Defendant's debt to Bank is nondischargeable.

IT IS FURTHER ORDERED that the Plaintiff, Norwest Bank Des Moines N.A., have judgment against the Defendant, Robert W. Lloyd, Sr., in the amount of $2,660.85, together with interest thereon at the rate of 11.5% per annum from and after September 2, 1987, and the costs of this action.

Dated this _____ day of September, 1988.

_____

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE