UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re	:	**Case No. 97-2951-CH**
	:	
TIMOTHY HOCKEY,	:	**Chapter 7**
	:	
Debtor.	:	
- -	:	
310 COMMUNITY CREDIT UNION,	:	**Adv. No. 97-97208**
	:	
Plaintiff,	:	
v.	:	
	:	
TIMOTHY HOCKEY,	:	
	:	
Defendant.	:	

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ORDER—COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On September 1, 1998, trial was held on the Plaintiff's Complaint to Determine Dischargeability of Debt. Debtor, Timothy Hockey, was represented by attorney Gary R. Hassel; Creditor, 310 Community Credit Union, was represented by attorney David Shinkle. At the conclusion of the trial, the Court took the matter under advisement upon a briefing schedule. Post-trial briefs have been filed and the Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. Timothy Hockey ("Hockey,") was an employee of Firestone Tire Company, and operated his own used car business, "Main Street Auto."

2. Hockey had conducted business with Plaintiff, 310 Community Credit Union ("the Credit Union"), for approximately 14 years prior to Hockey filing a voluntary petition for bankruptcy pursuant to chapter 7 of Title 11 of the United States Code.

3. Hockey regularly bought and sold cars as part of his used car business, and obtained financing through various lending institutions for this enterprise. The Credit Union was one of these institutions. Between January 8, 1986 and December 9, 1993, the Credit Union and Hockey were involved in at least 39 separate loan transactions (Defendant's Exhibits A - NN, inclusive).

4. In most instances, these loans were for the purchase of one or more vehicles, and the vehicles served as collateral for the loans.

5. The documents used to create the loans were either commercial notes and security agreements, or consumer credit transaction forms. Hockey was familiar with both forms of documents and understood the significance and importance of both of them.

6. Signature loans were also available at the Credit Union but this type of loan carried a higher interest rate. Hockey knew this.

7. Commercial loans were for a period not to exceed 90 days and the Credit Union expected to maintain control over the collateral. Hockey knew this.

8. Hockey was always required to furnish the title to vehicles which he purchased, either for resale or for personal use. Hockey historically borrowed from the Credit Union,

purchased a motor vehicle, and then furnished the certificate of title to the Credit Union for purposes of perfection of the security interest on the title. The only time this procedure was not followed was when Hockey sold the motor vehicle and paid off the loan immediately.

9. Most of the time when Hockey sold motor vehicles in his business the motor vehicles were pre-sold. A customer would advise Hockey about the vehicle they wished to purchase and Hockey would locate the vehicle for the customer. This was usually done at auction. Hockey would purchase a motor vehicle at auction and the next day would appear at the credit union with the vehicle identification number. Hockey would then take the proceeds from the loan and pay off the auction purchase price. The title would then be issued to Hockey and it was his responsibility to get it to the financing entity for purposes of perfection of their security interest on the title.

10. On December 9, 1993 Hockey signed a credit application with the Credit Union. (Exh. 1). Hockey requested $9,080.00 to purchase two vehicles, a 1987 Toyota X-Cab 4 WD and a 1984 Chevrolet 4 WD Blazer. Hockey signed this application "Tim K. Hockey."

11. The note and disclosure statement (Exh. 2) was prepared on Plaintiff's consumer credit transaction form. The vehicles were described as collateral for the loan, and the term of the loan was 36 months. Monthly payments were scheduled to begin on January 23, 1994. The final payment was due on December 23, 1996. Hockey signed this note and disclosure as "Tim K. Hockey" as the borrower and "Tim K. Hockey dba Main Street Auto" as the owner of the collateral. He also signed "Tim K. Hockey" as the signature of the borrower eligible for credit insurance.

12. The Note and Disclosure Statement for the loan contained the following language: "You promise not to sell . . . the property . . . until your loan with the Credit Union is repaid . . . . [Y]ou promise to have the Credit Union's security interest shown on the title . . . ."

13. Hockey also signed an insurance requirement notification on December 9, 1993. Hockey knew that the insurance premiums would be more expensive if insurance was purchased by the Credit Union; liability coverage would not be furnished; his payments would be increased; and, if the Credit Union provided the insurance it could affect his eligibility for further loans. (Exh. 3)

14. Hockey signed two blank applications for notation of security interest on the same day (Exh. 7). An application was signed for each vehicle so the security interest could be noted on each of the title certificates when they were received by the credit union.

15. Two drafts were issued by the Credit Union on the same day, to-wit: December 9, 1993 (Exhs 8 & 9). One draft was in the amount of $5,240.00 payable to Tim K. Hockey, personally, and Dealer's Choice Auto Auction for the purchase of a 1987 Toyota X-Cab 4WD. (Exh 8). The second draft was in the amount of $3,840.00 payable to Tim K. Hockey, personally, and Dealer's Choice Auto Auction for the purchase of 1984 Chevy Blazer 4WD. (Exh. 9).

16. The vehicles were never used for personal use and were resold by Hockey. Hockey testified at the trial that he did not know the sale date of the vehicles. He testified that the sale occurred within one year but he did not know if it occurred within six months. Hockey testified in his deposition on April 2, 1998 that he sold the vehicles right after he got them. (Deposition p. 23, ll 11-12).

17. Hockey never presented the certificates of title to the Credit Union so the Credit Union's lien could be noted on the certificates. He did not use the proceeds to pay off the loan.

18. Hockey was employed at Firestone Tire. The union at Firestone Tire was on strike. Some of the workers were back at work in July 1996. On January 15, 1996 the Credit Union sent Hockey a Notice to Cure Default. (Exh 4) As a result of this notice Hockey came into the Credit Union and arrangements were made to cure this default. Hockey did not advise the Credit Union in these discussions that he had already sold both motor vehicles.

19. The Credit Union discovered that it did not have the certificates of title on July 18, 1996. The Credit Union contacted Hockey immediately and Hockey advised them that he had the certificates and that he would bring the certificates of title to them. Hockey never brought in the certificates of title even after promising to do so on at least three more occasions when requests were made by the Credit Union.

20. Hockey signed an insurance requirement notice on December 9, 1993 in which he acknowledged that he would provide full coverage insurance on the two vehicles. Hockey did not comply with this requirement. The Credit Union provided the insurance on the vehicles and charged Hockey for this coverage. The Credit Union had several conversations with Hockey about this arrangement as this type of coverage is more expensive than if Hockey provided the insurance himself. During these conversations Hockey indicated that he still had the vehicles and never disclosed that the vehicles had been sold. He was willing to pay a higher premium for the forced place insurance so that he would not have to disclose that the vehicles had been sold.

21. Hockey filed a voluntary petition on June 24, 1997, pursuant to Chapter 7 of Title 11 of the United States Code. 310 Credit Union was scheduled as a creditor holding unsecured nonpriority claims.

DISCUSSION

The issue is the dischargeability of Hockey's debt to the Credit Union under 11 U.S.C. § 523(a)(2)(A). The Credit Union seeks to have the debt owed by Hockey declared nondischargeable. Hockey argues that the debt was not fraudulently incurred, and should therefore be dischargeable. The Code section at issue provides:

> § 523. Exceptions to discharge.
>
> (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, 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 insiders financial condition . . . .

11 U.S.C. § 532(a)(2)(A).

The standard of proof under § 523 is a preponderance of the evidence. See Grogan v. Garner, 489 U.S. 279, 286-87 (1991).

The creditor must prove the following elements to prevail under §523(a)(2)(A):

> (1) the debtor made false representations;
> (2) at the time made, the debtor knew them to be false;
> (3) the representations were made with the intention and purpose of deceiving the creditor;
> (4) the creditor justifiably relied on the representations; and,
> (5) the creditor sustained the alleged injury as a proximate result of the representations having been made.

In re Van Horne, 823 F.2d 1285, 1287 (8th Cir.1987), as modified by Field v. Mans, 516 U.S. 59, 74-75, 116 S.Ct. 437, 446, 133 L.Ed.2d 351 (1995) (holding that §523(a)(2)(A) requires "justifiable, but not reasonable, reliance").

The first three elements may be considered together by asking whether Hockey knowingly made false representations with the intention and purpose of deceiving the Credit Union.

In executing the loan documents for the December 9, 1993 loan, Hockey represented that the vehicles would serve as security for the loan, just as he did for every other loan with the Credit Union. The Credit Union asserts, and the Court accepts, that it would not have made the loan in question had it not been secured by the vehicles to be purchased. The question is, then, whether Hockey intended to convert the collateral and retain the proceeds at the time the loan was executed.

The Debtor's alleged fraud must have existed at the time the debt was incurred to provide a basis for excepting a debt from discharge, In re Scarlata, 127 B.R. 1004 (N.D. Ill.1991), aff'd, 979 F.2d 521 (1992). "A mere promise to be executed in the future is not sufficient to make a debt dischargeable, even though there is no excuse for the subsequent breach." In re Homer, 45 B.R. 15 (Bankr. W.D. Mo. 1984) (citing 1A L. King, Collier on Bankruptcy ¶ 17.16, pp. 1638-39 (15th ed. 1976)). A breach of contract is not necessarily a misrepresentation for purposes of § 523(a)(2)(A). Leeb v. Guy (In re Guy), 101 B.R. 961, 978 (Bankr. N.D. Ind. 1988). Without proof of intent, mere breach by the Debtor of his loan agreement with the Credit Union does not establish misrepresentation at the time that the Debtor entered into the contract.

The question for purposes of a fraud analysis is whether or not Hockey intended to sell the security without permitting the Credit Union to perfect its security interest on the certificates of title and retain the proceeds from the sale of the autos at the time the loan transaction was entered into. Direct proof of intent is nearly impossible to obtain, so a creditor may present evidence of the surrounding circumstances from which intent may be inferred. In re Van Horne, 823 F.2d 1285, 1287 (8th Cir.1987).

In resolving what was said and intended when Hockey and the Credit Union entered into the transaction on December 9, 1993, the court must look at the facts and circumstances surrounding the transaction since the direct testimony is antithetical.

Hockey is very sophisticated in the financing and purchase of used motor vehicles. He has dealt with the Credit Union for several years and knows and understands its business practices. He also knew and understood the significance of his being a member of the Credit Union and its benevolent attitude towards its members.

The court accepts as true the testimony of the representatives of the Credit Union that Hockey stated that the two motor vehicles were being purchased for personal use and were not being purchased for resale. The court finds that Hockey was deceptive on December 9, 1993 in that he knew he was purchasing the vehicles for resale and either had buyers for the vehicles at the time or was reasonably assured that he could sell the vehicles within a very short period of time. Hockey did this to obtain the benefits of a consumer credit transaction rather than the short term nature of a commercial note, and so that he could sell the vehicles without a security interest being noted on the certificates of title.

This deception was perpetuated when Hockey permitted the Credit Union to force place insurance on the vehicles with the understanding that the vehicles were in Hockey's possession. Hockey was not concerned about liability insurance because he had already sold the vehicles.

This deception was also perpetuated when the Credit Union asked Hockey to bring in the certificates of title so its security interest could be noted on the title certificates. Hockey repeatedly told the Credit Union that he had the certificates of title and would bring them in.

If Hockey thought that the Credit Union had made a mistake as to the nature of the transaction on December 9, 1993, he had ample opportunity to correct the mistake but he never

did. Rather, Hockey continued the deception and permitted the Credit Union to continue in its belief that this was a consumer loan transaction and Hockey still had possession of the vehicles.

This deception also caused the Credit Union to lower its guard regarding the delivery of the title certificates.

The court concludes that the Credit Union has shown be a preponderance of the evidence as follows:

(1) Hockey made false representations to the Credit Union on December 9, 1993. He falsely represented that he was purchasing these vehicles for his own use and that he would bring the certificates of title in so that the Credit Union could note its security interest on the certificates.

(2) Hockey knew these representations were false when he made them.

(3) These representations were made with the intention and purpose of deceiving the Credit Union.

(4) The Credit Union justifiably relied upon these representations. The Credit Union could rely upon it past dealings with Hockey and reasonably expect him to bring in the certificates of title or pay off the loans immediately as Hockey had done in the past.

(5) The Credit Union sustained injuries as a proximate result of Hockey's false and deceitful statements because the Credit Union lost its position as a secured creditor when Hockey sold the vehicles without any notation on the certificates of title that the Credit Union had a security interest in the vehicles.

ORDER

IT IS THEREFORE ORDERED that Timothy Hockey's debt to 310 Community Credit Union is excepted from discharge pursuant to § 523(a)(2)(A).

FURTHER, 310 Community Credit Union shall have judgment against Tim K. Hockey in the amount of $6,327.20, plus interest at the legal rate from June 24, 1997, and the costs of this proceeding.

Dated this _____ day of June, 1999.

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RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT