UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of DANIEL DEWEY SWANSON, aka DANIEL B. SWANSON and DANA ANN SWANSON aka DANA SEESTEDT, Debtors.	:	Case No. 92-2774-C Chapter 7
MERCANTILE BANK OF ILLINOIS, N.A., Plaintiff, v. DANIEL B. SWANSON, Defendant.	:	Adv. No. 92-92238

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ORDER--COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On November 9, 1993, trial was held on the Complaint to Determine Dischargeability of Debt filed by Mercantile Bank of Illinois, N.A. Plaintiff, Mercantile Bank of Illinois, N.A. (Bank), was represented by G. Mark Rice. Defendant, Daniel B. Swanson, was represented by David A. Morse. At the conclusion of the trial, briefing deadlines were set and the matter was taken under advisement. Post-trial briefs have been filed and the matter is now considered fully submitted.

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

FINDINGS OF FACT

1. On or about March 5, 1992, Swanson completed and returned a MasterCard Reservation Certificate sent to him by the Bank. The application was unsolicited by Swanson.

2. Swanson stated on the application that he was employed by DeMar Medical and stated his gross monthly income as $6,000 per month.

3. Subsequently, the Bank issued a Mercantile card to Swanson with a credit limit of $5,000.

4. At the time he applied for the Mercantile card, Swanson owned a number of credit cards amounting to approximately $50,000 in credit card debt. Swanson testified that at the time he applied for the Mercantile card he had no past-due balances on his other accounts.

5. Approximately one month later, Swanson obtained a $4,500 cash advance on the Mercantile card.

6. Swanson testified that he used the majority of the cash advance to make an $8,500 payment on a 1991 federal tax debt in the amount of $14,000. Swanson had been aware for six to eight months of this debt which resulted from capital gains from the previous sale of his home. Swanson had arranged with the IRS to make a payment which would allow him to establish a payment plan on the remaining debt. The IRS gave Swanson a deadline to pay a portion of the debt. Failure to meet this

deadline would have jeopardized Swanson's wife's employment with the IRS.

7. In June 1992, Swanson lost a major sales account, Great Lakes Orthopedic, which resulted in a substantial decrease in his income. Swanson testified that he had expected income related to this account to continue. Swanson was unable to replace the account.

8. In June 1992, Swanson's contract for his home was forfeited.

9. In June or July 1992, Swanson obtained financing for two automobiles. Swanson found it necessary to replace the cars he presently owned upon learning that they were in need of substantial repairs. As a salesman, Swanson depended on his car for transportation.

10. The Bank received from Swanson minimum monthly payments on the Mercantile card for the months of April, May, and June.

11. Debtors filed voluntary petitions for relief under Chapter 7 on September 9, 1992.

DISCUSSION

11 U.S.C. § 523(a) excepts from discharge 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.

In order to hold a credit card debt nondischargeable under § 523(a)(2)(A), the creditor must show that 1) the debtor knowingly made a false representation; 2) the debtor intended to deceive the creditor; and 3) the creditor relied upon the false representation. Matter of Stewart, 91 B.R. 489, 494 (Bankr.S.D.Iowa 1988) (citations omitted). These elements must be proven by a preponderance of the evidence. Grogan v. Garner,___ U.S.___, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Courts have recognized that the use of a credit card is an implied representation to the issuer that the holder has both the ability and the intention to pay for the purchases and the advances. Stewart, 91 B.R. at 494. Additionally, intent to deceive may be inferred when the card holder knew or should have known that the card holder was insolvent and had no ability to pay, although insolvency alone does not establish intent. Id. Although a creditor must prove reliance upon the false representation, the Eighth Circuit has held that the creditor need not prove that such reliance was reasonable. In re Ophaug, 827 F.2d 340, 342-43 (8th Cir. 1987).

In this case, the Court finds that the Debtor knowingly made a false representation. This is implied by the use of the Mercantile card by Swanson to obtain a cash advance. Therefore, the first element has been satisfied. Likewise, the

third element has been proven by a preponderance of the evidence. The Bank relied upon the use of the card as a representation that the Debtors could pay the debt. The Bank need not prove this reliance was reasonable.

However, the second element is more difficult in this case.

Several factors have been established that should be considered when determining intent to deceive:

> 1) the length of time between making the charges and filing bankruptcy; 2) the number of charges; 3)the amount of charges; 4) whether the charges were above the credit limit on the account; 5) a sharp change in the buying habits of the debtor; 6) whether charges were made in multiples of three or four per day; 7) whether charges were less than the $50.00 floor limit; 8) the financial condition of the debtor was hopelessly insolvent when the charges were made; 9) whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made; 10) the debtor's employment circumstances; and 11) the debtor's prospects for employment.

Stewart, 91 B.R. at 495 (citations omitted).

In this case, Swanson obtained the cash advance approximately five months before filing for bankruptcy. This was the only charge made to the card and was for $4500, well within the $5000 credit limit. As this was the first charge to the card made shortly after receiving it, Swanson had no prior history of charging habits with this Bank. However, at the time he applied for the Mercantile card Swanson owed approximately $50,000 in credit card debt, some of which was

apparently quite longstanding. Therefore, the $4500 cash advance does not appear to constitute a change in Swanson's buying habits. Swanson did not consult with an attorney regarding bankruptcy until August 1992.

The Bank contends that Swanson was insolvent at the time of the cash advance as he could not pay off his debt to the IRS. However, insolvency alone is not enough to establish intent to deceive. Swanson was attempting to make a payment on part of the tax debt in order to reduce the debt enough to allow him to establish a payment plan. Swanson was not in default on any of his credit card debts and was earning sufficient income to make his monthly expenses. In fact, Swanson made monthly minimum payments to the Bank on the cash advance. The situation was not yet hopeless. It was two months later, when Swanson lost a substantial account in his sales business, that Swanson began to default on debts and forfeited the contract on his home.

Therefore, taking all of the factors into account and given the credibility of the Debtor, the Court finds that the Bank has failed to prove by a preponderance of the evidence that Swanson intended to deceive the creditor when he obtained the cash advance. Accordingly, the Court holds that the debt in question is not excepted from discharge pursuant to § 523(a)(2)(A).

ORDER

IT IS THEREFORE ORDERED that the credit card debt owed to Mercantile Bank of Illinois is not excepted from discharge pursuant to § 523(a)(2)(A).

Dated this 5th day of January, 1994.

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RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE