Decision was rendered prior to U.S. Supreme court's adoption of a preponderance of the evidence standard for the burden of proof in dischargeability determination.s Grogan v. Garner, ___U.S.___, 111 S.Ct. 654, 112 L.Ed. 2d 755 91991).

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

KELLY P. DEWULF,
KATHRYN C. DEWULF,

Debtors.

Case No. 87-1579-D J

STEVEN K. ROHLING,
dba Wheatland Mill &
Elevator Co.,

Plaintiff,

Adv. Pro. No. 87-0178

Chapter 7

KELLY P. DEWULF,
KATHRYN C. DEWULF,

Defendants.

MEMORANDUM OF DECISION

On June 21, 1988 in Davenport, Iowa, the court conducted a trial on plaintiff Steven K. Rohling's complaint to determine dischargeability of debt. Thomas J. Yeggy appeared on behalf of the plaintiff (Rohling). Michael L. Roeder appeared on behalf of the defendants (DeWulf).

This is a core proceeding pursuant to 28 U.S.C. section 157(b)(2)(I). Based on the testimony of the witnesses, the documents entered into evidence, and the parties' written and oral arguments, the court makes the following findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 .

FACTS

Rohling owns and operates the Wheatland Mill & Elevator Company located in Wheatland, Iowa. Mr. DeWulf, a local

farmer, stored grain and purchased supplies at Rohling's elevator. The present dispute arises from the parties' dealings in 1985 and 1986.

When a producer delivers grain to an elevator for storage, the elevator issues a warehouse receipt. The receipt constitutes a record of the type, grade and amount of grain the producer delivered for storage. Receipts are important to producers participating in government subsidy programs because producers pledge receipts as security for Commodity Credit Corporation (CCC) loans. Before the CCC will make a loan on stored grain, it must have a superior lien on the grain. This usually means that the elevator must waive its warehouse operator's lien or that the producer must pay storage costs in advance.

Grain containing moisture above a certain level must be dried before it can be stored. Typically, elevators provide grain drying services. Drying expenses and storage expenses are the two primary costs a producer will incur when storing grain. Storage expenses are calculated on a charge per bushel basis.

In the fall of 1985 DeWulf delivered corn to Rohling's elevator for storage. DeWulf incurred drying and storage expenses. Rohling permitted DeWulf to pay these charges in monthly installments as had been done in prior years. He also issued DeWulf a lien waiver so that DeWulf could obtain a government loan on his 1985 crop. Over the course of the

1985 crop year, DeWulf was late with his monthly payments on four occasions.

In August of 1986 DeWulf elected to place his 1985 corn in the three-year reserve. DeWulf told Rohling that he would pay storage fees from government payments he received for entering into the reserve program. After obtaining a lien waiver from Rohling, DeWulf entered into the reserve program and applied the program proceeds to storage costs.

The downward spiral in the farm economy and problems with delinquent accounts prompted Rohling to change his credit policies in 1986. He decided that with respect to government program loans, storing and drying charges had to be paid before he would issue warehouse receipts. DeWulf wanted to store his 1986 crop at the elevator and use the crop as security for a CCC loan.

The parties dispute when DeWulf became aware of the credit policy change. Rohling claims he first verbally informed DeWulf about the change when DeWulf began delivering 1986 grain in October of 1986. Rohling never notified DeWulf in writing of the change. Records show that Rohling began releasing his liens on DeWulf's 1986 corn as early as October 20, 1986. Counter tickets sent to DeWulf on his account dated as early as October 24, 1986 show that the elevator was charging advance storage fees. DeWulf stated that he did not find out about the

change until December, 1986 when he received a year-end statement.

As of November 11, 1986 DeWulf had incurred over $23,000.00 in drying and storage charges. Rohling waived his lien on the 1986 crop so that DeWulf could participate in the 1986 government loan program. Rohling testified that he agreed to waive the lien on condition that the drying and storage charges would be paid out of government loan proceeds. Diane Jones, an elevator employee, stated that DeWulf told her that he would pay when he received his check from the government. DeWulf admitted telling Rohling that a payment would be made from loan proceeds but testified that when he stated "Payment", he meant one month's payment rather than a full yearly payment. He also testified that he expected to pay the balance of the bill from the sale of cattle and grain. According to DeWulf, disease and drought reduced cattle and grain income respectively and in turn prevented him from making the payment. DeWulf received a government program check in the amount of $113,000.00 in November, 1986. DeWulf used the money to pay other creditors. He paid $1,000.00 on the Rohling account on March 13, 1987. The DeWulfs filed a petition for relief under Chapter 7 on June 12, 1987.

DISCUSSION

Rohling claims that DeWulf agreed to pay for drying and storage of 1986 corn out of 1986 government loan proceeds and that in reliance on this statement, Rohling released his lien on the crop so that DeWulf could participate in the

1986 program. Rohling further maintains that DeWulf never paid him from the loan proceeds and had no intention of doing so when he made the statement.

11 U.S.C. section 523(a)(2)(A) provides:

> (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;

This provision expressly excludes statements regarding a debtor's financial condition. In re Roberts, 54 B.R. 765, 770 (Bankr. N.D. 1985). Since the statements at issue here do not concern the debtor's financial condition, resolution of the dispute is governed by the provision.

Exceptions to discharge are construed narrowly in favor of the debtor. In re Black, 787 F.2d 503, 505 (10th Cir. 1986); In re Schnitz, 52 B.R. 951, 955 (W.D. Mo. 1985). The party challenging the dischargeability of a debt must prove by clear and convincing evidence that the debt is nondischarqeable. Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987). Matter of Hyers, 70 B.R. 764, 769 (Bankr. M.D. Fla. 1987). For a debt to be nondischargeable under section 523(a) (2)(A), the plaintiff must prove that: (1) the debtors made

false representations; (2) at the time the representations were made the debtors knew they were false; (3) the debtors 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. Van Horne, 823 F.2d at 1287.

A "false pretense" involves conduct intended to create and foster a false impression as opposed to "false representation" which is an express misrepresentation. In re Faulk, 69 B.R. 743, 750 (Bankr. N.D. Ind. 1986). Implied fraud, which may arise in the absence of bad faith or immorality, is insufficient to sustain a dischargeability challenge. In re Black, 787 F.2d 503, 505 (10th Cir. 1986); In re Tracton, 73 B.R. 627, 630 (Bankr. S.D. Fla. 1987). Rather, a showing must be made that the debtor acted with moral turpitude or intentional wrong. In re Hunter, 780 F.2d 1577, 1579 (llth Cir. 1986); In re Maranzino, 67 B.R. 394, 397 (Bankr. D. Kan. 1986). Finally, a promise to pay, standing alone, is not a statement actionable under section 523(a)(2)(A). In re Schmidt, 70 B.R. 634, 639-640 (Bankr. N.D. Ind. 1986); In re Emery, 52 B.R. 68, 70 (Bankr. E.D. Pa. 1985).

Under these authorities, the court finds that Rohling has failed to satisfy his burden. It is undisputed that DeWulf told Rohling that drying and storage costs would be

paid from loan proceeds. However, each had a different idea as to how much Rohling would be paid from proceeds. believed that the charges would be paid on a monthly installment basis as in 1985 and that the proceeds would be used to pay the November 1986 installment. DeWulf planned to pay the balance from farm income. Rohling, on the other hand, expected that the entire bill would be paid from proceeds in accordance with his change in credit policy. Rohling's case might have been stronger had he clearly shown that DeWulf knew of the policy change prior to the releasing of the lien. He has not done so. The only physical evidence Rohling adduced in support of his position are counter tickets showing that advance storage costs were being charged on 1986 corn. The earliest of such tickets are dated October 24, 1986. However, Rohling began releasing liens as early as October 20, 1986. The significance of these circumstances is that DeWulf and Rohling entered into their oral agreement prior to the time Rohling's view of the agreement was evidenced by any writing. Hence, there is no reason to discount DeWulf's testimony that he construed the agreement to mean that loan proceeds would be used to pay the November 1986 installment rather than his entire obligation.

Even assuming that the debtor had made false representations and at the time the representations were made knew they were false, the court cannot find that DeWulf made the

representations with the intent to deceive. Direct proof of intent is almost impossible to obtain, so consequently, a creditor may present evidence of surrounding circumstances from which intent can be inferred. Van Horne, 823 F.2d at 1287. The evidence shows that at best this dispute is the result of an unfortunate misunderstanding between the parties. No doubt the dispute could have been avoided entirely had Rohling reduced his change in credit policy to writing. Absent such a writing and in light of Rohling's credit policy in 1985, the court must conclude DeWulf acted without deceitful intent.

CONCLUSION

Based on the foregoing discussion, the court concludes that Rohling failed to prove by clear and convincing evidence that the debt is nondischargeable under 11 U.S.C. section 523(a)(2)(A). The debt in issue is dischargeable.

An appropriate order will be entered.

Signed and dated this 25th day of August, 1988.

LEE M. JACKWIG
CHIEF U.S. BANKRUPTCY JUDGE