UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

RONNIE CARL PHILLIPS and
LISA LYNN PHILLIPS,

Chapter 7
Case No. 89-11300-K

Debtors.

CHEVY CHASE FEDERAL SAVINGS BANK,

Plaintiff,

VS.

Adversary Proceeding
No. 89-0326

RONNIE CARL PHILLIPS and
LISA LYNN PHILLIPS,

Defendants.

ORDER RE "COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT"

Plaintiff, Chevy Chase Federal Savings Bank ("Bank"), seeks to except its particular debt from the general discharge of the above-named debtors, defendants, Ronnie Carl Phillips ("Mr. Phillips") and Lisa Lynn Phillips ("Mrs. Phillips") (collectively as "Debtors"), under 11 U.S.C. §523(a)(2)(A) and (B).[1] This proceeding was heard on May 24, 1990.

INTRODUCTION

Specifically, the Bank seeks to except from the debtors' general discharge a $10,095.08 debt which arises out of cash advances on a credit card account. It is alleged by the Bank that the debtors falsely stated their annual income on the June 21, 1988 telemarketing application as $42,000.00 per year and $23,500.00 per year for Mr. and Mrs. Phillips respectively. Bank essentially contends that the $10,000.00 credit card limit would not have been given to the debtors but for the misstatements of income.

[1]This is a core proceeding by virtue of 28 U.S.C. §157(b)(2)(I).

DISCUSSION

11 U.S.C. §523(a)(2)(A) and (B) provide as follows:

> "(a) A discharge under section 727, 1141, 1128(a), 1228(b), or 1328(b) 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;
>
> "(B) use of a statement in writing -
>
> "(i) that is materially false;
>
> "(ii) respecting the debtor's or an insider's financial condition;
>
> "(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> "(iv) that the debtor caused to be made or published with intent to deceive"

Ms. Norma R. McDonald, a employee of the Bank for approximately four years ("Ms. McDonald"), testified about the sequence of events that gave rise to the debtors' $10,000.00 credit card limit. Her direct testimony disclosed that an initial credit check was made by the Bank approximately two to three months prior to a "telemarketing application" being taken orally over the phone on June 21, 1988. Subsequently, a second credit check was made upon receipt of the "telemarketing application".

On cross examination, Ms. McDonald revealed that the Bank relies more on the second credit check than the first, but relies still more on the "telemarketing application" than the second credit check. Finally, Ms. McDonald testified that the debtors' account was opened on July 6, 1988.[2]

[2]Exhibit 1 and the proof indicate that the "telemarketing application" was taken on June 21, 1988, from Mrs. Phillips.

By virtue of 11 U.S.C. §523(a)(2)(B), a writing is required for the plaintiff to prevail under this subsection. Because the instant situation involved oral information taken over the phone instead of a writing respecting the debtor's financial condition, the Bank's complaint based on §523(a)(2)(B) must fail, as proof of each element is essential. In re Martin, 761 F.2d 1163 (6th Cir. 1985).

In turning to the Bank's alternate theory of recovery under §523(a)(2)(A), this court is mindful of the requisite elements as set forth in In re Ward, 857 F.2d 1082, 1083 (6th Cir. 1988), as follows:

> "To except a debt from discharge under §523(a)(2)(A), a creditor must prove the following elements set forth in In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986):
>
> " `[T]he creditor must prove that the debtor obtained money through a material misrepresentation that at the time the debtor knew was false or made with gross recklessness as to its truth. The creditor must also prove the debtor's intent to deceive. Moreover, the creditor must prove that it reasonably relied on the false representation and that its reliance was the proximate cause of loss. In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985); In re Hagedorn, 25 B.R. 666, 668 (Bankr. S.D. Ohio 1982); 3 Collier On Bankruptcy, ¶523.08[4] (15th ed. 1985)."

Assuming arguendo that all the other elements of 11 U.S.C. §523(a)(2)(A) are met, this court will focus on the intent to deceive element therein. It is undisputed that Mrs. Phillips' income, as reflected on the "telemarketing application" was accurate; therefore, the very narrow issue remaining is whether the debtors intended to deceive the Bank regarding Mr. Phillips' income.

Mr. Phillips testified, inter alia, that he was not sure whether he talked to the telemarketing representative or not, but if he had, he would have told the individual that he expected to earn $42,000.00 per year. Mr. Phillips explained that 1988 was his first full year to operate "Hawk's Used Cars". Based on the business accounts receivable, etc., Mr. Phillips' CPA projected his annual income to be $42,000.00 per year and accordingly recommended that Mr. Phillips pay $1,500.00 per quarter as estimated federal tax liability.

Based on the testimony adduced at trial, this court finds that the Bank has not, by clear and

convincing evidence,[3] shown that the debtors acted with the requisite intent to deceive. At the time Mr. Phillips believed that he would earn $42,000.00 per year, although admittedly it turned out later that he did not. Even broken promises do not give rise to nondischargeable debts. Mr. Phillips' estimated income was not made with gross recklessness as to its truth. Intent will not be inferred here. Exceptions to the operation of a bankruptcy discharge are strictly construed against the objector and liberally in favor of the debtor. Gleason v. Thaw, 236 U.S. 558 (1915). The general philosophy of the laws of Congress relating to bankruptcy is to give the honest but unfortunate debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. Lines v. Frederick, 400 U.S. 18, 19 (1978), quoting Local Loan Co. v. Hunt, 292 U.S. 23, 244 (1933). A false representation or false pretense under §523(a)(2)(A) must be of a kind involving moral turpitude or intentional wrong. Fraud implied in law which may exist without imputation of bad faith or immorality is insufficient. See, e.g., Neal v. Clark, 95 U.S. 704 (1887); 3 Collier On Bankruptcy ¶523.08 [4], p. 523-39 (15th ed.).

Based on the foregoing and a totality of the particular facts and circumstances, the Bank's complaint seeking an exception to the discharge of its particular debt is hereby denied.

IT IS SO ORDERED:

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DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE

DATE: June 5, 1990

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[3] In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986).

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