UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

BARBARA J. McGHEE, Case No. SG 99-01947
Chapter 7

Debtor.
______________________________________/

AMERIBANK, Adversary Proceeding
No. 99-88203

Plaintiff,

v.

BARBARA J. McGHEE,

Defendant.
______________________________________/

NOT FOR PUBLICATION

NOTICE: It is the policy of the United States Bankruptcy Court for the Western District of Michigan that its unpublished bankruptcy opinions and/or orders shall not be cited or used as precedent except to support a claim of res judicata, collateral estoppel or law of the case in any federal court within this Circuit.

OPINION

The principal issue before this court is whether certain activities of the Debtor, Barbara J. McGhee (McGhee or Debtor) and the debt arising therefrom should be deemed nondischargeable pursuant to 11 U.S.C. §523(a)(2)(B) of the Bankruptcy Code. For the following reasons this court concludes that the debt is not dischargeable.

The nondischargeability claim presented in this adversary proceeding arises in a case referred to this court by the Standing Order of Reference entered by the United States District Court for the

Western District of Michigan on July 24, 1984. This court has jurisdiction over this case pursuant to 28 U.S.C. §1334(b). This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). Accordingly, the bankruptcy court is authorized to enter a final judgment subject to the appeal rights afforded by 28 U.S.C. §158 and Fed. R. Bankr. P. 8001 et. seq.

The following constitutes the court's findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052. In reaching its determinations, this court has considered the demeanor and credibility of all witnesses, the exhibits properly admitted into evidence and the parties' briefs and closing arguments.

Facts

In August of 1998, someone identifying themselves as Barbara McGhee, contacted Kool Chevrolet by telephone in order to purchase a vehicle. This person explained to the salesman since he had sold her now-deceased husband a van several years before, she hoped that he would help her find a suitable vehicle. The salesman[1] took all personal, employment and credit information over the telephone and proceeded within the next few weeks to locate a car that both fit the caller's needs and, based upon the information he had, was one she could afford.

Meanwhile, the Debtor, apparently unaware of the events going on at the car dealership, was contacted by her daughter Vicky. Vicky asked her mother to co-sign on a car loan. McGhee was aware that her daughter, like herself, did not have a good credit rating. In fact, Vicky had recently had a car repossessed. Vicky also had a criminal record, having been convicted of forgery in 1996 or 1997. Yet, when Vicky called her mother to co-sign on the loan, the Debtor felt certain that her

[1]During his testimony, the bank officer explained that the car dealership acts as the Bank's agent in that it takes the information, verifies it and protects the Bank's interests.

daughter would do nothing illegal while the Debtor's name was on the credit application. Consequently, McGhee agreed to go to the car dealership with her daughter to help her purchase a car.

On the appointed day, Vicky picked up the Debtor (who does not presently nor has ever possessed a driver's license) and took her to the dealership. There, the salesman showed McGhee the credit application completed with the information received over the phone, and a promissory note. He requested she sign them. Even though McGhee noticed that Vicky's name and credit information did not appear anywhere on the credit application and realized that the car dealership would be looking exclusively to her for payment, McGhee voluntarily signed both the credit application and the promissory note. Vicky gave the salesman the down-payment check and drove herself and McGhee away in the car.

The credit application given over the phone by the mysterious stranger, later determined to be Vicky, was peppered with misrepresentations. Among the incorrect entries were McGhee's social security number, her length of service at her job, her income and her marital status (she had never been married). It also falsely stated she had a pension, a bank account and no creditors when in fact there was no pension, no bank account and a plethora of creditors. McGhee knew all of this when she signed the promissory note but considered it a "miracle" that anyone would lend her money based on her poor credit.

Shortly thereafter the down payment checked bounced. No car payments were ever made and the car was ultimately located, repossessed and sold. McGhee filed bankruptcy under chapter 7 on March 11, 1999.

Ameribank (Bank) requests that a deficiency of $6581.88 plus attorney's fees be declared nondischargeable under 11 U.S.C. §523(a)(2)(B). The Debtor argues that the Bank did not reasonably rely on the credit application and therefore it cannot prove all the elements of §523(a)(2)(B).

Discussion

11 U.S.C. §523(a)(2)(B) states:

> (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 –
>
> (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;

Consequently, in order to prevail in a nondischargeability action under 11 U.S.C. §523(a)(2)(B), the Bank must prove by a preponderance of the evidence[2] that: 1) there was a

[2] Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

statement in writing; 2) the statement was materially false; 3) the statement reflected McGhee's financial condition; 4) the Bank reasonably relied on the statement and 5) McGhee caused the statements to be made with the intent to deceive. First National Bank of Centerville v. Sansom, 142 F.3d 433 (6th Cir. 1998). An injury element is no longer required. In re Plechaty, 213 B.R. 119 (B.A.P. 6th Cir. 1997).

Statement in Writing

There is no dispute that there was a statement in writing.

Material Falsity

It is a basic tenet of contract law that a person who has the capacity and opportunity to read a contract cannot avoid the contract if he signs without reading it. See Collier v. Stebbins, 236 Mich. 147, 210 N.W. 264 (1926). "Mere failure to read an agreement, unaccompanied by other facts indicating fraud, artifice, or deception, is not enough to avoid a contract." Vandendries v. General Motors Corp., 130 Mich. App. 195, 343 N.W.2d 4 (1983), Saginaw Medicine Co. v. Lee, 226 Mich. 561, 198 N.W. 200 (1924), Upton v. Tribilcock, 91 U.S. 45, 23 L.Ed. 203 (1875).

McGhee claims that the credit application and promissory note that she signed were flashed in front of her and not explained line by line. She did, however, see enough of it to notice that certain entries were untrue. In her testimony, she freely admitted that the social security number, marital status, length of employment and hourly wage were among the falsehoods. Yet, she did not object to signing the papers nor did she later inform the car dealership of the deception played upon them. By her own admission, the credit application was riddled with prevarications. Accordingly, we find that the statement in writing provided by the Debtor to Kool Chevrolet was materially false.

Reflection of Financial Condition

Even though the financial statement was initially submitted by Vicky, once the Debtor realized it was intended to reflect her own financial condition, and signed it, she incorporated it as her own. Therefore, there is no dispute that the financial statement provided to the car dealership, albeit grossly misstated, was intended to reflect McGhee's financial condition.

Reasonable Reliance

The Bank ran several credit checks. According to the testimony of the bank executive in charge of the loan account, the computer first checks under the name given by the applicant, then the address and then the social security number. A red flag can appear if the credit is bad, if the name is spelled incorrectly, the address is a digit off or if the social security number is incorrect.

The credit report was accessed through the last name of "McGee"[3] as opposed to the correct spelling of "McGhee." There was no credit history under the McGee name at all. However, the report did reflect that her credit had been checked nine times within the previous 60 days. The loan officer testified that this is not unusual when someone is looking for a car and has no credit history whatsoever.

Even so, due to this lack of credit history, the Bank initially denied the loan. After informing the car dealership of its decision, the salesman contacted the loan officer and told him that all of the Debtor's credit was in her "deceased husband's" name.[4] Consequently, after agreeing to finance a less expensive car and without further ado, the Bank approved the loan.

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[3]This was the spelling given over the phone to the car dealership.

[4]This information had apparently been imparted to the salesman by Vicky during the initial phone call.

Although we disagree with the meager credit check done by the Bank, the law is clear on this point. The Bankruptcy Appellate Panel and the Court of Appeals for the Sixth Circuit have addressed the reliance issue in §523(a)(2) litigation several times. One of the more recent cases is In re Plechaty, 213 B.R. 119 (B.A.P. 6th Cir. 1997) which instructs that: "reasonable and justifiable reliance does not require the court to undertake a subjective evaluation of a creditor's lending policy and practices."

In Bank One, Lexington N.A. v. Woolum (In re Woolum), 979 F.2d 71 (6th Cir. 1992), cert. denied, 507 U.S. 1005, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993) the court stated: "Once it has been established that a debtor has furnished a lender a materially false financial statement, the reasonableness requirement of §523(a)(2)(B) 'cannot be said to be a rigorous requirement, but rather is directed at creditors acting in bad faith.'" Woolum, at 76 (quoting Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163, 1166 (6th Cir. 1985)). This reasoning is consistent with the Sixth Circuit decisions not to second guess established banking policies. Plechaty, 213 B.R. at 127.

Because we have already determined that there were material misrepresentations in the credit application and having seen no evidence of bad faith, we find that the Bank reasonably relied on the misrepresentations made by the Debtor.

Intent to Deceive

The standard for this element is not limited to whether McGhee actually completed the credit application with intent to deceive but rather whether she acted with gross recklessness. "If the debtor intended to deceive the Bank or acted with gross recklessness, full discharge will be denied." In re Martin, 761 F.2d at 1167. "Gross recklessness is sufficient to establish an intent to deceive." Woolum, 979 F. 2d at 73.

When McGhee signed the credit application knowing that the majority of it was incorrect and then signed a promissory note agreeing to make a car payment of over $500 per month knowing she had barely $100 per month left after her living expenses, there is no other conclusion but that she acted with gross recklessness. After signing the papers she knew the Bank was going to be looking to her for the payments since she was the only person who signed anything. Instead of standing up and disavowing the credit application, she went along with the farce, recognizing that something was very amiss when anyone would allow her to borrow enough money to buy a car. Not only did she do the car dealership an injustice when she acquiesced in the credit application, but she also did herself a disservice when she signed the promissory note binding herself to the purchase of the car. Viewing the totality of the situation, the court finds that McGhee's actions clearly rise to the level of gross recklessness, if not outright deceit.

Attorney's Fees

In the promissory note signed by the Debtor it states: "You agree to pay all of our reasonable expenses of collecting what you owe us, including our attorney's fees and court costs." Consequently, we find that the Bank is entitled to its reasonable attorney's fees providing a detailed statement is timely filed.

Dated: April 25, 2000

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Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

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ORDER

At a session of said Court, held in and for said District, at the United States Bankruptcy Court, Federal Building, Grand Rapids, Michigan this 25 day of April, 2000.

PRESENT: HONORABLE JO ANN C. STEVENSON
United States Bankruptcy Judge

NOW THEREFORE IT IS HEREBY ORDERED THAT:

1. The debt owed by Barbara J. McGhee to Ameribank in the amount of $6,581.88 in nondischargeable under 11 U.S.C. §523(a)(2)(B).

2. No later than 4:30 p.m. on May 16, 2000, Plaintiff shall file with the Clerk of the United States Bankruptcy Court and serve upon Defendant's counsel, an application for attorney's fees comporting in all respects with Local Bankruptcy Rule 2016 and the Memorandum Regarding

allowance of Compensation and Reimbursement of Expenses for Court Appointed Professionals as Amended on October 14, 1997 (the "Fee Memorandum"). Defendant's Objections, if any shall comport with the Fee Memorandum and be filed with the Clerk of the United States Bankruptcy Court and served upon Plaintiff's counsel no later than 4:30 p.m. on May 30, 2000. Unless otherwise ordered by the Court, any and all objections timely filed to Plaintiff's timely filed fee application shall be heard at 10 a.m. on June 8, 2000 in Grand Rapids, Michigan.

IT IS FURTHER ORDERED that a copy of this Order and Opinion shall be served by first-class United States mail, postage pre-paid, upon, Ameribank, James R. Scheuerle, Esq., Barbara J. McGhee and Daniel B. Hess Jr.

Dated: April 25, 2000

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Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

Served as ordered:
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