

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: BKY. No. 3-89-2798
Mark R. Dvorak and
Susan L. Dvorak,
Debtors.

Chevy Chase Federal Savings Bank,
Plaintiff, ADV. No. 3-89-311
vs. ORDER
Mark R. Dvorak,
Defendant.

At St. Paul, Minnesota.

This matter came before the Court for trial June 14, 1990, on Plaintiff's complaint objecting to discharge of its debt pursuant to 11 U.S.C. Section 523(a)(2)(A) and (B);(1) and the Debtor's denial of fraudulent misrepresentation including a plea for attorney's fees and costs under 11 U.S.C. Section 523(d). Francis C. Ling appeared for Plaintiff Chevy Chase Federal Savings Bank (Chevy Chase). John A. Hedback represented the Defendant, Mark R. Dvorak (Dvorak). The Court, having considered the oral arguments at trial, the briefs and exhibits, now makes this Order pursuant to the Federal and Local Rules of Bankruptcy.

Footnote 1

At trial, the Plaintiff's Section 523 (a) (2) (A) was dismissed as inadequately plead.
End Footnote

I.
FACTS

Debtors Mark R. Dvorak and Susan L. Dvorak filed a voluntary Chapter 7 petition on July 31, 1989. Plaintiff is an unsecured creditor owed \$10,944.00. This obligation is the subject of the adversary proceeding.

Dvorak was employed from 1982 through 1986 as a salaried driving instructor at Dvorak Driving School. In 1986, he became sole proprietor of the entity. During 1987, Dvorak withdrew \$51,568.00 from the business. However, Dvorak's 1987 adjusted gross income was <\$14,075.00>. (2)

Footnote 2

Prior to 1986, Dvorak reported his income as salary and wages. Post 1986, Dvorak filed an Internal Revenue Service Form 1040, Schedule C reflecting his income or loss as a sole proprietor. In 1987, Dvorak Driving School lost \$14,075.00. This loss reflects \$53,970.00 of depreciation, a non-cash expense.
End Footnote

In 1987, Dvorak received a Chevy Chase credit card application for a Gold MasterCard and Premier Visa as part of a direct mail solicitation. Dvorak completed application on May 27, 1987 declaring his "annual salary" as \$50,000.00; his employment as self-employed owner of Dvorak Driving School; and his length of

employment as five and one-half years.

At trial Kim Sanders (Sanders), Chevy Chase's underwriting manager, testified that Chevy Chase routinely reviews an applicant's salary and employment. Sanders defined "annual salary" as gross taxable income. According to Sanders, the minimum "annual salary" required in 1987 for a Chevy Chase credit card was \$20,000.00. A total line of \$10,000.00 required an "annual salary" of \$50,000.00. Neither the underwriter's definition of annual salary nor the minimum salary limits are published.

Sanders testified that applicants who are self-employed less than three years are subject to further scrutiny; tax returns and personal financial statements are requested. However, Dvorak was not required to provide these documents.

The application was approved. Dvorak received the requested credit cards, each bearing a \$5,000.00 line of credit.

At filing, Dvorak owed \$10,944.00 on the accounts. Chevy Chase claims Dvorak's credit application was materially false alleging that: it did not report gross or adjusted gross income; and that he fraudulently disclosed his length of self-employment. Chevy Chase seeks judgement of nondischargeability pursuant to 11 U.S.C. Section 523(a)(2)(B).

II. DISCUSSION

A. False Financial Statements

Chevy Chase asserts that the debt is non-dischargeable under 11 U.S.C. Section 523(a)(2)(B). 11 U.S.C. Section 523(a)(2)(B) provides in pertinent part:

(a) a discharge under Sections 727, 1141, 1228(a), 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-

(B) use of financial statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insiders financial condition;

(iii) on which the creditor to 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, or ...

Nondischargeable fraud under Section 523(a)(2)(B) involves active and intentional wrongdoing by misrepresentation and deceit. *Richards v. F & M Marquette Nat'l Bank (In re Richards)*, 71 B.R. 1017, 1021 (Bankr. D.Minn. 1987). It is an intentional tort. *Id.* Thus, the Plaintiff must support every element with clear and convincing evidence. See *Henson v. Garner (In re Garner)*, 881 F.2d 579, 581-2 (8th Cir. 1989), cert. granted, 110 S.Ct. 1945 (1990); *Franklin State Bank v. Lippert (In re Lippert)*, 84 B.R. 612, 617 (Bankr. D.Minn. 1988); *Oppenheimer v. Reder (In re Reder)*, 60 B.R. 529, 533 (Bankr. D.Minn. 1986); *IFG Leasing v. Vavra (In re Harms)*, 53 B.R. 134, 140 (Bankr. D.Minn. 1985); *Norwest Card Serv. v. Barnacle (In re Barnacle)*, 44 B.R. 50, 54 (Bankr. D.Minn. 1984).

A materially false statement substantially misrepresents an individual's financial condition. See *Harms*, 53 B.R. 134 at 140 (citing *Merchants Nat'l. Bank v. Denenberg (In re Denenberg)*, 37

B.R. 267, 271 (Bankr. D.Mass. 1983)). However, an incorrect financial statement is not necessarily materially false. Denenberg, 37 B.R. at 271.

Dvorak's financial statement was not materially false. The Chevy Chase application did not define annual salary. However, Black's Law Dictionary defines salary as "a reward or recompense for services performed." at 1200 (5th ed. 1979). As a sole proprietor, Dvorak drew money on the entity for personal consumption. Accordingly, during 1987 Dvorak's annual salary was \$51,686.00.

Additionally, Dvorak did not fraudulently misrepresent his length of employment. The application is not clear on whether there is a correlation between job title and length of employment. At the time of application, Dvorak Driving School had employed Dvorak for five and one-half years. However, he had owned the school for only a year. Given the mandate to narrowly construe exceptions to discharge in favor of debtors, an inference in favor of the creditor on this issue is not justified under the circumstances. See *Gleason v. Thaw*, 236 U.S. 558 (1915).

Chevy Chase has failed to clearly and convincingly prove that the credit application was materially false. Neither the Debtor's stated annual salary, nor his stated length of employment, were shown to be materially false.

But even if they were materially false, Chevy Chase must prove that Dvorak constructed the credit application with the intent to deceive to succeed. See *Lippert*, 84 B.R. at 618; *Harms*, 53 B.R. at 141. Chevy Chase must show that Dvorak's credit application was knowingly false. *Lippert*, 84 B.R. at 618. The evidence does not support such a finding. Dvorak did not request or seek out the Chevy Chase application. When received, he supplied the required information that he believed was true. In fact, Dvorak's "annual salary" for 1987 was \$1,568.00 greater than represented. At worst, his alleged misinterpretations were inadvertent, not intentional.

B. Award of Costs and Attorney Fees

In his answer, Dvorak requested a judgment for attorney's fees and costs. 11 U.S.C. Section 523(d) provides:
If a debtor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of and a reasonable attorney's fee for the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

The purpose of this provision is to protect honest debtors against the threat of false nondischargeability actions. See H.R. Rep. No. 959, 95th Cong., 1st. Sess. 131 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5866. The fear being that such practices impair the debtor's fresh start. *Id.*

Chevy Chase's action might have been initially justified. However, through discovery, the Plaintiff was, or should have been, aware of the evidence that was eventually before the court at trial. As the trial record reflects, there is no evidence tending to support the allegation that Dvorak's credit application was materially false or that he intended to deceive Chevy Chase. Accordingly, an award of post-discovery attorney's fees and costs is justified in this case. Such an award will be considered on motion by Defendant, consistent with this opinion.

III.
ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The debt of Mark R. Dvorak to Chevy Chase Federal Savings Bank is discharged under 11 U.S.C. Section 727;
2. The Defendants post-discovery costs and attorney's fees pursuant to Section 523(d) are determinable upon notice and motion consistent with the foregoing opinion.

Dated: _____

BY THE COURT:

DENNIS D. O'BRIEN
U.S. Bankruptcy Judge