

FILED

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

FEB 5 1985

CLERK, U.S.
BANKRUPTCY COURT

CASE NO.

In re:

Case Number:

MARLIN A. HAHN
JOANNE HAHN
d/b/a Hahn's Cafe and
Service Station,

EF7-83-00557

Debtors

SKOGLUND OIL COMPANY, INC.,

Plaintiff,

Adversary Number:

v.

83-0278-7

MARLIN A. HAHN and JOANNE HAHN,
d/b/a Hahn's Cafe and Service
Station,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER DETERMINING DEBT TO BE DISCHARGEABLE

Skoglund Oil Company, Inc., (hereinafter SOC), by Warren W. Wood, Ltd., having filed a Complaint to determine the dischargeability of a debt; and Debtors Marlin A. and Joanne Hahn, by Doar, Drill & Skow, S.C., having filed an Answer; and a trial having been held; and SOC appearing by Attorney James R. Bartholomew; and the Debtors appearing in person and by Attorney Thomas R. Schumacher; and briefs having been filed; the Court, being fully advised in the premises, FINDS THAT:

1. On April 11, 1983, Debtors Joanne and Marlin A. Hahn filed for relief under Chapter 11 of the Bankruptcy Code.¹

2. Skoglund Oil Company, Inc. (hereinafter SOC), was not listed as a creditor and received no notice of the Chapter 11 proceedings.

3. The Debtors' account with SOC reveals the following:

<u>Date of Posting</u> ²	<u>Event</u>	<u>Amount</u>	<u>Balance</u>
	Balance Forward		493.48
4-9-83	Charge	4,026.86	4,520.34
4-16-83	"	2,829.30	7,349.64
4-23-83	"	3,394.48	10,744.12
4-29-83	"	22.00	10,766.12
4-31-83 [sic]	"	6,418.38	17,184.50
5-1-83	Payment	(2,200.00)	14,984.50
5-1-83	"	(5,000.00)	9,984.50
5-11-83	"	(4,500.00)	5,484.50
5-23-83	Charge	9,567.89	15,052.39
5-23-83	Payment	(383.29)	14,669.10
5-23-83	"	(6,000.00)	8,669.10
5-29-83	"	(4,500.00)	4,169.10
5-24 to 7-30-83	Not itemized	11,300.14	15,469.24
7-31-83	Charge	7,754.89	23,224.13
8-3-83	Payment	(3,000.00)	20,224.13
8-5-83	"	(4,000.00)	16,224.13
8-6-83	Charge	1,048.70	17,272.83
8-11-83	Payment	(1,500.00)	15,772.83
8-15-83	Charge	5,944.00	21,716.83
8-19-83	Payment	(1,500.00)	20,216.83

An additional payment of \$3,500 was made on August 13, 1983, but not credited to the Debtors' account.

4. On August 5, 1983, Vernell A. Skoglund, SOC President, refused a Marlin Hahn request for more credit.

¹ The Debtors' petition was executed on March 23, 1983, and first received by the Court on March 31, 1983. The petition was returned to the Debtors by the Clerk's office and re-submitted to the Court on April 6, 1983. The petition was returned again, re-submitted a second time and, finally, filed on April 11, 1983.

² (By the Court) Evidence suggests, for example, that the \$5,944 purchase posted on August 15 was actually made on August 8.

5. On August 6, 1983, Mr. Skoglund again advised Mr. Hahn that only cash purchases would be permitted.

6. After August 5, 1983, Mr. Hahn received product from SOC without immediate cash payment. (The SOC employee who served Mr. Hahn had not been advised of the Debtors' "cash only" status at SOC.)

7. On August 16, 1983, the Debtors filed a motion to convert their bankruptcy proceeding to Chapter 7 of the Bankruptcy Code.

8. On August 19, 1983, this Court granted said motion.

9. On August 22, 1983, the Debtors ceased doing business.

10. On August 26, 1983, SOC recovered \$4,498.22 of its product from the Debtors' place of business.

11. SOC has filed a Complaint to determine the dischargeability of debt arising from purchases posted after August 5, 1983.

12. A debt is not dischargeable under 11 U.S.C. sec. 523(a)(2)(A) only when it is established, by clear and convincing evidence, that the following elements were present at the time the debt was incurred (i.e., when property was obtained or credit was extended):

- (1) the debtor made representations which he knew to be false or made with reckless disregard for the truth;
- (2) the representations were made to deceive; and
- (3) the creditor actually and reasonably relied on the representations.

In re Sauer, 41 B.R. 483, 485 (Bankr.W.D.Wis. 1984).

13. The Court will assume, without deciding, that obtaining property on credit from an entity which has revoked credit privileges is a "misrepresentation" within the meaning of section 523(a)(2)(A),³ that Mr. Hahn did so misrepresent, that Mr. Hahn's misrepresentations were intentional, and that SOC relied on those misrepresentations.

14. However, SOC did not reasonably rely upon a misrepresentation as to its own credit policies. See In re Geist, Adv. No. 84-36-7 (Bankr.W.D.Wis. Aug. 27, 1984) (attached as an appendix) (under 11 U.S.C. sec. 523(a)(2)(B): a creditor has constructive knowledge of its own records and is not entitled to rely upon an obviously false representation by the debtor).

CONCLUSION OF LAW

SOC has not clearly and convincingly shown that it reasonably relied on any Debtor misrepresentation.

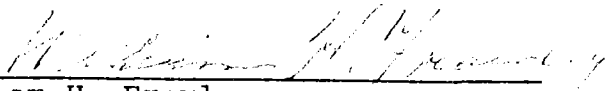
³ While the general rule is that misrepresentation may be implied by debtor conduct or silence, In re Schnore, 13 B.R. 249, 252 (Bankr.W.D.Wis. 1981), this Court is not convinced that a debt is non-dischargeable under 11 U.S.C. sec. 523(a)(2)(A) when the debtor was willing and able to pay the debt but made misrepresentations as to other aspects of the transaction. See generally In re Sauer, Paragraph 12 supra, at 485 (creditor required to show that debtors made credit purchases for which they were unable or unwilling to pay). In this regard the Court notes that, in August, Mr. Hahn paid \$13,500 toward his account while charging only \$6,992.70 to that account and SOC subsequently recovered product valued at \$4,498.22.

ORDER

IT IS ORDERED THAT the debt due Skoglund Oil Company, Inc., from Marlin A. and Joanne Hahn be, and the same hereby is, determined DISCHARGEABLE.

Dated: February 5, 1985.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney James R. Bartholomew (Warren W. Wood, Ltd.)
Attorney Thomas R. Schumacher (Doar, Drill & Skow, S.C.) *ca*