UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	
Wesley Jason Boles and Cindy Smith Boles,	)	Case No. 03-53196C-11W
	)	
Debtors.	)	
	)	
Riddle Farm Equipment, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 04-6027
	)	
Wesley Jason Boles,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This adversary proceeding came before the court for trial on February 4, 2005. A. Carl Penney appeared on behalf of the Plaintiff, Riddle Farm Equipment, Inc. ("Riddle"). Edwin H. Ferguson, Jr. appeared on behalf of the Defendant, Wesley Jason Boles ("Boles"). In this proceeding Riddle seeks to establish the nondischargeability of debt pursuant to § 523(a)(2)(A) of the Bankruptcy Code. The following constitutes the court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

FACTS

Riddle is a North Carolina corporation that sells and services tractors, implements and other farm equipment. The company has

been in business since 1979 and is co-owned by brothers Gene and Vance Riddle. At the time of the events giving rise to this proceeding, Boles was a part-time farmer and the owner and operator of Big Creek Underground Utilities, Inc. ("Big Creek).

During past years, Boles had purchased parts, implements and a used Kubota tractor from Riddle. Up until the events that led to the filing of this adversary proceeding, the parties had enjoyed a positive business relationship. Gene Riddle described the Boles's performance throughout prior dealings with the company as "perfect" and testified that Boles had a reputation for trustworthiness.

The transaction giving rise to this proceeding was the purchase by Boles of a new Kubota tractor from Riddle on April 29, 2003. Earlier in April, Boles had visited Riddle's place of business in connection with arranging for the repair of a used Kubota tractor that had been damaged in a traffic accident. While at Riddle's place of business, Boles expressed interest in possibly purchasing a new tractor. Boles was interested in the Kubota M6800 SDC tractor and discussions occurred between Boles and Gene Riddle regarding a price for the purchase of that model tractor. On April 29, 2003, Boles indicated to Gene Riddle that he had decided to proceed with the purchase of a new Kubota M6800 SDC tractor which Riddle had priced at $29,000.00.

On April 29, 2003, Kubota Credit Corporation was offering financing at zero percent interest for 36 months which was an

exceptional and limited-time-only offering. It is undisputed that Gene Riddle informed Boles of the availability of such financing. However, the parties presented conflicting testimony regarding the terms that were actually agreed upon by the parties. Boles testified that he accepted the financing and instructed Gene Riddle to "run it through Kubota." He admitted, however, that he did not sign any documentation with respect to the financing as he had done in the past when he had financed with Kubota Credit. Gene Riddle, on the other hand, testified that Boles declined the financing and instead said that he would "have the ladies send a check" for the purchase price of the new tractor. According to Riddle, he took his conversation with Boles to mean that a check for the purchase price would be mailed promptly by someone in Bole's office. However, there was no evidence that Gene Riddle obtained any statement or commitment from Boles that was any more definite regarding the time of payment than Boles' statement that he "would have the ladies send a check."

Both parties apparently understood that the new tractor would be picked up that day and, in fact, an employee of Big Creek came to Riddle's place of business on April 29 to pick up the new tractor. Although no check was delivered at that time, the employee was permitted to pick up the tractor after signing an invoice for the tractor in the amount of $29,080.00 (the $29,000.00 purchase price plus $80.00 in tax). In the portion of the invoice

related to the terms of the sale, the $29,080.00 purchase price was inserted in the box for "charge to account."

Two weeks passed without Riddle receiving a check from Boles. Gene Riddle then tried to call Boles regarding payment for the tractor but did not reach him on that occasion. On May 25, 2003, while reviewing billing statements that were going out to customers with unpaid accounts, Gene Riddle noticed that Boles had not paid for the tractor and again tried to call Boles and again was unable to reach him. Finally, in July, after a number of unsuccessful attempts to call Boles, Gene Riddle reached Boles by telephone and Boles again said that he would have a check sent to Riddle. However, Riddle still had not received payment from Boles when Boles and his wife filed a Chapter 11 petition on October 24, 2003. Riddle then filed this adversary proceeding seeking to establish Boles's debt to Riddle as nondischargeable pursuant to § 523(a)(2)(A) of the Bankruptcy Code.[1]

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[1]Riddle's complaint also challenges the dischargeability of the debt owed by Boles for services rendered by Riddle in repairing the damaged tractor. With respect to this debt, the evidence presented at trial established only that Boles had provided Gene Riddle with the contact information for his insurance adjuster, that Gene Riddle had been working with the insurance adjuster and that Riddle had not received payment for its services. Riddle presented no evidence that this debt was fraudulently incurred and Riddle's counsel stated at trial that his client no longer alleged fraud with respect to the repairs. Accordingly, the court's opinion will only address Riddle's claims with respect to the purchase of the new Kubota tractor on April 29, 2003.

LEGAL ANALYSIS

Section 523(a)(2)(A) of the Bankruptcy Code provides as follows:

> (a) A discharge granted under section 727, 1141, 1228(a), 1228(b), or 1328(b) of Title 11 does not discharge an individual debtor from any debt–
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> * * *
>
> (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....

11 U.S.C. § 523(a)(2)(A).

In order to establish the nondischargeability of a debt under § 523(a)(2)(A), a creditor must prove the following five elements: 1) that the debtor made a representation; 2) that the debtor knew the representation was false at the time it was made; 3) that the debtor intended to deceive the creditor at the time the debtor received the money, services or property; 4) that the creditor relied on the representation; and 5) that the creditor sustained a loss as a result of that reliance. John J. O'Connor, CPO, Inc. v. Booker (In re Booker), 165 B.R. 164, 168 (Bankr. M.D.N.C. 1994); Kuper v. Spar (In re Spar), 176 B.R. 321, 326 (Bankr. S.D.N.Y. 1994); Rowe v. Showalter (In re Showalter), 86 B.R. 877, 880 (Bankr. W.D. Va. 1988); Lisk v. Criswell (In re Criswell), 52 B.R. 184, 196 (Bankr. E.D. Va. 1985). As the party challenging the dischargeability of an indebtedness, Riddle has the burden of

establishing each of the foregoing elements by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991).

The first of the foregoing elements to be considered is whether there was a representation by Boles within the meaning of § 523(a)(2)(A). There was a conflict in the evidence regarding this element. Did Boles request financing through Kubota Finance Corporation as he maintains or did he represent that he would pay for the tractor himself? The court resolves the evidentiary conflict in favor of a finding that Boles represented that he would be paying for the tractor himself rather than financing it. Further analysis is required, however, before reaching a conclusion as to whether the representation made by Boles satisfies the requirements of § 523(a)(2)(A). While the evidence in this proceeding established a representation by Boles that he would pay the purchase price, it did not establish a representation by Boles as to when the payment would be made. Certainly, there was no representation that payment would be made on April 29. There was no evidence that Boles was asked to do so or that he represented he would do so. Nor does it appear that Riddle expected the payment to be made on April 29. In that regard, it is undisputed that Riddle voluntarily released the tractor on April 29 without receiving a check and issued an invoice when the tractor was released on April 29 stating that the purchase price was being charged to Boles' account. The situation thus presented involves

a declaration of future intent or a promise of future action, i.e., a representation that payment would be made at an unspecified point in the future. Such a promise or declaration, standing alone, is insufficient to support a claim under § 523(a)(2)(A) because a promise to perform some act in the future, without more, does not constitute a representation for purposes of § 523(a)(2)(A). Allison v. Roberts (In re Allison), 960 F.2d 481, 484 (5th Cir. 1992) ("[A] promise to perform acts in the future is not considered a qualifying misrepresentation merely because the promise subsequently is breached."); James Cape & Sons Co. v. Bowles (In re Bowles), 318 B.R. 129, 144 (Bankr. E.D. Wis. 2004) ("[A] cause of action for fraud does not exist for misrepresentations as to future promises or facts...."); New Austin Roosevelt Currency Exch., Inc. v. Sanchez (In re Sanchez), 277 B.R. 904, 908 (Bankr. N.D. Ill. 2002) (observing that a check is a promise of future payment and holding debt for NSF check dischargeable absent evidence of present intent not to honor it); Carroll & Sain v. Vernon (In re Vernon), 192 B.R. 16, 171-72 (Bankr. N.D. Ill. 1996) (holding debt for legal fees dischargeable where plaintiff law firm had not demonstrated intent not to pay); Kuper v. Spar (In re Spar), 176 B.R. 321, 327 (Bankr. S.D.N.Y. 1994) ("A promise to perform in the future is insufficient."); Rowe v. Showalter (In re Showalter), 86 B.R. 877, 880 (Bankr. W.D. Va. 1988) ("A mere promise to repay, and nothing more, does not rise to the level of a representation under

§ 523(a)(2)."). The "representation" must be "one of existing fact" and not "merely an opinion, expectation or declaration of intent." Lisk v. Criswell (In re Criswell), 52 B.R. 184, 196-97 (Bankr. E.D. Va. 1985). See also In re Spar, 176 B.R. at 327; In re Showalter, 86 B.R. at 880.

In order to show that a promise of future action or a declaration of intent constitutes a representation for purposes of § 523(a)(2)(A), the plaintiff must also establish that at the time the promise of future action was made, the debtor had no intention of performing as promised. Allison v. Roberts (In re Allison), 960 F.2d 481, 484 (5th Cir. 1992) (holding debtor's promise to second mortgagee to limit amount of first mortgage to 20% of the value of property so that second mortgagee would be fully secured was a false representation under § 523(a)(2)(A) where debtor had no intention of performing at the time the promise was made); James Cape & Sons Co. v. Bowles (In re Bowles), 318 B.R. 129, 144 (Bankr. E.D. Wis. 2004) (holding promise by debtor-general contractor to place payments to creditor-subcontractor in escrow account pursuant to lock-box arrangement was not actionable under § 523(a)(2)(A) absent evidence of intent not to perform promise); First N. Am. Nat'l Bank v. Widner (In re Widner), 285 B.R. 913, 918 (Bankr. W.D. Va. 2002) (holding use of a credit card is a promise to pay in the future and debtor's credit card debt was nondischargeable under § 523(a)(2)(A) where debtor did not intend to repay debt at the

time she incurred the charges) ; Kuper v. Spar (In re Spar), 176 B.R. 321, 327 (Bankr. S.D.N.Y. 1994) (holding debtor's promise to execute a promissory note in exchange for $100,000.00 loan from creditor-friend was a fraudulent misrepresentation under § 523(a)(2)(A) where debtor never intended to execute the note).

When applied in the present case, the foregoing cases mean that in order to establish a representation of the type required under § 523(a)(2)(A), Riddle was required to establish that Boles had no intention of sending a check at the time he said he would. In order to carry this burden, however, Riddle was not required to produce direct evidence that Boles did not intend to pay for the tractor when he promised to do so. Because direct proof of intent is seldom available, the court in a dischargeability proceeding may infer the debtor's intent or lack of intent from the surrounding facts and circumstances. Mandalay Resort Group v. Miller (In re Miller), 310 B.R. 185, 196 (Bankr. C.D. Cal. 2004); Gadtke v. Bren (In re Bren), 284 B.R. 681 (Bankr. D. Minn. 2002). However, in determining whether a debtor had a present intention to pay at the time he promised to do so, a court may not rely solely upon a debtor's inability to pay. See First N. Am. Nat'l Bank v. Widner (In re Widner), 285 B.R. 913, 918 (Bankr. W.D. Va. 2002) ("[t]he emphasis must be on the debtor's intention, rather than ability, to repay); First Card Servs., Inc. v. Koop (In re Koop), 212 B.R. 106, 108 (Bankr. E.D.N.C. 1997) ("The emphasis is not on

the debtor's ability to repay, but on the debtor's intention to repay."); Chase Manhattan Bank v. Murphy (In re Murphy), 190 B.R. 327, 332 n.6 (Bankr. N.D. Ill. 1995) (applying a subjective test of intent and observing that "[i]ntent to pay is not synonymous with ability to pay; at most, the latter is merely one factor to be considered in determining whether the debtor intended to repay"). On the other hand, evidence that the debtor was financially unable to pay at the time the promise was made and that the debtor knew he was unable to pay, at the very least, suggests a lack of intention to repay. See generally Citibank (South Dakota), N.A. v. Hale (In re Hale), 274 B.R. 220 (Bankr. E.D. Va. 2001); Am. Express Centurion Bank Optima v. Choi (In re Choi), 203 B.R. 397 (Bankr. E.D. Va. 1996). Some courts go even further and conclude that a debtor's knowledge of his inability to repay the debt is the legal equivalent of lack of intention to repay. See First N. Am. Nat'l Bank v. Widner (In re Widner), 285 B.R. 913 (Bankr. W.D. Va. 2002) (citing Manly v. Ohio Shoe Co. (In re Baltimore Shoe House, Inc.), 25 F.2d 384 (4th Cir. 1928) (holding that obtaining goods on credit with the knowledge that one cannot pay for them is the equivalent of intent not to pay)).

In the present case, Riddle relies upon evidence regarding Boles' financial condition as establishing that Boles did not intend to send a check in payment of the purchase price when he said that he would do so. Riddle's theory is that Boles' financial

situation on April 29 was such that he knew that he would not be able to pay for the tractor and therefore had no intention of sending a check to Riddle when he promised that he would do so. In evaluating this argument, consideration of Boles' financial condition is not limited solely to whether he could have written a check for $29,080.00 on April 29, which would be appropriate had Boles promised to make payment on April 29. However, as noted earlier, the evidence adduced by Riddle did not establish that Boles promised that he would send or deliver a check to Riddle on April 29. The statements attributed to Boles simply did not go that far. Instead, the representation attributed to Boles was a general statement that he would send a check to Riddle. Boles did not specify when the check would be sent and Gene Riddle did not ask Boles to be more specific. In fact, according to Mr. Riddle, he assumed that Boles meant that a check would be sent "promptly." Mr. Riddle confirmed that there was no expectation of payment on April 29 when he released the tractor on April 29 without receiving payment and after issuing an invoice indicating that the purchase price was being charged to Boles' account. Moreover, had there been an expectation on the part of Riddle that payment was to be made on April 29, it seems doubtful that Riddle would have allowed two weeks to pass before attempting to call Boles or would have allowed several more weeks to pass before again attempting to contact Boles. No showing having been made that Boles promised to

send a check on April 29, his failure to do so on April 29 is not a basis for a finding of fraudulent conduct on the part of Boles.

While there was evidence that Boles had financial problems on April 29, such evidence was insufficient to establish by a preponderance that Boles had no prospect of paying for the tractor and no intention of doing so. The evidence showed that Boles' company, Big Creek, was experiencing rather severe cash flow problems at times and that there had been some months in which Big Creek did not have enough cash to pay Boles' salary for the month. The evidence also established that Big Creek was behind in paying the withholding taxes for its employees and that a $159,439.41 tax lien was filed against Boles as a result of his being a responsible officer of Big Creek and subject to the 100% penalty for the corporate withholding taxes. Ironically, the tax lien against Boles was filed in Stokes County on the same day that Boles was at Riddle's place of business in Forsyth County for the purchase of the new tractor. While it is reasonable to assume that Boles was aware that Big Creek was behind in paying its taxes, it appears almost certain that Boles was not aware of the tax lien being filed against him when he purchased the tractor on April 29. Thus, to the extent that the tax lien impaired Boles' ability to pay for the tractor, such impairment almost certainly was not a matter which Boles was aware of when he purchased the tractor. There also was evidence of judgments being entered against Boles. However, two of

these judgments were entered more than six months after the purchase of the tractor from Riddle and the other judgment was for $3,500.00 and was entered in May of 2002. Despite these problems, the evidence reflected that Big Creek still had work to perform and was continuing to operate and to produce income. In addition to his involvement with Big Creek and anticipated cash flow from its operations, Boles owns a substantial amount of farmland and was actively involved in a sizable farming operation that included some twenty acres of tobacco from which he anticipated a substantial return.

Taken as a whole, the evidence was insufficient to establish that Boles purchased the new tractor with no intention of paying for it. While, in retrospect, he may have misjudged his ability to pay, his doing so is not a sufficient basis for a finding of a false representation or fraud. Accordingly, no relief may be granted under § 523(a)(2)(A) in this proceeding. A judgment so providing is being entered contemporaneously with the filing of this memorandum opinion.

This 11th day of April, 2005.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

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Debtors.	)	
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Riddle Farm Equipment, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 04-6027
	)	
Wesley Jason Boles,	)	
	)	
Defendant.	)	
	)	

JUDGMENT

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED that the relief sought in the complaint is denied and this adversary proceeding is hereby dismissed with prejudice.

This 11th day of April, 2005.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge