

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: A05-77658-PWB
	:	
SIMON JAMES HORROCKS,	:	
	:	IN PROCEEDINGS UNDER
Debtor.	:	CHAPTER 7 OF THE
	:	BANKRUPTCY CODE
	:	
MBNA AMERICA,	:	
	:	
Plaintiff	:	ADVERSARY PROCEEDING
	:	NO. 05-6571
v.	:	
	:	
SIMON JAMES HORROCKS,	:	
	:	
Defendant.	:	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

MBNA America Bank, N.A. (“Plaintiff”) asserts that the credit card debt of Simon James Horrocks (the “Debtor”) for \$2,434.00 incurred approximately one month prior to filing his chapter 7 case is excepted from discharge under § 523(a)(2) because the Debtor obtained credit from Plaintiff by false pretenses, false representations, and actual fraud. The Debtor has moved for summary judgment. The Plaintiff has not responded to the Debtor’s motion.

Section 523(a)(2)(A) provides an exception from a chapter 7 discharge for a debt for “money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud.” 11 U.S.C. § 523(a)(2)(A). The burden is upon the creditor to prove nondischargeability under this section. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994).

The Plaintiff alleges that “[b]y obtaining and/or accepting an extension of credit from

Plaintiff and incurring charges on the account, [Debtor] represented an intention to repay the amounts charged” and that “[Debtor] incurred the debts when [Debtor] had no ability or objective intent to repay them.” Complaint, ¶¶ 11, 13. This Court has previously rejected the implied representation theory that Plaintiff’s complaint pleads. In *FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834, 842-843 (Bankr. N.D. Ga. 2004), this Court held:

In order to obtain relief on its § 523(a)(2)(A) claim based on false pretenses or false representation, Plaintiff must show an actual affirmative misrepresentation made by Debtor to Plaintiff (as well as all other elements of a false pretenses or false representation claim) or use of the credit card after clear communication of its revocation. To obtain a nondischargeability determination based on actual fraud, Plaintiff must make a showing of sufficient facts from which the Court can draw an inference of the Debtor’s actual, subjective fraudulent intent that is essential to an actual fraud claim.

The Plaintiff has failed to allege any facts that would support a finding of false pretenses, false representation, or actual fraud. Moreover, the Plaintiff has admitted the absence of a factual basis for its claims because it failed to respond to the Debtor’s 28 requests for admissions sent to the Plaintiff on January 17, 2006. *See* Brief at 3-4, and Statement of Material Facts, ¶¶ 29, 30. The Plaintiff’s failure to respond to these requests means they are deemed admitted. FED. R. CIV. P. 36(a) (applicable under FED. R. BANKR. P. 7036(a)). Any matter admitted under Rule 36 is “conclusively established” unless the court on motion permits withdrawal or amendment of the admission. The facts as thus established are:

4. MBNA has no direct evidence of fraud on the part of [the Debtor].
5. MBNA has no direct evidence that [the Debtor] made a false statement.
6. MBNA has no direct evidence that [the Debtor] made a false statement with the purpose of deceiving MBNA.

7. MBNA has no direct evidence that [the Debtor] made a false statement with the intention of deceiving MBNA.

8. MBNA has no direct evidence that it relied upon alleged false statements made by [the Debtor].

(Admissions, as recited in Brief at 3-4).

The Plaintiff has not sought to withdraw or amend its admissions and has not responded to the Debtor's motion for summary judgment. Based on the foregoing, the Court concludes that the Debtor has established that the debt at issue is not one incurred by false pretenses, false representations, or actual fraud; therefore, the debt is not excepted from discharge pursuant to § 523(a)(2)(A).

The Plaintiff also alleges that the \$2,434.00 in retail charges were "made within the presumption period." Complaint, ¶ 9. Although the Plaintiff cites no code section in reference to the "presumption period," it appears the reference is to § 523(a)(2)(C). Section 523(a)(2)(C) provides that, for purposes of dischargeability determinations under § 523(a)(2)(A),

consumer debts owed to a single creditor and aggregating more than \$1,225 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than \$1,225 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined

in the Consumer Credit Protection Act.¹

11 U.S.C. § 523(a)(2)(C) (emphasis added). Unless the debt is a consumer debt under an open end credit plan for "luxury goods and services" or cash advances, the presumption of nondischargeability under this section does not apply.

The Plaintiff has failed to allege that the charges of \$2,434.00 were for "luxury goods and services." Because a necessary element of § 523(a)(2)(C) has not been alleged, the presumption of nondischargeability of the portion of the debt attributable to retail charges under § 523(a)(2)(C) is inapplicable. Further, the Plaintiff has failed to contest the Debtor's statement that "None of the purchases made by [the Debtor] within the presumption period were for the purchase of 'luxury goods'" in the Statement of Material Facts, ¶ 26. Accordingly, the Debtor's debt to Plaintiff is not excepted from discharge pursuant to § 523(a)(2)(C).

Within the Debtor's motion for summary judgment, the Debtor has requested that the Court impose sanctions against the Plaintiff and the Plaintiff's counsel pursuant to FED. R. BANKR. P. 9011. Rule 9011(c)(1)(A) provides that a motion for sanctions under Rule 9011 "shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate [Rule 9011(b)]." Although the Debtor's attorney sent the Plaintiff's attorney a letter on December 9, 2005, notifying her of the Debtor's intent to seek sanctions if the complaint was not dismissed, no separate motion has been filed as required by Rule 9011(c). The Debtor may file a motion for sanctions under Rule 9011 and may do so without the necessity of a second request for withdrawal of the complaint. In addition, the Debtor's motion may also seek costs and attorney's fees pursuant to 11 U.S.C. § 523(d), which provides that when a creditor unsuccessfully seeks a determination

¹Substantial changes were made to the time limits and dollar limits of § 523(a)(2)(C) by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") which became effective for cases filed on or after October 17, 2005. Because this bankruptcy case was filed on September 21, 2005, this case is governed by the provisions of the pre-BAPCPA § 523(a)(2)(C).

of dischargeability under § 523(a)(2), 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.” Accordingly, it is

ORDERED that the Debtor’s motion for summary judgment is GRANTED. The debt owed by the Debtor to MBNA America is discharged; and it is

FURTHER ORDERED that the Debtor may file a motion for sanctions, fees, and costs pursuant to Rule 9011 and § 523(d) within fifteen days of the entry date of this Order. The Defendant may file a response within twenty days of the filing of the Debtor’s motion. The Court will then review the record as established and determine whether there are disputed facts that require an evidentiary hearing on the Debtor’s Rule 9011 and § 523(d) motion; and it is

FURTHER ORDERED that the Clerk shall not close this adversary proceeding pending a determination of whether the Debtor is entitled to sanctions, fees, or costs.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Atlanta, Georgia, this _____ day of October, 2006.

PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE

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