



**IT IS ORDERED** as set forth below:

**Date: June 23, 2009**

**W. H. Drake**  
**U.S. Bankruptcy Court Judge**

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

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBERS</b>
	:	
WILLIAM W. BAGBY	:	BANKRUPTCY CASE
MELANIE W. BAGBY,	:	NO. 08-11215-WHD
	:	
Debtors.	:	
-----	:	
	:	
CHASE BANK USA, N.A.	:	ADVERSARY PROCEEDING
	:	NO. 08-1053
Plaintiff,	:	
	:	
v.	:	
	:	
WILLIAM W. BAGBY,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Motion for Default Judgment filed by Chase Bank USA, NA (hereinafter the "Plaintiff") in the above-captioned adversary proceeding. The Plaintiff

seeks judgment by default against William W. Babgy (hereinafter the “Debtor”). This matter arises in connection with a complaint to determine dischargeability in which the Plaintiff alleges that a debt owed by the Debtor to the Plaintiff is nondischargeable pursuant to §§ 523(a)(2). This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I).

The Plaintiff filed its complaint on August 25, 2008. The Debtor filed no responsive pleading. On March 30, 2009, the Plaintiff filed the instant motion for default judgment.

In order to grant default judgment, the Court must first determine that the Plaintiff’s allegations of fact serve as a sufficient basis for entry of a judgment. *Nishimatsu Construction Co., Ltd. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). To succeed under § 523(a)(2)(A), a creditor must establish by a preponderance of the evidence that: (1) the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) the creditor relied upon the debtor’s representation; (3) such reliance by the creditor was justifiable; and (4) the creditor suffered a loss as a result of that reliance. *See City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277, 279-84 (11th Cir. 1995); *see also Grogan v. Garner*, 498 U.S. 279, 285-90 (1991); *Signet Bank v. Keyes*, 959 F.2d 245 (10th Cir. 1992); *Mfr. Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082, 1082 (6th Cir. 1988).

In this case, the Plaintiff’s complaint is insufficient to establish nondischargeability under § 523(a)(2)(A) because it fails to allege that the Debtor made a false representation

to the Plaintiff. This Court has previously held that without additional evidence, neither a debtor's promise to repay a credit card balance nor his use of the credit card, constituted a false representation. *See GECC v. Hall*, 03-1034 (Bankr. N.D. Ga. Oct. 15, 2003) (Drake, J.) (rejecting the implied representation theory, a theory which assumes that a "credit card user impliedly represents when he uses the card that he has the intent to pay for goods and services"); *see also Citibank (South Dakota) N.A. v. Young On Kim*, No. 01-6088-ADK (Dec. 24, 2001) (Cotton, J.), *affirmed* Civil Action No. 1:02-CV-314-JOF (Apr. 1, 2003) (Forrester, J.) (same); *FDS National Bank v. Alam (In re Alam)*, No. 03-6465-PWB (Bankr. N.D. Ga. June 24, 2004) (Bonapfel, J.) (holding that the "implied representation theory" is inconsistent with the Eleventh Circuit Court of Appeals' holding in *First National Bank of Mobile v. Roddenberry*, 701 F.2d 927 (11th Cir. 1983)). The Court agrees with the reasoning of *Citibank v. Kim* that the Eleventh Circuit Court of Appeals would not apply the "implied representation theory" to determine whether credit card debt is nondischargeable pursuant to § 523(a)(2)(A). As noted by the court in *Citibank v. Kim*, "Plaintiff's complaint does not allege facts to support the elements of a Section 523(a)(2)(A)[,]" but instead, "consists of a series of allegations which merely recite legal conclusions unsupported by facts." *Id.*

An alternative basis for establishing that a debt is nondischargeable under § 523(a)(2)(A) is to establish that the debt was incurred as a result of the debtor's actual fraud. In *Alam*, the court noted that "[t]he existence of a fraudulent misrepresentation is not

necessary to an actual fraud claim under § 523(a)(2)(A)." *Alam*, at 8 (citing *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000)). With regard to credit card transactions, actual fraud can be established by showing that the debtor used "a credit card without the actual, subjective intent to pay the debt thereby incurred." *Id.* That being said, in *Alam*, the court made clear that it would not find conclusory allegations sufficient for the purpose of establishing the debtor's subjective intent. *Id.* at 10. Similarly, rather than rely upon the plaintiff's conclusory allegations that the debtor lacked a subjective intent to repay the charges, this Court will require a plaintiff to plead specific factual allegations from which the Court could infer that the debtor lacked any subjective intent to pay the charges incurred.

In this case, the Court finds the following facts to be established due to the Debtor's failure to answer the Plaintiff's Complaint: 1) the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on May 5, 2008; 2) the Debtor owes \$6,952.41 on the credit card account provided by the Plaintiff; and 3) between December 11, 2007 and December 12, 2007, the Debtor incurred \$4,617 in cash advance/convenience check charges through use of his credit card account. These facts are insufficient for the Court to conclude that the Debtor lacked the subjective intent to pay the charges made at the time.

For the reasons discussed above, the Court cannot enter a default judgment in favor of the Plaintiff at this time.<sup>1</sup> Should the Plaintiff wish to amend the complaint to include

---

<sup>1</sup> Although the Plaintiff did not specifically refer to § 523(a)(2)(C), the charges at issue here would not be nondischargeable pursuant to that subsection. Section 523(a)(2)(C)

additional allegations of fact or to submit evidence that would establish its claim, the Plaintiff may do so **on or before July 17, 2009**.

Should the Plaintiff fail to do so, the Plaintiff's Motion for Default Judgment shall stand **DENIED** as of the date of the entry of this Order, the Clerk's Entry of Default shall be **VACATED** without the need for a further order, and the Plaintiff's Complaint shall stand **DISMISSED** as of the date of the entry of this Order.

**END OF DOCUMENT**

---

presumes that a debt is nondischargeable where the debtor has taken cash advances totaling more than \$825 within 70 days of filing the bankruptcy case. *See* 11 U.S.C. § 523(a)(2)(C). The Debtor did not obtain cash advances in excess of within the 70 days preceding the filing of his petition.