



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

**Date: May 19, 2010**

*C. Ray Mullins*

**C. Ray Mullins  
U.S. Bankruptcy Court Judge**

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

IN RE:  SEUNG HUN OH,  Debtor.	CHAPTER 7  CASE NO. 09-75027-CRM  JUDGE MULLINS
CHASE BANK U.S.A., N.A.,  Plaintiff,  v.  SEUNG HUN OH,  Defendant.	ADVERSARY PROCEEDING NO. 09-06515-CRM

**ORDER**

THIS MATTER is before the Court on the Motion for Entry of Default Judgment (the “Motion”) filed by the Plaintiff. The Plaintiff initiated this adversary proceeding by filing a complaint contending that its claim against the Debtor is nondischargeable pursuant to 11 U.S.C. § 523(a)(2) (the “Complaint”).

On September 7, 2009, a summons was issued requiring the Debtor to file and serve an answer or a response. According to the certificate of service, the Plaintiff properly served a copy of the Complaint and the summons on the Debtor by regular first class United States mail, postage pre-paid, on September 8, 2009. Bankruptcy Rule 7012 requires a defendant to “serve an answer within 30 days after the issuance of the summons.” No response has been filed or served. Accordingly, the Plaintiff has filed the Motion pursuant to Rule 55 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 7055 of the Federal Rules of Bankruptcy Procedure.

A failure to respond to a complaint does not end the Court’s inquiry into the validity of the Motion. Rule 55 provides that the entry of default judgment is discretionary. *Doe v. Clifford Fort Myers, LLC*, No. 07-cv-00334-FtM-34SPC, 2008 U.S. Dist. LEXIS 31310, at \*2 (M.D. Fla. Apr. 16, 2008).

[A] defendant’s default does not in itself warrant the court entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered . . . The defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law. In short . . . a default is not treated as an absolute confession of the defendant of his liability and of the plaintiff’s right to recover.

*Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *see also DIRECTV, Inc. v. Huynh*, 318 F. Supp. 2d 1122, 1127 (M.D. Ala. 2004); *McCoy v. Johnson*, 176 F.R.D. 676, 679 (N.D. Ga. 1997); *Bruce v. Wal-Mart Stores, Inc.*, 699 F. Supp. 905, 906 (N.D. Ga. 1988). Accordingly, the Court must determine whether the facts alleged constitute a legitimate claim for relief. *See* 10 Alan N. Resnik, Henry J. Sommer, & Lawrence P. King, *Collier on Bankruptcy* ¶ 7055.02 (15th ed. rev. 2004) (“Upon a default, the court is generally required to deem as true the well pleaded allegations of a complaint, but it is not required to agree that the pleaded facts constitute a valid cause of action.”).

According to the Complaint, the Debtor incurred charges in the amount of \$14,358.00 on December 5, 2008 (the “Debt”). Doc. No. 1 at ¶ 8. The Plaintiff seeks a determination

that the Debt is nondischargeable because the Debtor obtained credit from the Plaintiff “by false pretenses, false representations, and/or actual fraud” pursuant to 11 U.S.C. § 523(a)(2). Doc. No. 1 at ¶ 25. According to § 523(a)(2), a debtor does not receive a discharge of a debt obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.”

An allegation of “false pretenses or false representation” requires an “express, affirmative representation.” *FDS National Bank v. Alam* , 314 B.R. 834, 841-42 (Bankr. N.D. Ga. 2004); *Discover Bank v. Howard*, 2006 Bankr. LEXIS 3922 (Bankr. N.D. Ga. Dec. 21, 2006). The Court has specifically rejected the theory that the use of a credit card is a representation of an ability to pay. *Howard*, 2006 Bankr. LEXIS 3922, at \*5-6. Further, a creditor must establish that the debtor “knowingly” made a false statement. *Alam*, 314 B.R., at 839. To establish this element, a creditor must show “actual, subjective fraudulent intent.” *Id.* A creditor can not establish the subjective intent “solely by the fact that an insolvent debtor used a credit card and did not have the ability to pay the debt.” *Id.* Finally, the statute specifically excludes unwritten statements respecting the debtor’s financial condition. 11 U.S.C. § 523(a)(2). An unwritten representation concerning the “ability to pay” addresses a debtor’s financial condition; therefore, it can not be a basis for nondischargeability under § 523(a)(2). *Alam* , 314 B.R., at 839.

The Plaintiff alleges that each time the Debtor used the credit card she represented that she had the “ability to repay the credit line” and that she made these representations with the “intent and purpose of deceiving the Plaintiff.” Doc. No. 1 at ¶ 14. Also, the Debtor was insolvent when she incurred the charges; therefore, the Plaintiff contends that the Debtor “knew” that she did not have the ability to repay. Doc. No. 1 at ¶ 22. The Complaint does not include allegations of a false “express, affirmative representation.” Further, the only

basis for the Plaintiff's allegation of subjective intent is the fact that he Debtor was insolvent. Even if the Court were to accept that the Debtor's use of a credit card is a representation of her ability to pay, it is an unwritten representation respecting her financial condition which is excluded from the scope of § 523(a)(2). Therefore, the Court can not enter a default judgment on the ground that the Debtor made a false representation.

A creditor can establish "actual fraud" by proving that a debtor used a credit card "without the actual, subjective intent to pay the debt thereby incurred." *Alam*, 314 B.R., at 841. Arguably, the mere statement that the debtor used a credit card without the intent to pay may be sufficient to meet the notice requirements under Rule 8 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 7008 of the Federal Rules of Bankruptcy Procedure. *Id.* However, the Court has held that it would not exercise its discretion to enter a default judgment unless there are 'specific factual allegations from which actual, subjective fraudulent intent may be inferred.' *Howard*, 2006 Bankr. LEXIS 3922, at \*7 (*quoting Alam*, 314 B.R., at 841). The Plaintiff alleges that the Debtor "had a specific intent to deceive Plaintiff by accepting the benefits of the extension of credit without ever intending to repay the same." Doc. No. 1 at ¶ 24. Other than this conclusory statement, the Complaint does not include "specific factual allegations" that support an inference of actual fraud; therefore, the Court will not enter a default judgment on this ground. Accordingly,

**IT IS ORDERED** that the Motion be and is hereby **DENIED**.

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