



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

**Date: April 08, 2010**

**Paul W. Bonapfel**  
**U.S. Bankruptcy Court Judge**

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

IN THE MATTER OF:	:	CASE NUMBER: A09-82308-PWB
	:	
ANATOLIY MATVEYEV,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
_____	:	
	:	
FIA CARD SERVICES, N.A. (f/k/a MBNA	:	
AMERICA BANK, N.A.),	:	
	:	
Plaintiff	:	
	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 09-6714
ANATOLIY MATVEYEV,	:	
	:	
Defendant.	:	

**ORDER DENYING MOTION FOR DEFAULT JUDGMENT**

FIA Card Services, N.A. (the “Plaintiff”) seeks entry of default judgment on its claim that its debt, consisting of a \$10,000 “online banking advance” incurred by the Debtor, Anatoliy

Matveyev, approximately five months prior to filing bankruptcy, is nondischargeable pursuant to 11 U.S.C. § 523(a)(2).<sup>1</sup> For the reasons stated herein, the Plaintiff's motion is denied.

Section 523(a)(2)(A) provides that a discharge under chapter 7 does not discharge a debtor from 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).

In *FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834 (Bankr. N.D. Ga. 2004), this Court set forth the criteria for establishing nondischargeability under § 523(a)(2)(A). In *Alam*, the plaintiff, a credit card company, contended that each use of the debtor's available credit line for a purchase or a cash advance was a representation that he had the ability and intent to repay the debts incurred (the "implied representation theory"). The Court rejected this implied representation theory and instead held that, in order for a Plaintiff to prevail on a false representation or false pretenses claim, the plaintiff must show an express, affirmative representation made by the debtor to the plaintiff or use of the card after clear communication of its revocation. *Alam*, 314 B.R. at 838-839 (citing *First Nat. Bank of Mobile v. Roddenberry (In re Roddenberry)*, 701 F.2d 927 (11th Cir. 1983)). With respect to actual fraud, the Court also rejected the implied representation theory and held that "a debtor commits actual fraud for purposes of § 523(a)(2)(A) if the debtor uses a credit card without the actual, subjective intent to pay the debt thereby incurred." *Id.* at 841. Such a claim is established by showing sufficient facts from which the Court may draw an inference of the debtor's actual, subjective fraudulent intent. *Id.* at 843.

As an initial matter, the Court concludes that the Plaintiff has not set forth a factual

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<sup>1</sup>This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

basis for false pretenses or false representation since the Plaintiff has failed to allege that the Debtor made an express, affirmative representation or that it had revoked the Debtor's use of the account. Further, in *Alam*, the Court expressly rejected the implied representation theory with respect to false pretenses or false representation claims that this complaint pleads.

With respect to actual fraud, the Plaintiff's complaint also fails. Here, the Plaintiff's complaint is deficient because it (1) relies on the implied representation theory (Complaint, ¶¶ 14, 19); and (2) alleges that the Debtor had no "*objective* intent" to repay the debt to support its claim for fraud. (Complaint, ¶ 19). In reality, these two arguments are one and the same; they are both flawed because they rely on the theory that a debtor's intent not to pay may be inferred solely from the inability to pay. *See Alam*, 314 B.R. at 839-840.

For purposes of actual fraud, the proper focus is instead on whether the Debtor had the actual *subjective* intent to pay the debt. "Objective" intent is not the standard for nondischargeability under § 523(a)(2)(A).

Under the subjective intent analysis, the Plaintiff has made no allegations from which, if true, the Court can draw an inference of the Debtor's actual, subjective fraudulent intent. *Alam*, 314 B.R. at 843. Instead, the Plaintiff contends that the Debtor's fraudulent intent is demonstrated as follows (Complaint, ¶¶ 20-23):

20. Pursuant to Defendant's statements and schedules, Defendant has a monthly income of \$2521.00 and monthly expenses of \$3451.00. Defendant has a negative net income of \$930.00 each month.

21. Defendant's schedules do not include any payment allotment for the almost \$34760.68 in listed unsecured debt (of which this transaction appears to be a third). As Defendant's schedules show a negative net income per month any minimum payment due at the time of the charges would have created a larger negative net income per month.

22. Based on the negative net income which would have been in effect at the time of the incurred charges, Defendant knew that Defendant did not have the ability to repay the charges nor the ability to abide by the contractual agreement with Plaintiff.

23. By reason of the foregoing Defendant obtained money from Plaintiff through a material misrepresentation of his intention to repay the debt which at the time the debt was incurred he knew to be false or which he made with gross recklessness as to its truth.

Essentially, the Plaintiff argues that fraud exists because the Debtor used the account for transactions while insolvent, the Debtor did not have the current or prospective ability to pay, and did not pay. These allegations alone do not state a claim for relief because they do not demonstrate a subjective, fraudulent intent. This Court previously observed in *Alam* that “subjective intent is not established solely by the fact that an insolvent debtor used a credit card and did not have the ability to pay the debt.” *Alam*, 314 B.R. at 839.

The Plaintiff also alleges that “Defendant had a specific intent to deceive Plaintiff by accepting the benefits of the extension of credit without ever intending to repay the same.” (Complaint, ¶ 24). The Court declines to enter default judgment based upon the conclusory allegation that the Debtor had the intent to deceive the Plaintiff. See *Fleet Credit Card Svcs., L.P. v. Kendrick (In re Kendrick)*, 314 B.R. 468, 473 (Bankr. N.D. Ga. 2004) (differentiating between *Kendrick’s* admission of subjective fraudulent intent in requests for admission and *Alam*, in which court declined to enter default judgment where “the complaint alleged actual fraud based solely on a conclusory allegation of intent not to repay.”).

The Plaintiff has made no specific factual allegations from which actual, subjective fraudulent intent may be inferred. Thus, notwithstanding the Debtor’s failure to respond to the complaint, the Plaintiff’s complaint does not provide a basis for establishing fraud. No admission

occurs as to “facts that are not well-pleaded.” *Nishimatsu Construction Co. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).

Based on the foregoing, the Court concludes that the Plaintiff has failed to set forth a factual or legal basis for judgment on its § 523(a)(2) claim. The Plaintiff may amend its complaint to address the deficiencies within 30 days after entry of this Order. The Plaintiff shall serve any amendment on the Debtor and the Debtor’s counsel in accordance with FED R. BANKR. P. 7004. The Debtor shall have 30 days after service to file responsive pleadings. If no response is timely filed to an amended complaint, the Plaintiff may file a second motion for default judgment.

Alternatively, if the Plaintiff declines to amend the complaint and elects to stand on its complaint as filed, the Court will schedule a hearing at which the Plaintiff may introduce evidence to establish a claim for nondischargeability under § 523(a)(2)(A) on the basis of the Debtor's actual fraud. The Plaintiff shall advise the Court of such election by filing a request for a hearing within 30 days after entry of this Order.

If the Plaintiff does not timely amend the complaint or request a hearing on the actual fraud theory, the Court will enter an order and judgment dismissing the complaint. Accordingly, it is

ORDERED that the Plaintiff's motion for default judgment is DENIED and that the Plaintiff proceed as set forth above; and it is

FURTHER ORDERED that, if the Plaintiff fails to amend and serve its complaint or to request a hearing as set forth above within 30 days from entry of this Order, the Court will enter an order and judgment dismissing the complaint.

End of Order

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