IT IS ORDERED as set forth below:

Date: April 13, 2015

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 14-72281-WLH
	)	
DEBORAH N. VANDEFORD,	)	CHAPTER 7
	)	
Debtor.	)	JUDGE WENDY L. HAGENAU
	)	
FIRST NATIONAL BANK OF OMAHA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADV. PROC. NO. 15-5072
	)	
DEBORAH N. VANDEFORD,	)	
	)	
Defendant.	)	
	)	

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO DISMISS, AND AUTHORIZING PLAINTIFF TO AMEND ITS COMPLAINT

This matter came before the Court on the Defendant's Motion to Dismiss Pursuant to Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(b)(6) [Docket No. 6], and Plaintiff's response thereto [Docket No. 8]. As the Complaint is one to determine the dischargeability of a debt, this

constitutes a core proceeding over which this Court has subject matter jurisdiction and is permitted to enter a final order. 28 U.S.C. §§ 1334 and 157(b)(2)(I).

First National Bank of Omaha ("Bank"), as the issuer of a credit card, filed its Complaint to determine the dischargeability of its debt, alleging it was for money (i) obtained by false representation, false pretenses and/or actual fraud; (ii) obtained by the Debtor within 90 days of the filing of the bankruptcy petition for the purchase of luxury goods and services; and (iii) incurred to pay a tax to a governmental unit that would otherwise be nondischargeable. The Complaint alleged the Debtor charged $5,802.46 within the 90 days prior to filing of the bankruptcy petition which was nondischargeable under Section 523(a)(2)(C); charged $7,200.06 which was nondischargeable pursuant to Section 523(a)(2)(A); and charged $1,700.00 to pay Gwinnett County on September 23, 2014 which was nondischargeable under Section 523(a)(14A). In response, the Debtor filed her Motion to Dismiss, alleging the Complaint was insufficient as a matter of law because (i) it did not specify the charges that were allegedly for luxury goods and services; (ii) it relies upon "implied representations" from the use of the credit card as a basis for its allegation of false representation and that such implied representation theory is not permitted in this District; (iii) it did not plead fraud with particularity; and (iv) it failed to plead specifically what tax was paid with the credit card and on what basis the tax would be nondischargeable.

LEGAL ANALYSIS

In the context of a motion to dismiss, the Court must construe all of the allegations in the complaint as true and view the assertions "in the light most favorable to the plaintiff." Watts v. Florida Internat'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007). Under Fed. R. Civ. P. 8(a)(2), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief". There is no need for "detailed factual allegations", but the complaint must

provide the grounds for relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombley, 550 U.S. 544, 555 (2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678.

Debts for Luxury Goods – Section 523(a)(2)(C)

The Debtor first challenges the adequacy of the pleadings that charges incurred on the credit card within 90 days of the filing of the Debtor's bankruptcy petition were for luxury goods and services and are presumptively nondischargeable. Section 523(a)(2)(A) makes nondischargeable a debt for money, to the extent obtained by false pretenses, a false representation or actual fraud. Section 523(a)(2)(C) provides that,

> (i) for purposes of subparagraph (A) –
> (I) consumer debts owed to a single creditor and aggregating more than $650 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be non-dischargeable; and
> …
> (ii) for purposes of this subparagraph –
> (II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

The only allegations in the Complaint with respect to this issue are the total amount of charges made within 90 days ($5,802.46), the attached credit card statements, and the allegation in paragraph 25, "To the extent that the Debtor incurred luxury good purchases or services aggregating more than $650 within ninety days of filing this Chapter 7 bankruptcy, said luxury good purchases or services are presumed nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(C)(i)." (*sic*). Nowhere in the Complaint does Plaintiff allege that any charge was for

luxury goods and services. Rather, the Complaint only pleads, "to the extent" that charges were for luxury goods or services, they should be nondischargeable.

The Bank's pleadings are deficient. As the court stated in Discover Bank v. Hankins (In re Hankins), 2012 WL 5409629, at *5 (Bankr. D. Kan. Nov. 5, 2012), "At the pleading stage, it was incumbent upon [plaintiff] to allege the credit card charges were for luxury goods, coupled with factual allegations from which the 'luxury' characterization could be inferred." See also GE Money Bank v. McGraw (In re McGraw), 2007 WL 1076690 (Bankr. N.D. Ala. Apr. 5, 2007); FDS National Bank v. Alam (In re Alam), 314 B.R. 834, 842 (Bankr. N.D. Ga. 2004). The Bank has not identified any specific charge or charges that it contends are for luxury goods or services, nor has it alleged that any of the charges in fact were for luxury goods or services. The Complaint, as presently stated, fails to state a claim under Section 523(a)(2)(C). Nevertheless, the Court may permit the Bank to amend the Complaint to set forth the requisite allegations. The Court will allow the Bank 14 days from the date of entry of this Order to amend the Complaint with allegations sufficient to state a claim under Section 523(a)(2)(C).

Debts Incurred by False Representation, False Pretenses or Actual Fraud – Section 523(a)(2)(A)

Next, the Debtor points to paragraphs 18-21 in the Complaint, alleging they are insufficient to state a claim under Section 523(a)(2)(A). Under Section 523(a)(2)(A), a debt for money obtained by false pretenses, a false representation or actual fraud is nondischargeable. The elements required to assert a Section 523(a)(2)(A) claim for false representation are: (1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the representation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation. SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998); Chase Manhattan Bank, N.A. v. Ford (In re Ford), 186 B.R. 312, 316 (Bankr. N.D. Ga. 1995). False pretenses is defined as, "[A] series of events, activities or communications which, when

considered collectively, create a false and misleading set of circumstances, or false and misleading understanding of a transaction, in which a creditor is wrongfully induced by the debtor to transfer property or extend credit to the debtor …" ColeMichael Invs., L.L.C. v. Burke (In re Burke), 405 B.R. 626, 645 (Bankr. N.D. Ill. 2009) (alteration in original) (citation omitted), affm'd sub nom ColeMichael Investments L.L.C. v. Burke, 436 B.R. 53 (N.D. Ill. 2010). Actual fraud under Section 523(a)(2)(A) embraces "all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another … [I]t includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated." Id. at 646 (citing McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000)).

The allegations in paragraphs 18-21 are (i) the Debtor accepted and opened the credit account, thereby agreeing to abide by the terms set forth in the account agreement; (ii) the Debtor's use of the account was governed by the terms of the account agreement; (iii) at the time the Debtor incurred the charges on the account, the Debtor represented that she had the intention to repay the debt pursuant to the terms of the account agreement by using the card; and (iv) at the time the Debtor incurred the charges on the account, the Debtor represented that she agreed to abide by the terms of the account agreement. As the Debtor rightfully points out, there are no allegations in the Complaint that the Debtor made any express representations which were false and on which the Bank relied. The Bank's only allegation of representations is those implied by the use of the card.

This Court, and numerous other courts in this jurisdiction, have addressed whether "implied representations" by the use of the card are sufficient to state a claim for false representations. The courts have unanimously stated the answer is no. The matter is discussed in this Court's opinion FIA Card Services, N.A. v. Quinn (In re Quinn), 492 B.R. 341 (Bankr.

N.D. Ga. 2013) and will not be restated here in full. Suffice it to say that nondischargeability based on false pretenses or false representation "requires an express, affirmative representation". Alam, 314 B.R. at 838. As in the Quinn case, the Bank here has alleged neither an affirmative representation made by the Debtor, nor that the Debtor's credit card was revoked prior to the Debtor's incurrence of the charges on the credit card. To the contrary, the Complaint specifically alleges the Debtor's account was in good standing before she began making the charges. Moreover, because Section 523(a)(2)(A) excludes statements respecting the Debtor's financial condition, the Debtor's use of the credit card cannot be deemed a representation that she had the ability to repay. Such statements must be in writing in order to be actionable. 11 U.S.C. § 523(a)(2)(B). Consequently, the Bank has not sufficiently alleged theories of false pretenses or false representation and the Debtor's Motion to Dismiss on these theories is granted.

The Bank, however, also asserts the Debtor committed actual fraud as contemplated by Section 523(a)(2)(A) and several of the allegations in Plaintiff's Complaint set out indicia of the Debtor's intent not to repay the debt in question. In establishing actual fraud, the existence of a fraudulent representation is not a prerequisite. Actual fraud encompasses a wider range of behavior than false representation or false pretenses. McClellan, 217 F.3d at 893. To establish actual fraud under Section 523(a)(2)(A), a creditor must prove a debtor used a credit card without the actual subjective intent to pay the debt incurred. Alam, 314 B.R. at 841. "Objective" intent is not the standard for nondischargeability under Section 523(a)(2)(A). FIA Card Services, N.A. v. Matveyev (In re Matveyev), 2010 WL 2036690, at *2 (Bankr. N.D. Ga. Apr. 8, 2010). "[S]ubjective 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. Rather, the plaintiff must allege facts that show the debtor used the card while possessing the subjective intent not to repay.

Whether a particular debtor had no intention to repay the charges is a determination made on a case-by-case basis in light of the totality of the circumstances. See Chase Manhattan Bank (U.S.A.), N.A. v. Carpenter (In re Carpenter), 53 B.R. 724, 729-30 (Bankr. N.D. Ga. 1985); In re Huynh, 2008 WL 7874785 *3-4 (Bankr. N.D. Ga. 2008). When analyzing subjective intent, relevant points of consideration on the question should include: (1) the length of time between the charges made and the bankruptcy filing; (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges are made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges were made; (6) whether the debtor made multiple charges on the same day; (7) whether or not the debtor was employed; (8) the debtor's prospects for employment; (9) whether there was a sudden change in the debtor's buying habits; and (10) whether the purchases were made for luxuries or necessities. Ford, 186 B.R. at 320 (citing Carpenter, 53 B.R. at 730).

In its Complaint, the Bank alleges specific facts addressing most of the factors set forth above. The Bank alleges in paragraph 9 the Debtor made charges only two days before she received pre-bankruptcy counseling and paid her bankruptcy filing fee and/or legal fees. Paragraph 11 of the Complaint alleges the bankruptcy filing was made only five days after the last charge on the card. Attached to the Complaint are copies of all of the credit card statements, so the number and amount of the charges is included in the Complaint. The Complaint includes allegations regarding the Debtor's income and expenses at paragraphs 13-17. Allegations regarding a change in the Debtor's buying habits are included not only by virtue of the copies of the account statements attached but in paragraphs 6 and 7. These allegations are specific to the Debtor and the charges at issue, and are not merely formulaic recitations of the requirements of proving actual fraud. Consequently, the Court concludes the Complaint is sufficient to state a claim with respect to actual fraud and denies the Debtor's Motion to Dismiss on that basis.

Debt for Payment of Nondischargeable Taxes – Section 523(a)(14A)

Finally, the Bank's third cause of action alleges the Debtor used the credit card to pay a purported tax debt in the amount of $1,700 to Gwinnett County on September 23, 2014. A debt is nondischargeable under Section 523(a)(14A) if it was incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under Section 523(a)(1). Certain taxes are nondischargeable under Section 523(a)(1) and include taxes identified in Section 507(a)(8) under certain circumstances. The Complaint does not allege the type of tax that was paid, the tax year that was paid, or why that tax would be deemed nondischargeable. The Complaint is specific, however, as to the charge, the date and the payee. Given the early stage of the pleading, where no discovery has yet occurred, it is unlikely the Bank knew all of that information when the Complaint was filed. Nevertheless, the Court believes the Complaint is sufficient to state a claim and to put the Debtor on notice of the specific charge that is at issue since the charge, the amount, the date and the payee have all been identified. The Court, therefore, concludes the Complaint is sufficient and the Motion to Dismiss the third cause of action is denied.

CONCLUSION

The Debtor's Motion to Dismiss is GRANTED as to the allegations in the Complaint that the debt is nondischargeable under the theories of false representation or false pretenses. The Court also concludes the Complaint is deficient as to the "first cause of action" because it does not allege that any goods or services were luxury goods or services as required by Section 523(a)(2)(C) or identify which charges may fall within that category and why the Bank believes they are for luxury goods or services. Rather than dismissing the first cause of action, though, the Court permits the Bank to amend the first cause of action within 14 days of the date hereof. Absent a timely amendment, the first cause of action will be dismissed.

Finally, the Court DENIES the Motion to Dismiss the Complaint as to Plaintiff's theories of actual fraud under 11 U.S.C. § 523(a)(2)(A) and that the credit card was used for the payment of nondischargeable taxes under 11 U.S.C. § 523(a)(14A).

END OF ORDER

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