UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JACK T. McGARITY, JR.,	:	BANKRUPTCY CASE NO. 03-41928-MGD
Debtor,	:	
AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,	:	ADVERSARY CASE NO. 03-05041
Plaintiff,	:	
v.	:	
JACK T. McGARITY, JR.,	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendant.	:	

ORDER GRANTING RENEWED MOTION FOR DEFAULT JUDGMENT

This adversary proceeding is before the Court on a Renewed Motion for Default Judgment ("Renewed Motion") (Adversary Proceeding Docket No. 16) filed by American Express Travel Related Services Company, Inc. ("Plaintiff"). This case was commenced when, on September 25, 2003, Plaintiff filed a complaint to determine the dischargeability of a debt owed by Jack T. McGarity ("Defendant") pursuant to 11 U.S.C. § 523(a)(2)(A). Defendant did not answer the complaint and as a result, Plaintiff filed a motion for default judgment. A hearing on the motion for default judgment was held before the undersigned bankruptcy judge on August 25, 2004. The only party present at the hearing was counsel for Plaintiff. At the hearing, the Court stated that absent a specific factual basis, the use of mere conclusory allegations, as originally set forth in Plaintiff's complaint, did not satisfy the requirements necessary to establish a claim of false pretenses, false representation, or actual

fraud under § 523(a)(2)(A) as defined by the 11th Circuit. *See First Nat'l Bank v. Roddenberry*, 701 F.2d 927 (11th Cir. 1983); *also see FDS Nat'l Bank v. Alam (In re Alam)*, 314 B.R. 834 (Bankr. N.D. Ga. 2004) (Bonapfel, J.). As a result, Plaintiff's motion for default judgment was denied. However, as part of its Order denying Plaintiff's motion for default judgment, the Court granted Plaintiff thirty (30) days to file and properly serve an amended complaint. Upon Plaintiff filing and properly serving an amended complaint, the Court would entertain a renewed motion for default judgment.

On October 5, 2004, Plaintiff filed an amended complaint. The amended complaint does not add any new or additional claim for relief against Defendant, but remains predicated upon a determination of the dischargeability of credit card debt pursuant to 11 U.S.C. § 523(a)(2)(A). The amended complaint traces the same legal basis as the original complaint for the Court to determine nondischargeability, but contains a more detailed factual basis for purposes of assisting the Court in its evaluation. As such, Plaintiff's amended complaint does not assert "new or additional claims" which would warrant the issuance and service of an alias summons as required by Rule 4 of the FEDERAL RULES OF CIVIL PROCEDURE. The Court finds Plaintiff's service to be in compliance with Rule 5(a) of the FEDERAL RULES OF CIVIL PROCEDURE, made applicable to this proceeding pursuant to FED. R. BANKR. P. 7005.[1] *See Varnes v. Glass Bottle Blowers Asso.*, 674 F.2d 1365 (11th Cir. 1982); *D'Angelo v. Potter*, 221 F.R.D. 289 (D. Mass. 2004).

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[1]Rule 5(a) of the FEDERAL RULES OF CIVIL PROCEDURE provides, in pertinent part:
(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. *No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief shall be served upon them in the manner provided for service of summons in Rule 4.* (Emphasis added).

Once again, Defendant failed to file an answer, and on December 28, 2004, Plaintiff filed the Renewed Motion that is the subject of this Order. Defendant did not respond to the Renewed Motion and as a result the matter is again deemed unopposed. The Court has reviewed the entire record in the case and has determined that Plaintiff is entitled to the relief requested.

Due to Defendant's failure to respond to Plaintiff's Amended Motion, the factual allegations are therefore deemed uncontroverted. Plaintiff is the holder of a claim against Defendant arising from a credit card account. (Amended Complaint, ¶8). The balance of the account as of the date of the filing of Defendant's chapter 7 petition was $11,707.32, not including fees and costs as provided by the account agreement. (*Id.*, ¶9). Defendant opened the account in November 2002 under the name of JTM Construction. (*Id.*, ¶10). Defendant's credit application reflected that he was the "owner" and "authorizing officer" of a business in operation for at least four years. (*Id.*, ¶36). Plaintiff's records kept in the ordinary course of business reflect that Defendant advised Plaintiff that his annual income was $100,000 from his employment in construction. (*Id.*, ¶16). From the inception of the account in November 2002 through January 2003, Defendant complied with the applicable terms and conditions of the account agreement, including a payment in full. (*Id.*, ¶12). In December 2002, Defendant incurred a charge of $25.92 and made payment in full of said charge. (*Id.*, ¶13). Between January 16, 2003 to January 30, 2003, Defendant made three charges totaling $11,247 on the account. (*Id.*, ¶14). Two of the three charges total $11,235 for medical services through Bosley Medical, a firm that specializes in hair transplantation services. (*Id.*, ¶15). After making the charges described above, Defendant made a single payment of $200. (*Id.*, ¶18). Defendant filed a petition under chapter 7 of the Bankruptcy Code on June 24, 2003. (*Id.*, ¶6). According to Statement of Financial Affairs filed with the Defendant's chapter 7 petition, the Defendant reported annual gross income of $15,000 for 2003, $14,000 for 2002, and $17,000 for 2001. (*Id.*, ¶21). Defendant's Schedule I reflects current income of the Defendant to be

$1,863.34, and Schedule J reflects current household expenditures to total $2,811. (*Id.*, ¶¶ 22, 23). According to the Defendant's Schedule F, the Defendant had unsecured nonpriority debt totaling $43,570.51, of which, $43,445.75 appears to be credit card debt. (*Id.*, ¶24).

Plaintiff contends that the debt owed by Defendant should be deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) provides that a debtor's chapter 7 discharge would not discharge an individual debtor for any debt for money, property, services, or an extension of credit, to the extent obtained by false pretenses, a false representation, or actual fraud.

Plaintiff's false pretenses or false representation claim depends on the assertion that with each use of Debtor's credit account he was making an implied representation to Plaintiff of his intent to repay the debt pursuant to the terms of the account agreement. (*Id.*, ¶26). However 11th Circuit case law greatly precludes use of the implied representation theory to establish false pretenses or false representations. *Alam*, 314 B.R. 834. In *First Nat. Bank of Mobile v. Roddenberry (In re Roddenberry)*, 701 F.2d 927 (11th Cir. 1983), the 11th Circuit concluded that any potential false pretenses or false representation claim under § 17a(2) of the Bankruptcy Act of 1898 "must involve a determination of whether the bank unconditionally revoked the cardholder's right to use and possession of that card and if so when the cardholder became aware of such revocation." *Roddenberry,* 701 F.2d at 928. Only a debtor's use of a credit card after an unconditional and unequivocal revocation by the creditor can establish false pretenses or false representation. Due to the fact that only a small percentage of dischargeability questions involve post-revocation charges, very few such debts will qualify as non-dischargeable for "false pretenses" or "false representation" under *Chase Manhattan Bank, N.A. v. Ford (In re Ford)*, 186 B.R. 312, 319 (Bankr. N.D. Ga. 1995) (Drake, J.). Plaintiff has not set forth such facts in its complaint to establish a claim under false pretenses or false representation based upon 11th Circuit law. As such, any claim under false pretenses or false representation must fail.

The focus now turns on whether or not Plaintiff can establish a case under "actual fraud." "Actual fraud" is not specifically defined in section 523, however many Courts look to the United States Supreme Court case of *Field v. Mans*[2] which stated that the common-law understanding of the term should be used.[3] In *Field v. Mans*, the Supreme Court addressed the misrepresentation aspect of fraud. However, in the instant case Plaintiff's actual fraud allegation appears predicated upon the notion that Defendant incurred charges that he, subjectively, had no intention of paying.

> "American Express asserts that at the time the Defendant incurred the charges on the Account his total monthly expenses exceeded his total monthly income and therefore, subjectively, he did not intend to honor his obligations to American Express to satisfy the Account." (Complaint, ¶32).

This theory does not necessarily incorporate an allegation of a false representation. *See Alam*, 314 B.R. 840. Importantly, the Court does not consider "actual fraud" to be strictly limited to misrepresentations.

> "Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain advantage over another by false suggestions or by the impression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all cunning, dissembling, and any unfair way by which another is cheated." *Stapleton v. Hotty*, 207 Okla. 441, 250 P.2d 451, 453-54 (1952).

McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000).

A debtor's fraudulent intent frequently must be distilled from circumstantial evidence

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[2]516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995).

[3]The common law elements of fraud are:
(1) [that] the debtor made the representations;
(2) that at the time he made those representations the debtor knew they were false;
(3) that he made them with the intention and purpose of deceiving the creditor;
(4) that the creditor relied on such representations; and
(5) that the creditor sustained the alleged loss and damage as the proximate result of the representations made.
Boyd Gaming Corp. v. Hall (In re Hall), 228 B.R. 483, 489 (Bankr. M.D. Ga. 1998).

Factors used by courts to help ascertain whether a debtor had fraudulent intent include: (1) the length of time between the charges made and the bankruptcy; (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 are 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. *AT&T Universal Card Servs. Corp. v. Chinchilla (In re Chincilla)*, 202 B.R. 1010, 1014 (Bankr. S.D. Fla. 1996) (internal citations omitted).

Each case should be evaluated on a case by case basis and the above factors may or may not be useful to the Court in an effort to determine whether a debtor lacked the subjective intent to pay the debt. *In re Carpenter*, 53 B.R. 724, 730 (Bankr. N.D. Ga. 1985). In this case, the Court finds the uncontested facts to demonstrate the existence of Debtor's actual, subjective intent to defraud, *i.e.*, to obtain money or property by incurring charges with no intent to pay. *See FDS National Bank v. Alam (In re Alam)*, Ch. 7 Case No. 03-96116-PWB, Adv. No. 03-06465, slip op. at 3 (Bankr.N.D.Ga. 2005).

The amended complaint sets forth that the Debtor opened the credit account in November 2002. In January 2003, after minimal use on the card, he incurred charges of $11,235 for hair replacement services, clearly an expense that would not be a necessity. The Defendant made a single payment of $200 before filing his petition under chapter 7 in June 2003. The Defendant's bankruptcy schedules reveal net monthly income of $1,863.34 and current household expenses exceeding $2,800. Schedule F lists over $43,000 of credit card debt. Defendant held himself out to Plaintiff as being the owner of a construction company with annual income of $100,000. This contradicts the Schedules and Statement of Financial Affairs filed with the Court under penalty of perjury. The Statement of Financial Affairs filed

with the petition reveal annual gross income of $15,000 for 2003, $14,000 for 2002, and $17,000 for 2001.

The Court finds the above uncontested facts to be sufficient to infer specific fraudulent intent. The Defendant's schedules reveal a large amount of credit card debt and, as of June 2004, absolutely no disposable income with which to pay it. Based upon the Defendant's Statement of Financial Affairs, his income has remained very consistent for the past three years, which serves to support the notion that Defendant did not have the means or the intent to pay the debt owed to Plaintiff when it was incurred. As such the Court finds that entry of default judgment based upon the Plaintiff's allegations and Defendant's failure to answer is appropriate.

Plaintiff also requests for the payment of attorney's fees of 15% and all costs expended by Plaintiff in the collection of the debt as provided by the terms and conditions of the account agreement. The 11th Circuit has held that such a request is a question of local law. *TranSouth Financial Corp. v. Johnson*, 931 F.2d 1505 (11th Cir. 1991). O.C.G.A. § 13-1-11(a)(3) sets forth Georgia law on the matter. Under Georgia law, a contractual provision for attorney's fees is enforceable if the creditor gives ten days written notice of the principal and interest due and its intent to enforce the attorney's fees provision, and the debtor subsequently fails to pay. *See Alam*, Ch. 7 Case No. 03-96116-PWB, Adv. No. 03-06465, slip op. at 5, and *Am. Express Travel Related Servs. v. Jawish (In re Jawish)*, 260 B.R. 564 (Bankr. M.D. Ga. 2000). There is no evidence that Plaintiff complied with the requirements of O.C.G.A. § 13-1-11(a)(3) prior to the filing of this bankruptcy case. Accordingly, it is

ORDERED that Plaintiff's Renewed Motion is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff may file proof of its compliance with O.C.G.A. § 13-1-11(a)(3) and a statement of attorney fees and costs incurred for this action within 30 days of date of entry of this Order. Failure to file proof of compliance with O.C.G.A. § 13-1-11(a)(3) shall result in denial of Plaintiff's request for fees and costs. A

final judgment shall be entered following a determination of whether Plaintiff is entitled to attorney's fees and costs.

The Clerk is directed to serve a copy of this Order to counsel for Plaintiff, counsel for Defendant and Defendant.

IT IS SO ORDERED.

This, the _____ day of March, 2005.

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MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE