UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	**CASE NUMBERS**
CHONG U. HAN and SUN A. HAN,	BANKRUPTCY CASE NO. 04-69046-MGD
Debtors,	
CITIBANK (SOUTH DAKOTA), N.A.,	ADVERSARY CASE NO. 04-06478
Plaintiff,	
v.	
CHONG U. HAN,	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendant.	

ORDER GRANTING IN PART
SECOND MOTION FOR DEFAULT JUDGMENT

This adversary proceeding is before the Court on a Second Motion for Entry of Default Judgment ("Renewed Motion") (Adversary Proceeding Docket No. 13) filed by Citibank (South Dakota), N.A., ("Plaintiff"). The Court has reviewed the Renewed Motion and the entire record in the case and has concluded that a hearing is not necessary. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and the Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. For the reasons set forth below, the Court hereby **GRANTS** Plaintiff's Renewed Motion.

This case was commenced when, on August 24, 2004, Plaintiff filed a complaint to determine the dischargeability of a debt owed by Chong U. Han ("Defendant") pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(C). Defendant did not answer the complaint and

Plaintiff filed a motion for default judgment. Defendant did not file a response in opposition to Plaintiff's motion. On March 28, 2005, the Court entered an Order which denied Plaintiff's motion for default judgment. The Court stated that absent a specific factual basis, the use of mere conclusory allegations, as 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 of Mobile v. Roddenberry*, 701 F.2d 927 (11th Cir. 1983); *also see FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834 (Bankr.N.D.Ga. 2004) (Bonapfel, J.). Additionally, the Court concluded that Plaintiff did not allege facts sufficient to trigger the presumption of non-dischargeability in § 523(a)(2)(C). 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.

On April 26, 2005, Plaintiff timely filed an amended complaint. The amended complaint does not add any new or additional claim for relief against Defendant, but is predicated upon a determination of the dischargeability of credit card debt pursuant to 11 U.S.C. § 523(a)(2)(A).[1] The amended complaint asserts the same legal basis as the original complaint for the Court to determine nondischargeability, but does contains a more detailed factual basis for the requested relief. As such, Plaintiff's amended complaint does not assert "new or additional claims" which would warrant the issuance and service of an alias subpoena 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.[2] *See*

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[1]While the original complaint also asserted a cause of action pursuant to § 523(a)(2)(C), the amended complaint only argues for a finding of non-dischargeability under § 523(a)(2)(A).

[2]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

Varnes v. Local 91, Glass Bottle Blowers Assoc. of the United States and Canada, 674 F.2d 1365 (11th Cir. 1982); *D'Angelo v. Potter*, 221 F.R.D. 289 (D.Mass. 2004).

Defendant failed to file a response pleading, and on June 27, 2005, 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 Renewed Motion, the factual allegations are uncontroverted and therefore deemed admitted. Plaintiff is the holder of a claim against Defendant arising from a credit card account. (Amended Complaint, ¶4). The balance of the account as of the date of the filing of Defendant's chapter 7 petition was $10.654.76.[3] (*Id.*). Defendant opened the account with Plaintiff in August of 1994. (*Id.*, ¶6). Beginning April 8, 2005 and ending April 25, 2004, 38-55 days prior to filing his petition under chapter 7, Defendant accumulated charges in the amount of $3,918. (*Id.*). The last payment Defendant made on the account was on March 31, 2004, in the amount of $60. (*Id.*) After the last payment was made, Defendant continued to make thirty-nine (39) separate charges on the account, many of them on the same day. (*Id.*, ¶7). Defendant's balance on the account in the month prior to the charges in question was $1,728.05. (*Id.*). Defendant charged nearly $9,000 on Plaintiff's credit card within eighty-five (85) days of filing the chapter 7 bankruptcy and made only one payment of $60 during this period of time. (*Id.*).

A review of Defendant's bankruptcy schedules reveal a total of seven unsecured

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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).

[3]The date of the filing of the chapter 7 petition was June 2, 2004.

creditors, all listed because of monies owed on various credit card accounts. The total unsecured debt shown on Schedule F is $50,000. Defendant's Schedule I indicates that one of the joint Debtors has pension income totaling $151 per month.[4] The other Debtor has been employed three months at Standard Building Maintenance Co. and has total net monthly income of $1,679.72. Schedule J shows total expenses of $2,430, of which $2,000 is for home mortgage payments. Question 18 of the Statement of Financial Affairs ("SOFA") reveals that between February 2000 and April 22, 2004, Debtors operated a grocery store named Dino Grocery on McPherson Avenue in Atlanta. Question One of the SOFA indicates that Debtors earned $43,000 in gross income during 2003.[5] The schedules show no business debts or assets and the only secured creditors listed are the two lien holders on Debtors' residence.

Plaintiff alleges that the debt owed by Defendant should be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) provides that a debtor's chapter 7 discharge does not discharge an individual debtor as to 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 Defendant's credit account Defendant 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. at 838. 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 [creditor] unconditionally revoked the cardholder's right to use and possession of that card and if so

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[4]Schedule I is silent as to which of the two Debtors is unemployed.

[5]Question 1 of SOFA should also list Debtors' income for the year 2004, but does not.

when the cardholder became aware of such revocation." *Roddenberry,* 701 F.2d at 928. The Court notes that *Roddenberry* was decided under § 17a(2) of the Bankruptcy Act, but because of the similarities between § 17a(2) and § 523(a)(2)(A), the case law construing § 17a(2) is given precedential value in § 523(a)(2)(A) cases. *See Birmingham Trust National Bank v. Case*, 755 F.2d 1474 (11th Cir. 1985); *Chase Manhattan Bank v. Carpenter*, 53 B.R. 724 (Bankr. N.D.Ga. 1985). The holding in *Roddenberry* is that only a debtor's use of a credit card after an unconditional and unequivocal revocation by the creditor can establish a claim under 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 *Roddenberry. Matter of Ford*, 186 B.R. 312, 319 (Bankr.N.D.Ga. 1995) (Drake, J.). Plaintiff has not set forth such facts in its complaint or amended 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*[6] which stated that the common-law understanding of the term should be used.[7] In *Field v. Mans*, the Supreme Court addressed the misrepresentation aspect of fraud. However, in the instant case, Plaintiff's actual fraud

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[6]516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995).

[7]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.
In re Hall, 228 B.R. 483, 489 (Bankr.M.D.Ga. 1998).

allegation appears predicated upon the allegation that Defendant incurred charges that he, subjectively, had no intention of paying.

> "...Defendant did not have the ability to repay Plaintiff, and Defendant knew or should have known of this inability to repay, or incurred the debt with reckless disregard as to the belief that Defendant could repay the debt to Plaintiff. Defendant was already insolvent at the time of the purchases, and did not have the present ability or realistic future possibility to repay the debt. Pursuant to Defendant's schedule I, Defendant was unemployed when the charges were made. Pursuant to Defendant's Statement of Financial Affairs, Defendant had no income at all for 2004. How did Defendant expect to pay nearly $9000 in charges without a job? Defendant therefore had an actual, subjective intent to defraud Plaintiff by accepting the benefits of the credit line without ever intending to repay same." (Amended Complaint, ¶9).

This theory does not necessarily incorporate an allegation of a false representation. *See Alam*, 314 B.R. at 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 created." *Stapleton v. Holt*, 207 Okla. 442, 250 P.2d 451, 453-54 (Okla. 1952).

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

A debtor's fraudulent intent frequently must be distilled from circumstantial evidence. 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 Services, 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 its facts and the above factors may or may not be useful to the Court in determining whether a debtor lacked the subjective intent to pay the debt. *Chase Manhattan Bank, (U.S.A.) N.A. v. Carpenter (In re Carpenter)*, 53 B.R. 724, 730 (Bankr.N.D.Ga. 1985). In this case, the Court finds the uncontested facts 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.

The amended complaint sets forth that in early 2004, Debtor had a modest balance on his credit card account of $1,728.05. In the Spring of 2004, while his income was plummeting, the Defendant made thirty-nine separate charges on the subject account and incurred a total of approximately $9,000 of debt, while making only one payment of $60. Debtor's bankruptcy schedules reveal that his grocery business terminated in April 2004, but the credit card statements show numerous charges incurred afterwards. Debtor's Schedule F lists $50,000 of credit card claims and Schedules I and J show no disposable income for the household.

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 Schedules and Statement of Financial Affairs, the Defendant is unemployed and the spouse earns a very modest income, 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 uncontested and unrebutted allegations to be 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. of Florida 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 a debtor ten days written notice of the principal and interest due and its intent to enforce the attorney's fees provision, and debtor fails to pay within ten days of receipt of notice. *See Alam*, Ch. 7 Case No. 03-96116-PWB, Adv. No. 03-06465, slip op. at 5, and *American Express Travel Related Svcs., Inc. 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 and Plaintiff's request must be denied. Accordingly, it is

ORDERED that Plaintiff's Renewed Motion is **GRANTED IN PART.** The Court finds that $8,926.71 to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).[8]

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

IT IS SO ORDERED.

This, the 5th day of August, 2005.

Mary Grace Diehl
MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

[8]This amount is derived by taking the total amount owed by Defendant to Plaintiff, which was represented to be $10,654.76, and deducting $1,728.05, which, according to the amended complaint, represents the balance owed on the account in the month prior to when the charges in question were incurred.