UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
DAE IL JO	)	CASE NO. 04-71384-MHM
	)	
Debtor	)	
	)	
CITIBANK (SOUTH DAKOTA), N.A.	)	
	)	**ADVERSARY PROCEEDING**
Plaintiff	)	**NO. 04-6542**
v.	)	
	)	
DAE IL JO	)	
	)	**ORDER**
Defendant	)	

On January 3, 2005, Plaintiff filed a motion for default judgment. Default was entered by the Clerk November 12, 2004. Plaintiff seeks entry of a default judgment in the amount of $19,422.28, plus attorneys fees and costs. Plaintiff's claims that form the subject of its complaint arise from Defendant's use of a credit card issued to Defendant by Plaintiff.

Plaintiff alleges that during the 60-day period immediately preceding Debtor's filing of the bankruptcy petition, Debtor accumulated charges totaling $1,754.41 (the "60-Day Charges"). Plaintiff does not allege that these charges were for luxury goods and services, although some of these do appear to be so. On the other hand, several significant charges appear *not* to be for luxury goods and service: A $765 charge to Oconee Regional Medical Center, and a $90 charge to Atlanta Dental are the most obvious non-luxury charges. Other charges appear to be for parking, groceries, gas and office supplies. Deduction of these amounts bring the total of the 60-Day Charges below the $1150 floor of §523(a)(2)(C). Therefore, Plaintiff is not entitled to the benefit of the presumption in §523(a)(2)(C).

The remaining allegations in Plaintiff's complaint are insufficient to establish that Plaintiff's credit card claims against Debtors are nondischargeable. A credit card debt is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A) to the extent that money, property, services, or an extension, renewal, or refinancing of credit, was obtained by

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or insider's financial condition[.]

The burden of proof is upon the creditor to show by a preponderance of evidence that the debt is nondischargeable. *Grogan v. Garner*, 111 S. Ct. 654, 659 (U.S. 1991).

In the Eleventh Circuit Court of Appeals, the seminal case on that issue is *First National Bank of Mobile v. Roddenberry,* 701 F. 2d 927 (11th Cir. 1983). Although *Roddenberry* was decided under §17a(2) of the Bankruptcy Act, the similarities between §17a(2) and §523(a)(2)(A) give the case law construing §17a(2) precedential value in §523(a)(2)(A) cases. *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).

Roddenberry is a credit card case. In reaching its conclusion that mere use of a credit card without the ability or intent to repay did not constitute obtaining credit by false pretenses or false representation, the *Roddenberry* court noted that credit card companies routinely "encourage or willingly suffer credit extensions beyond contractual credit limits." *Id.* at 932. The court concluded that §17a(2) "should not be construed to afford additional protection for those who unwisely permit or encourage debtors to exceed credit limits." *Id.* The court, therefore, held:

> Voluntary assumption of risk on the part of a [credit card company] continues until it is clearly shown that the [credit card company] unequivocally and unconditionally revoked the right of the cardholder to further possession and use of the card, and until the cardholder is aware of this revocation.

Id. Plaintiff has shown no false representation by Debtor; use of the card itself is insufficient to show false representation.

The *Roddenberry* court noted in footnote 3 the addition of actual fraud to §523(a)(2)(A) [formerly §17(a)2] and hypothesized that addition "may alter the outcome in certain cases where debtors obtain credit without a present intention of repayment." In bankruptcy courts in the Eleventh Circuit, the most frequently cited opinion on the "actual fraud" issue is *Chase Manhattan Bank v. Carpenter,* 53 B.R. 725 (Bankr. N.D. Ga. 1985). *See, for example, Chase Manhattan Bank, NA v. Ford,* 186 B.R. 312 (Bankr. N.D. Ga. 1995); *American Express Travel Related Services Co., Inc. v. Rusu,* 188 B.R. 325 (Bankr. N.D. Ga. 1995). The *Carpenter* case concludes that, in dischargeability proceedings involving credit cards, actual fraud may be shown by demonstrating the debtor used the credit card with no present intention to repay. The *Carpenter* case noted that an inability to pay--hopeless insolvency--does not support an inference that the debtor lacked an intent to repay. *See also, Anastas v. American Savings Bank*, 94 F. 3d 1280 (9th Cir. 1996); *Chase Manhattan Bank, NA v. Ford*, 186 B.R. 312 (Bankr. N.D. Ga. 1995); *American Express Travel Related Services Co., Inc. v. McKinnon,* 192 B.R. 768 (Bankr. N.D. Ala. 1996).[1] *But see, American Express Centurion Bank v. Hinshaw,* 199 B.R. 786 (Bankr. M.D. Fla. 1995); *Southtrust Bank of Alabama v. Moody,* 203 B.R. 771 (Bankr. M.D. Fla. 1996).[2] The *Carpenter* court also noted that mere violation of contractual provisions in the credit agreement did not establish actual fraud.

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[1] The *McKinnon* court departed from the "totality of the circumstances" analysis espoused by the *Carpenter* court and chose instead the Common Law/Subjective analysis which characterized the used of a credit card as a promise to pay in the future which is actionable as fraud only if the debtor lacked the subjective intent to repay. The *McKinnon* court relies upon the instructions of the U.S. Supreme Court in *Field v. Mans,* 116 S. Ct. 437 (U.S. 1995), that bankruptcy courts should apply common law principles to dischargeability issues.

[2] The courts in Florida employ a standard that a credit card debt is nondischargeable pursuant to §523(a)(2)(A) if the debtor had no intention to repay the debt or if the debtor *knew* he would be unable to repay the debt. Both prongs include a *mens rea* element but the knowing inability to repay the debt would obviously be proven primarily by evidence of the debtor's financial condition.

The court has wide discretion in determining whether to enter a default judgment. *Riehm v. Park,* 272 B.R. 323 (Bankr. D. N.J. 2001); *Owens-Illinois, Inc. v. Garrett,* 3 B.R. 557 (Bankr. N.D. Ga. 1980). In the instant case, the allegations in Plaintiff's complaint are insufficient to establish that Debtors lacked the present intention to repay. Accordingly, it is hereby

ORDERED that Plaintiff's motion for default judgment is ***denied.***

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 11th day of March, 2005.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE