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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JOSEPH RYAN HARRELL SHARON JANE HARRELL,	:	BANKRUPTCY CASE NO. 04-13732-WHD
Debtors.	:	
CHASE MANHATTAN BANK,	:	ADVERSARY PROCEEDING NO. 05-1010
Plaintiff,	:	
v.	:	
SHARON JANE HARRELL	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendant.	:	

ORDER

Before the Court is the Motion for Default Judgment filed by Chase Manhattan Bank USA, NA (hereinafter the "Plaintiff") in the above-captioned adversary proceeding. The Plaintiff seeks judgment by default against Sharon Jane Harrell (hereinafter the "Debtor"). This matter arises in connection with a complaint to determine dischargeability in which the Plaintiff alleges that a debt owed by the Debtor to the Plaintiff is nondischargeable pursuant to §§ 523(a)(2). This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I).

The Plaintiff filed its complaint on February 11, 2005. The Debtor filed no

responsive pleading. On March 16, 2005, the Plaintiff filed a motion for default judgment.

In order to enter a default judgment, the Court must first determine that the Plaintiff's allegations of fact serve as a sufficient basis for entry of a judgment. *Nishimatsu Construction Co., Ltd. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). To succeed under § 523(a)(2)(A), a creditor must establish by a preponderance of the evidence that: (1) the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) the creditor relied upon the debtor's representation; (3) such reliance by the creditor was justifiable; and (4) the creditor suffered a loss as a result of that reliance. *See City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277, 279-84 (11th Cir. 1995); *see also Grogan v. Garner*, 498 U.S. 279, 285-90 (1991); *Signet Bank v. Keyes*, 959 F.2d 245 (10th Cir. 1992); *Mfr. Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082, 1082 (6th Cir. 1988).

In this case, the Plaintiff's complaint is insufficient to establish nondischargeability under § 523(a)(2)(A) because it fails to allege that the Debtor made a false representation to the Plaintiff. This Court has previously held that without additional evidence, neither a debtor's promise to repay a credit card balance nor his use of the credit card, constituted a false representation. *See GECC v. Hall,* 03-1034 (Bankr. N.D. Ga. Oct. 15, 2003) (Drake, J.) (rejecting the implied representation theory, a theory which assumes that a "credit card user impliedly represents when he uses the card that he has the intent to pay for goods and services"); *see also Citibank (South Dakota) N.A. v. Young On Kim*, No. 01-6088-ADK

(Dec. 24, 2001) (Cotton, J.), *affirmed* Civil Action No. 1:02-CV-314-JOF (Apr. 1, 2003) (Forrester, J.) (same); *FDS National Bank v. Alam (In re Alam)*, No. 03-6465-PWB (Bankr. N.D. Ga. June 24, 2004) (Bonapfel, J.) (holding that the "implied representation theory" is inconsistent with the Eleventh Circuit Court of Appeals' holding in *First National Bank of Mobile v. Roddenberry*, 701 F.2d 927 (11th Cir. 1983)). This Court continues to agree that the Eleventh Circuit Court of Appeals would not apply the "implied representation theory" to determine whether credit card debt is nondischargeable pursuant to § 523(a)(2)(A). As noted by the court in *Citibank v. Kim*, "Plaintiff's complaint does not allege facts to support the elements of a Section 523(a)(2)(A)[,]" but instead, "consists of a series of allegations which merely recite legal conclusions unsupported by facts." *Id.*

An alternative basis for establishing that a debt is nondischargeable under § 523(a)(2)(A) is to establish that the debt was incurred as a result of the debtor's actual fraud. In *Alam*, the court noted that "[t]he existence of a fraudulent misrepresentation is not necessary to an actual fraud claim under § 523(a)(2)(A)." *Alam*, at 8 (citing *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000)). With regard to credit card transactions, actual fraud can be established by showing that the debtor used "a credit card without the actual, subjective intent to pay the debt thereby incurred." *Id.* That being said, in *Alam*, the court made clear that it would not find conclusory allegations sufficient for the purpose of establishing the Debtor's subjective intent. *Id.* at 10. Similarly, rather than rely upon the Plaintiff's conclusory allegations that the Debtor lacked an objective intent to repay the

charges, this Court will require the Plaintiff to plead specific factual allegations from which the Court could infer that the Debtor lacked any subjective intent to pay the specific charges incurred.

In making this determination, the Court considers the "totality of the circumstances test" employed by the Ninth Circuit Bankruptcy Appellate Panel in *Citibank v. Dougherty (In re Dougherty),* 84 B.R. 653, 657 (9th Cir. BAP 1996). This test allows a bankruptcy court to infer a debtor's fraudulent intent from "the totality of the circumstances," by considering "twelve, non-exclusive factors." *See In re Ettell*, 188 F.3d 1141 (9th Cir. 1999) (citing *In re Eashai*, 87 F.3d 1082 (9th Cir. 1996)). These factors include:

> "(1) the length of the time between the charges made and the filing of bankruptcy; (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of charges made; (5) the financial condition of the debtor at the time the charges were made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospect for employment; (10) the financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases were made for luxuries or necessities."

Ettell, 188 F.3d at 1144 n.2. As it is not likely that a debtor would admit that he or she incurred charges without the intent to pay them, it is appropriate for the Court to infer this intent from the facts of the case. *Id.* at 1145 ("Because fraud lurks in the shadows, it must usually be brought to light by consideration of circumstantial evidence."). These factors provide a reasonable method of determining whether the debtor intended to repay the

charges at the time she incurred them.

In this case, the Court finds the following facts to be established due to the Debtor's failure to answer the Plaintiff's Complaint: 1) the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on November 14, 2004; 2) the Debtor owes $22,665.16 on the credit card account provided by the Plaintiff; 3) between June 10, 2004 and June 16, 2004, the Debtor incurred $129.24 in retail charges and obtained $1,062.69 in cash advances through use of her credit card account; and 4) after June 10, 2004, the Debtor made no payments to the Plaintiff. These facts are insufficient for the Court to conclude that the Debtor lacked the subjective intent to pay the charges made at the time. For example, the Debtor apparently stopped using this credit card in June of 2004, but did not file her bankruptcy petition until November 2004. This fact does not indicate that the Debtor planned to file for bankruptcy protection at the time that she incurred the last charges on her credit card account.

For the reasons discussed above, the Court cannot enter a default judgment in favor of the Plaintiff at this time.[1] Should the Plaintiff wish to amend the complaint to include additional allegations of fact or submit evidence that would establish its claim, the Plaintiff

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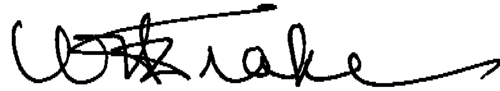
[1] Although the Plaintiff did not specifically refer to § 523(a)(2)(C), the charges at issue here would not be nondischargeable pursuant to that subsection. Section 523(a)(2)(C) presumes that a debt is nondischargeable where the debtor has incurred a debt of more than $1,225 for luxury goods or took cash advances totaling more than $1,225 within 60 days of filing the bankruptcy case. *See* 11 U.S.C. § 523(a)(2)(C). The Debtor did not charge more than $1,225 or obtain cash advances in excess of $1,225 within the sixty days preceding the filing of her petition.

may do so **on or before May 13, 2005.**

Should the Plaintiff fail to do so, the Plaintiff's Motion for Default Judgment shall stand **DENIED** as of the date of the entry of this Order, the Clerk's Entry of Default shall be **VACATED** without the need for a further order, and the Plaintiff's Complaint shall stand **DISMISSED** as of the date of the entry of this Order.

IT IS SO ORDERED.

At Newnan Georgia, this 19 day of April, 2005.



W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE