

1/3/07

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	CASE NO. 04-97684-CRM
GREGORY L. HOWARD,	
Debtor.	CHAPTER 7
DISCOVER BANK, ISSUER OF THE DISCOVER CARD,	ADVERSARY PROCEEDING NO. 05-6033-CRM
Plaintiff,	
v.	JUDGE MULLINS
GREGORY L. HOWARD,	
Defendant.	

ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Default Judgment, filed on September 26, 2005. The Plaintiff filed the Complaint Objecting to Dischargeability of Indebtedness (11 U.S.C. § 523) (the "Complaint") in the above-styled action on January 27, 2005. On January 28, 2005, a Summons in an Adversary Proceeding (the "Summons") was issued requiring the Debtor to file and serve an answer or a response to the Complaint. Pursuant to Plaintiff's request, an Alias Summons was issued on February 22, 2005. According to the Certificate of Service filed on February 23, 2005, the Debtor was duly served with the Summons and Complaint February 23, 2005 via first class mail, postage prepaid. Rule 7012 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") requires a defendant to "serve an answer within 30 days after the issuance of the summons." No answer or response was filed or served. On April 15, 2005, this Court issued an Order *sua sponte* stating that the Debtor was in

default and that Plaintiff was given 20 days from the date of entry of the Order to file a request for entry of default or show cause. The Order stated that “[s]hould Plaintiff fail to comply with this Order, the Complaint shall, without further notice, be dismissed for want of prosecution.” On May 3, 2005, Plaintiff filed a Request for Entry of Default pursuant to Bankruptcy Rule 7055(a). On September 26, 2005, the Plaintiff filed the Motion for Default Judgment.

Rule 55 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings pursuant to Bankruptcy Rule 7055, provides that the entry of default judgment is discretionary. See Fed. R. Civ. P. 55(b) (“[j]udgment by default *may* be entered” by the court) (emphasis added). In addition, the court should consider whether the complaint, and the allegations asserted therein, is legally sufficient.

[A] defendant’s default does not in itself warrant the court entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered The defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law. In short . . . a default is not treated as an absolute confession of the defendant of his liability and of the plaintiff’s right to recover.

Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975); see also McCoy v. Johnson, 176 F.R.D. 676, 679 (N.D. Ga. 1997); Bruce v. Wal-Mart Stores, Inc., 699 F. Supp. 905, 906 (N.D. Ga. 1988). Accordingly, the court must determine whether the facts alleged constitute a legitimate claim for relief. See 10 Alan N. Resnik, Henry J. Sommer, & Lawrence P. King, Collier on Bankruptcy ¶ 7055.02 (15th ed. rev. 2006) (“Upon a default, the court is generally required to deem as true the well pleaded allegations of a complaint, but it is not required to agree that the pleaded facts constitute a valid cause of action.”).

According to the Complaint, Plaintiff, a credit card issuer, alleges that Debtor "obtained credit extended from Plaintiff by false pretenses, false representations, and/or actual fraud" (Doc. No. 1 at ¶ 15). Plaintiff states that the Debtor incurred charges and cash advances on the account totaling \$2,257.57, including interest, and that \$1,935.96 of the transactions were

made within the presumption period (Doc. No. 1 at ¶ 9). Moreover, Plaintiff states that "by obtaining and/or accepting an extension of credit from Plaintiff and incurring charges on the account, Defendant represented an intention to repay the amounts charged" and "Defendant incurred the debts when Defendant had no ability or objective intent to repay them" (Doc. No. 1 at ¶¶ 12,14). Accordingly, Plaintiff seeks a determination that \$1,935.96 of Debtor's debt to Plaintiff is excepted from discharge under 11 U.S.C. section 523(a)(2)(A) due to debtor's false pretenses, false representations, or actual fraud (Doc. No. 1).

Plaintiff's Complaint lacks the necessary factual allegations which allow this Court to grant Plaintiff's Motion for Default Judgment based on false pretenses or false representations. In a factually analogous case to the one presented before this Court, Judge Bonapfel of this District denied a motion for default judgment because plaintiff's § 523(a)(2)(A) complaint: (1) failed to sufficiently allege facts that established false pretenses or false representation and also because it (2) lacked specific factual allegations from which a finding of actual, subjective fraudulent intent to establish actual fraud could be inferred. FDS National Bank v. Alam (In re Alam), 314 B.R. 834, 841-42 (Bankr. N.D. Ga. 2004) (Bonapfel, J.). In his ruling, Judge Bonapfel held that "nondischargeability based on false pretenses or false representation requires an express, affirmative representation" and therefore refused to apply an implied representation theory to find the credit card debt nondischargeable. Id. at 839. Moreover, the court stated that debt is nondischargeable under the false pretenses or false representation dischargeability exception only if the representation was knowingly false. Id. To establish this element, Plaintiff must show that the debtor possessed an actual, subjective fraudulent intent. Id. This subjective 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." Id. at 837-39. In this case, Plaintiff's skeletal Complaint contains only bald assertions that make blanket legal

conclusions. Therefore, like in Alam, Plaintiff's Complaint lacks specific factual allegations from which a finding that Debtor possessed an actual, subjective fraudulent intent can be sufficiently established.

Likewise, Plaintiff's Complaint lacks specific allegations from which this Court could find that Debtor engaged in actual fraud against Plaintiff. The Complaint recites the blanket statement that "Defendant obtained credit extended by Plaintiff by false pretenses, false representations and/or actual fraud" (Doc. No. 1 at ¶ 15). Plaintiff bases the fraud allegation on the representations of financial condition previously discussed and that \$1,935.96 of transactions were made within the presumption period (Doc. No. at ¶ 9). In Alam, Judge Bonaphel stated that a claim that a debt is nondischargeable due to actual fraud shown only by implied representations does not warrant entry of a default judgment. Alam, 314 B.R. at 840. However, Plaintiff also makes the allegation that Debtor incurred debts when he "had no ability or objective intent to repay them" (Doc. No. 1 at ¶ 14). This argument could be construed as not being based on false representations and, as such, is not resolved by the implied representation analysis above. See Alam, 314 B.R. at 840. With regard to factual allegations merely stating that a debtor did not intend to pay a debt when he incurred it, the Alam court stated that while these allegations are arguably sufficient to meet the notice requirements of Rule 8 of the Federal Rules of Civil Procedure (made applicable by Bankruptcy Rule 7008), it would not exercise its discretion to "enter default judgment in a nondischargeability proceeding alleging actual fraud based on technical compliance with notice pleading rules." Id. at 841. Ultimately, "[u]nless there are specific factual allegations from which actual, subjective fraudulent intent may be inferred or Plaintiff produces evidence at a hearing that proves such intent, entry of default judgment based on actual fraud is not appropriate." Id. Likewise, in this case, the Plaintiff has not made a showing of sufficient facts from which the Court can draw an inference of the Debtor's actual,

subjective fraudulent intent that is essential to an actual fraud claim. Accordingly,

IT IS ORDERED that the Motion for Default Judgment be and is hereby **DENIED**.

IT IS FURTHER ORDERED that the Plaintiff may amend the Complaint to address issues regarding the legal sufficiency of the claims. The amended Complaint must be filed within thirty (30) days of the date of entry of this Order. The Plaintiff shall also serve the amended Complaint on the Debtor in accordance with the Bankruptcy Rules. The Debtor shall have thirty (30) days after service to file a response.

IT IS FURTHER ORDERED that should the Plaintiff fail to amend the Complaint, the Court will enter an order dismissing the Complaint.

The Clerk's Office is directed to serve a copy of this Order upon Plaintiff's Counsel, the Debtor, and the Chapter 7 Trustee.

IT IS SO ORDERED, this 21 ^{December} day of ~~November~~, 2006.


C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE