

MAR 22 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 05-61523-CRM
KYU TAE CHO,	
Debtor.	CHAPTER 7
HUNTINGTON NATIONAL BANK,	ADVERSARY PROCEEDING NO.
Plaintiff,	05-6139-CRM
v.	
KYU TAE CHO,	JUDGE MULLINS
Defendant.	

ORDER

THIS MATTER is before the Court on the Plaintiff's Second Motion For Default Judgment (Doc. No. 12), filed on November 13, 2006. The Plaintiff filed the original Complaint to Determine Dischargeability of Debt (11 U.S.C. § 523) (the "Complaint"; Doc. No. 1) in the above-styled action on April 26, 2005. Pursuant to §523(a)(2)(A) and §523(a)(2)(B), the Plaintiff requested a non-dischargeable judgment in the amount of \$19,149.96, plus interest, costs, and attorney's fees.

On April 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 (Doc. No. 5). According to the Certificate of Service filed on April 29, 2005, the Debtor was duly served with the Summons and Complaint on April 29, 2005 (Doc. No. 6). 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. Plaintiff filed the Motion for Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings pursuant to Bankruptcy Rule 7055, on June 28, 2005. On June 29, 2005, a Clerk's Entry of Default was entered. On June 9, 2006, this Court entered an Order denying the Motion for Default Judgment ("Order", Doc. No. 8) because Plaintiff's Complaint "fail[ed] to allege facts sufficient to establish false pretenses, false representations, and/or actual fraud under section 523(a)(2)(A), or a materially false statement in writing that was reasonably relied on by the Plaintiff under section 523(a)(2)(B). Plaintiff's Complaint further "lack[ed] specific factual allegations from which a finding of actual, subjective fraudulent intent to establish fraud could be inferred." The Order provided that Plaintiff could amend the Complaint within thirty (30) days of the entry of the Order and serve the Amended Complaint on Defendant.

On July 3, 2006, Plaintiff filed an Amended Complaint to Declare Debt Nondischargeable ("Amended Complaint"; Doc. No. 10). In the Amended Complaint, the Plaintiff alleges facts supported by references to the Retail Installment Contract and Security Agreement ("the Retail Installment Contract"), attached as Exhibit "A" to the Amended Complaint; references to Debtor's credit application stating a gross salary of \$60,000, attached as Exhibit "C" to Plaintiff's Amended Complaint; and specific references to the Rule 2004 Examination of the Debtor (Case No. 05-61523; Doc No. 17). According to the Amended Complaint, the Plaintiff granted the Debtor a loan in the amount of \$30,031.20 to purchase a 2003 Chevrolet Express van ("Vehicle"). The Debtor began monthly installments on the loan on March 6, 2003. The Plaintiff alleges that it has a claim against the Debtor in the amount of \$19,149.96 and attorney's fees. The Plaintiff argues that the Debtor obtained credit from the Plaintiff (1) under false pretenses, false representation, and/or actual fraud, and (2) by a statement in writing that was materially false, respecting the Debtor's financial condition, on which the

creditor reasonably relied.

Defendant was served with the Amended Complaint on July 3, 2006. No answer or response was filed or served. On October 16, 2006, the clerk entered its second Entry of Default. On November 13, 2006, Plaintiff filed its Second Motion for Default Judgment ("Second Motion for Default Judgment"; Doc No. 12). No response was filed or served.

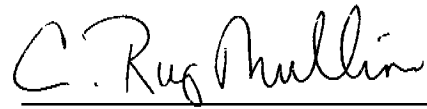
With regard to Count I, brought pursuant to 11 U.S.C. section 523(a)(2)(A), Movant states that Debtor's indebtedness was obtained through false pretenses, false representation, and actual fraud. To substantiate this claim, Movant first references the Retail Installment Contract that Defendant executed to finance the purchase of the Vehicle. Movant states that in violation of express provisions of the Contract, Defendant failed to keep the property in his possession but rather transferred or facilitated the transfer of the vehicle to a third party. Under section 523(a)(2)(A), a creditor must demonstrate: (1) that the debtor made a false statement with the purpose and intention of deceiving the creditor; (2) that the creditor relied on such false statement; (3) that the creditor's reliance on the false statement was justifiably founded; and (4) the creditor sustained damage as a result of the false statement. Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 350 (11th Cir. 1996). A review of the Rule 2004 Examination transcript indicates that Debtor transferred the vehicle to Tayne Kim ("Kim"), Debtor's partner in a painting business. Rule 2004 Examination transcript, p. 7, L. 19-25. In the transcript, Debtor states that he transferred the vehicle to Kim simply because Debtor was unable to make payments on the vehicle. Rule 2004 Examination transcript, pp. 18-19. A review of Movant's amended Complaint and accompanying evidence reveal no actual statements or representations made by the Debtor which evidence that Debtor made false statements with requisite fraudulent intent. See FDS National Bank v. Alam (In re Alam), 314 B.R. 834, 842 (Bankr. N.D. Ga. 2004) (Bonapfel, J.).

With regard to Count II, brought pursuant to 11 U.S.C. section 523(a)(2)(B), Movant alleges that Defendant obtained his loan for purchase of the vehicle through the use of a statement in writing that was materially false. Amended Complaint, ¶ 22. Under § 523(a)(2)(B), a money debt will be non-dischargeable if a debtor: (1) made a statement in writing about his financial condition, (2) that statement was materially false, (3) the lender reasonably relied on the false financial information in approving the loan, and (4) the debtor had the intent to deceive the lender. Agribank v. Gordon, 2002 U.S. Dist. LEXIS 26436, *6 (D. Ga. 2002). “In order to prove an intent to deceive, a creditor must show that the debtor’s false financial information ‘was either knowingly false or made so recklessly as to warrant a finding that [the debtor] acted fraudulently.’” Id. at *10 (citing 4 *Collier on Bankr.* P 523.08[2][e][ii] (15th ed. rev. 2001)). In this case, while Defendant’s credit application lists a gross annual salary of \$60,000 of 2003, Defendant’s testimony at the Rule 2004 Examination reveals that Defendant earned “no money” that year. Amended Complaint, ¶ 22; Rule 2004 Examination transcript, pp. 26-28. Therefore, unlike Plaintiff’s original Complaint, the Amended Complaint sufficiently pleads facts with the required specificity to establish a legitimate exception to discharge pursuant to section 523 due to use of a materially false statement in writing that was reasonably relied on by the Plaintiff under section 523(a)(2)(b). Accordingly,

IT IS ORDERED that the Second Motion for Default Judgment be and is hereby **DENIED** with respect to **Count I** and **GRANTED** with respect to **Count II**.

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 day of March, 2007.

A handwritten signature in cursive script, reading "C. Ray Mullins". The signature is written in dark ink and is positioned above a horizontal line.

C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE