UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 05-76731
Kyung Soon Ahn,	CHAPTER 7
Debtor.	JUDGE MASSEY
Citibank(South Dakota), N.A.,	
Plaintiff,	
v.	ADVERSARY NO. 05-6458
Kyung Soon Ahn,	
Defendant.	

ORDER

In this adversary proceeding, Plaintiff Citibank (South Dakota), N.A. seeks a judgment declaring that a debt allegedly owed to it by Defendant Kyung Soon Ahn is not dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(2)(C). Plaintiff now moves for a default judgment based on Defendant's failure to file any response to the complaint.

Plaintiff filed its complaint on October 25, 2005, and the Clerk issued the summons on October 26, 2006. The certificate of service subsequently filed by Plaintiff's counsel describes proper service of the summons and complaint on Defendant via U.S. mail, postage prepaid, in accordance with Bankruptcy Rule 7004(b)(9). Defendant has not filed an answer or other response to the complaint, as confirmed by the Clerk's entry of default on December 8, 2005.

The Court construes the motion for a default judgment and supporting documentation as certification that Defendant has not served Plaintiff with any response to the complaint. See FED. R. BANKR. P. 7012(a).

On January 6, 2006, Plaintiff filed a motion for a default judgment requesting this Court to "enter a nondischargeable judgment pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(2)(C) in the principal amount of $3,685.73, attorneys' fees of $393.57, together with Court costs of $150, for a total of $4,229.30." A motion for default judgment is governed by Civil Rule 55, made applicable by Bankruptcy Rule, and provides in part:

> (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
>
> (b) Judgment. Judgment by default may be entered as follows:
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> (1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain . . . .
>
> (2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

FED. R. CIV. P. 55(a) and (b).

Whether the Court should grant Plaintiff's motion depends on whether the facts set forth in the complaint establish the relief demanded. The complaint alleges the following facts.

Plaintiff issued a credit card to Defendant on or about March 1, 2005. Plaintiff maintained a zero balance until June 6, 2005. From June 6, 2006 to September of 2006, Defendant made thirty-one charges and cash advances totaling $3,685.73. Plaintiff alleges the majority of these purchases were luxuries and various shopping endeavors. Other than one payment of $20.00 on July 29, 2005, Defendant has not made any payments on the debt.

Plaintiff alleges that at the time of the charges Defendant was insolvent and did not have the ability to repay, nor any realistic future possibility to repay, the debt. Plaintiff further alleges that under the cardholder agreement, Defendant represented that she would repay all amounts utilized in accordance with the terms and conditions set forth in the agreement. Plaintiff alleges that Defendant made such a representation with the intention and purpose of deceiving Plaintiff into extending and continuing to extend the credit line. Plaintiff alleges that it justifiably relied on Defendant's representations.

The effect of a defendant's failure to respond to a complaint is that the defendant admits the facts pleaded in the complaint. "The [defaulting] defendant is not held to admit facts that are not well-pleaded or to admit to conclusions of law." *Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).

Plaintiff asserts that the debt owed to it by Defendant is not dischargeable under section 523(a)(2)(A) of the Bankruptcy Code which provides: "A discharge . . . does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or

refinancing of credit, to the extent obtained . . . by false pretenses, a false representation, or actual fraud."

For a debt to be nondischargeable because of a false representation, the Court must find the traditional elements of common law fraud. *SEC v. Bilzerian (In re Bilzarian)*, 153 F.3d 1278, 1281-82 (11th Cir. 1998). "A creditor must prove that: (1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation." *In re Bilzerian*, 153 F.3d at 1281.

The debtor's representations must be made with the intent to deceive the creditor. This intent requires moral turpitude. *Hennessy Cadillac, Inc. v. Green (In re Green)*, 5 B.R. 247, 249 (Bankr. N.D. Ga. 1980). The representation must be of past or current acts. The mere fact that a debtor makes a promise of future actions and fails to follow through on that promise is insufficient. *Carlan v. Dover (In re Dover)*, 185 B.R. 85, 88 (Bankr. N.D. Ga. 1995). If the debtor, however, never intended to follow through on the promise at the time the promise was made, such a representation is fraudulent.

Plaintiff has sufficiently pled the facts to establish three of the four elements of its claim for fraudulent representation. Plaintiff has shown that Defendant's use of the credit card was a representation to pay back funds used according to the cardholder agreement. Plaintiff has further shown that Defendant never intended to pay back those funds. Plaintiff relied on these misrepresentations by extending credit to Defendant. This reliance led Plaintiff to extend credit to Defendant resulting in a loss to Plaintiff of $3,685.73.

Even if a debtor makes a false representation, to succeed under section 523(a)(2)(A), the creditor must have justifiably relied on that representation. Simply stating that reliance was justified is a conclusion of law, and such conclusions are not deemed admitted by the defendant who fails to respond to the complaint. Whether a creditor's reliance on a false representation is justified depends on the circumstances and knowledge of the creditor. *Field v. Mans*, 519 U.S. 59 (1995). The level of reliance is specific to the individual creditor and thus does not necessarily have to rise to that of reasonable reliance. The Supreme Court in *Field* noted that to justifiably rely, a creditor must "use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make cursory examination or investigation." *Field*, 516 U.S. at 71 (quoting RESTATEMENT (SECOND) OF TORTS § 541 cmt.).

Plaintiff makes no factual allegation to show that its reliance was justified. To do so, it would have to show that it made some investigation of Debtor's financial condition. It is, after all, one of the world's largest banks and presumably not in the habit of handing over money to customers about whom it knows nothing. If, for example, Plaintiff issued the card without knowing whether Defendant had a job or was insolvent or had any ability to repay debt, it could not show it was justified in relying on Defendant's bare representation that she would pay. It could not rely solely on Defendant's own representations about employment and financial condition without proving that in doing so, it was justified in relying on those representations. Consequently, Plaintiff is not entitled to a default judgment under section 523(a)(2)(A).

Plaintiff also requests relief pursuant to section 523(a)(2)(C). This section states in relevant part:

> [C]onsumer debts owed to a single creditor and aggregating more than $1225 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1225 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable . . . .[1]

The commencement of a voluntary case constitutes an order for relief under Title 11. 11 U.S.C. § 301 (2000). This case was filed on September 9, 2005. Therefore, only debts incurred on or after July 11, 2005 fall within the presumption of nondischargeability. Any debt incurred before July 11, 2005 is not subject to 523(a)(2)(C). The monthly statements attached as exhibits to the complaint show that Debtor charged less than $1,225 after July 10, 2005; none of those charges, according to the statements, were cash advances. Plaintiff alleges that "the majority of [the] purchases were for luxuries." But, that allegation does not necessarily show that any of the post-July 10,2005 charges were for luxury goods or services. Therefore, Plaintiff is not entitled to a default judgment pursuant to section 523(a)(2)(C).

In addition to the nondischargeability of the credit card debt, Plaintiff requests attorney's fees. Plaintiff requests both attorney's fees under the cardholder agreement and attorney's fees under GA. CODE ANN. § 13-1-11. As to Plaintiff's request for "reasonable attorneys' fees incurred" under the contract, Plaintiff has supplied no such contract to support such a claim. Consequently, the claim is denied. As to Plaintiff's request for additional attorney's fees of $393.57, Plaintiff is requesting something the court cannot grant it. The complaint asks this Court to find nondischargeable an amount of attorney's fees not paid "within ten (10) days of the

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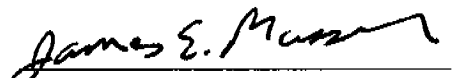
[1] Congress amended this section in the Bankruptcy Abuse Protection and Consumer Protection Act of 2005. This Court is applying the pre-amendment Code because the debtor's petition was filed before October 17, 2005, the effective date of the amendment.

entry of judgment." The Georgia statute is meant to allow a creditor to add attorneys' fees to the underlying debt if the debt is not paid within ten days of "receipt of such notice to pay the principal and interest without the attorney's fees." GA. CODE ANN. § 13-1-11. The statute does not add attorney's fees based on when the Court renders a judgment. Plaintiff does not ask for the appropriate relief, and therefore, relief is denied.

For these reasons, it is

ORDERED that Plaintiff's motion for a default judgment is DENIED.

Dated: March 23, 2006.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE