UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
MOHAMMED A-AZAD CHOWDHURY,	)	
JASMIN AZAD CHOWDHURY a/k/a	)	
JASMIN AKHTER CHOWDHURY	)	CASE NO. 05-75674-MHM
	)	
Debtors	)	
	)	
AMERICAN EXPRESS CENTURION BANK	)	
	)	
Plaintiff	)	
	)	
v.	)	**ADVERSARY PROCEEDING**
	)	**NO. 05-6548**
MOHAMMED A-AZAD CHOWDHURY,	)	
JASMIN AZAD CHOWDHURY a/k/a	)	
JASMIN AKHTER CHOWDHURY	)	
	)	
Defendants	)	

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

On April 4, 2002, Plaintiff filed a motion for default judgment. Plaintiff seeks a determination that its claim, in the amount of $9,554.32, which arises from a credit card account, is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A). Plaintiff also seeks prejudgment interest at the default rate of 23.99%, attorneys fees of $1,270, and costs of $250.

Defendants filed their joint bankruptcy petitio August 29, 2005. In the affidavit attached to Plaintiff's motion for default judgment, Plaintiff alleges Debtor made certain

charges using Plaintiff's credit card during the time more than 60 days prior to the date Debtor's bankruptcy petition was filed. The account had originally been opened in May 2003. Between April 28, 2005 and June 1, 2005, Defendants incurred 19 charges totaling $8,773.40, which included charges for six passenger airline tickets to Bangladesh. The tickets alone totaled $6,045.00. During the same period, Defendants incurred a single charge totalling $2,400 for the purchase of home electronics from Brandsmart USA of GA." Prior to incurring these charges, the account had been in good standing and the balance was $0.00. Except for the above-described charges, during the twelve-month period immediately before the bankruptcy petition was filed, Defendants' account had shown no activity. Defendants' schedules show that their monthly expenses are approximately five times their current monthly income.[1] The charges exceeded Defendants' credit limit with Plaintiff.

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).

[1] The terms "current monthly income" and "monthly expenses" are used ascribing their ordinary meaning and not the meanings which have arisen under the Bankruptcy Abuse Prevention and Consumer Protection Act, which was effective only as to cases filed after October 17, 2005.

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.

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).[2] *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).[3] The *Carpenter* court also noted that mere violation of contractual provisions in the credit agreement did not establish actual fraud.

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 facts set forth in Plaintiff's affidavit

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[2] 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.

[3] 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 *amens rea* element but the knowing inability to repay the debt would obviously be proven primarily by evidence of the debtor's financial condition.

are sufficient to establish that Debtors lacked the present intention to repay. Plaintiff has shown that Defendants engaged in a relatively brief flurry of charges involving international travel and electronics. Those charges were uncharacteristic of Defendants' use of the credit card previously and subsequently and the charges were for luxury goods and services. Defendants' bankruptcy schedules show that Defendants lacked the ability to pay the charges both at the time they were made and subsequently. Defendants filed their bankruptcy petition just over 60 days after these charges were made. Accordingly, it is hereby

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

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's attorney, the Chapter 7 Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 11th day of April, 2006.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE