UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	CASE NUMBER: A05-86591-PWB
MICHAEL HOWARD GOODMAN, and ALISSA R. GOODMAN,	
Debtors.	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
DISCOVER FINANCIAL SERVICES,	
Plaintiff	ADVERSARY PROCEEDING NO. 06-6238
v.	
MICHAEL HOWARD GOODMAN,	
Defendant.	

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Debtor is indebted to the Plaintiff for charges, balance transfers, and cash advances made under a credit account issued by the Plaintiff. The Plaintiff contends that its debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(C) and seeks summary judgment on its § 523(a)(2)(C) claim only. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

Section 523(a)(2)(A) provides that a discharge under chapter 7 does not discharge a debtor from a 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. . . ." 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(C) provides:

> (C)(I) for purposes of subparagraph (A) -
>
> (I) consumer debts owed to a single creditor and aggregating more than $500

> for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
>
> (II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title are presumed to be nondischargeable.

The Plaintiff contends that it is entitled to summary judgment because charges made and advances obtained by the debtor are presumptively nondischargeable pursuant to § 523(a)(2)(C). Specifically, the Plaintiff contends that in the 54 days preceding the filing of bankruptcy, the debtor incurred new charges for luxury goods and services on his account totaling $1,872.39. In addition, the Plaintiff argues that advances in the form of balance transfers and cash advances totaling $8,609.00 incurred within 44 days of filing bankruptcy are also presumptively nondischargeable.

The Debtor concedes that some of the new charges were for luxury goods and services: Tiffany & Co. in the amount of $270.00; Delta in the amount of $550.97; and Nordstrom in the amount of $55.64 and $42.80. However, the Debtor contends that the remaining charges of $434.41 to Meineke for brakes and $518.57 to Bob McDonald, Inc. for auto repair were not "luxury goods and services" and, therefore, the Plaintiff is not entitled to a presumption of nondischargeability under § 523(a)(2)(C). With respect to *all* the charges, the Debtor contends that there is a material dispute as to whether they were obtained by false pretenses, a false representation, or actual fraud. In addition, the Debtor contends that the balance transfers are not "advances" for purposes of § 523(a)(2)(C) and that, with respect to the cash advances, he can rebut the presumption of nondischargeability by showing that the cash obtained was used to provide for basic household expenses.

As a starting point in this analysis, it must be noted that § 523(a)(2)(C) itself does not

create a separate class of nondischargeable debts; section 523(a)(2)(C) merely creates a presumption of nondischargeability for purposes of § 523(a)(2)(A) for certain debts based on the nature of the debt, its amount, and the date on which it was incurred. If the presumption is triggered, the burden shifts to the Debtor to rebut the presumption of nondischargeability. *See, e.g., Sears, Roebuck and Co. v. Green (In re Green)*, 296 B.R. 173, 179 (Bankr. C.D. Ill. 2003) ("Where applicable, the presumption . . . is rebuttable. It can be overcome by evidence that the debtor experienced a sudden change in circumstances or that the debtor did not contemplate filing a bankruptcy petition until after the transactions took place."). The burden of proof remains with the plaintiff who must establish by a preponderance of the evidence that the debt is excepted from discharge as one obtained by false pretenses, false representation, or actual fraud pursuant to § 523(a)(2)(A). *See* FED. R. EVID. 301 ("In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.").

In *FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834 (Bankr. N.D. Ga. 2004), this Court set forth the criteria for establishing nondischargeability under § 523(a)(2)(A) based upon fraud.[1] The Court concluded in *Alam* that "a debtor commits actual fraud for purposes of

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[1]The Court limits its analysis here to "actual fraud" under § 523(a)(2)(A) because the Plaintiff has not set forth a factual basis for false pretenses or false representation. To establish nondischargeability of a debt based on false pretenses or false representation the creditor must show, among other things, a false representation. This Court has previously held that in order to meet this requirement in the context of a credit card debt, there must be an express, affirmative representation or use of a credit card after the issuer has revoked it. FDS National Bank v. Alam (*In re* Alam), 314 B.R. 834 (Bankr. N.D. Ga. 2004) (*citing* First Nat. Bank of Mobile v. Roddenberry (*In re* Roddenberry), 701 F.2d 927 (11th Cir. 1983)). In *Alam*, the Court expressly rejected the implied representation theory with respect to false pretenses or false representation

§ 523(a)(2)(A) if the debtor uses a credit card without the actual, subjective intent to pay the debt thereby incurred." *Alam*, 314 B.R. at 841. The Court further stated that, although a number of objective facts may be relevant to determining intent, "the ultimate factual issue is the debtor's subjective intent not to pay. This factual issue cannot be determined by a formulaic use of objective criterion and, critically, is quite distinct from the question of ability to pay." *Id.* Nevertheless, "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." *Id.* at 839.

The analysis is the same whether the use of the credit card or credit line is for making charges, balance transfers, or cash advances. If a plaintiff's debt is of a kind which falls within the parameters of § 523(a)(2)(C), it is entitled to a presumption of nondischargeability under § 523(a)(2)(A). However, a debtor may rebut that presumption by demonstrating that he did not make charges or advances without the actual, subjective intent to pay them.

This is the context in which the Court must examine the Plaintiff's motion. Thus, for purposes of this motion for summary judgment, the Court must analyze three categories of debts under the provisions of § 523(a)(2)(A) and § 523(a)(2)(C): (1) the credit card charges; (2) the two balance transfers totaling $2,609; and (3) the cash advances totaling $6,000.

Luxury goods and services

The Plaintiff contends that $1,872.39 in charges, consisting of charges of $270.00 to Tiffany & Co., $98.44 to Nordstrom (representing 2 separate charges); $518.57 to Bob McDonald, Inc., $550.97 to Delta Airlines, and $434.41 to Meineke, incurred by the Debtor within 54 days of

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claims. *Id.* at 838 (this Court "rejects the implied representation theory that Plaintiff's complaint pleads"). The Plaintiff has alleged no "express, affirmative representation" necessary to state a claim for false pretenses of false representation and, as such, has stated no basis for recovery on these grounds.

filing, are charges for "luxury goods and services" entitled to a presumption of nondischargeability. The Debtor concedes that the charges at Tiffany, Delta, and Nordstrom are entitled to a presumption of nondischargeability. However, the Debtor contends that the remaining charges of $434.41 at Meineke for brakes and $518.57 at Bob McDonald, Inc. for auto repair were not "luxury goods and services" and, therefore, the Plaintiff is not entitled to a presumption of their nondischargebility under § 523(a)(2)(C). Further, with respect to all the charges, the Debtor contends that there is a material factual dispute as to the Debtor's intent when incurring such charges. As a result, the Debtor argues, it is not appropriate to enter summary judgment on the Plaintiff's § 523(a)(2)(A) claim.

Section 523(a)(2)(C)(ii)(II) states that the term luxury goods and services "does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor." The Court must determine whether the remaining disputed charges at Meineke and Bob McDonald are "luxury goods and services" for purposes of the statute. The burden is on the Plaintiff to establish that it is entitled to the presumption of nondischargeability.

The Plaintiff makes the conclusory allegation that the charges represent a "consumer debt aggregating more than $500 for luxury goods or services incurred within 54 days of the filing of the petition." (Plaintiff's Statement of Material Facts, ¶ 7, filed December 1, 2006). In response, the Debtor states that he charged $434.41 at Meineke for brake repairs on his vehicle (the first use of his credit card) and $518.57 at Bob McDonald for the replacement of fuel injectors on his vehicle (the last use of his credit card). (Affidavit of Michael Howard Goodman, ¶¶ 9, 22).[2] The Debtor explains that these repairs were necessary so that he would have transportation to work.

[2]The Debtor's Affidavit is attached as an exhibit to the Debtor's Statement of Disputed Material Facts to Be Tried filed December 22, 2006 (Doc. No. 12).

(Debtor's Brief at 10, filed December 22, 2006).

The Plaintiff has made no specific factual allegations regarding the nature of the charges at Meineke or Bob McDonald and has not contested the Debtor's affidavit that the repairs were necessary for his transportation. Thus, the Plaintiff has not stated a sufficient factual basis for a finding that the charges at Meineke and Bob McDonald were luxury goods and services and has not established that these charges are entitled to a presumption of nondischargeability under § 523(a)(2)(C).

Consequently, there are two charges for which the presumption does not arise and four charges for which it does. With respect to the former charges, the Plaintiff must establish that they were incurred by the Debtor without the actual, subjective intent to pay in order for the charges to be nondischargeable under § 523(a)(2)(A). With respect to the latter charges, the fact that they fall with the provisions of § 523(a)(2)(C) does not render them nondischargeable but merely creates a presumption that the debt is nondischargeable under § 523(a)(2)(A), thereby shifting the burden of going forward to the debtor. Nevertheless, the burden of proving nondischargebility under § 523(a)(2)(A) remains with the creditor. The Plaintiff has not sought summary judgment on its § 523(a)(2)(A) claim and, as a result, the Court will schedule for trial the issue of whether the charges were incurred by the Debtor without the actual, subjective intent to pay.

Balance Transfers

In order to be entitled to a presumption of nondischargeability, a creditor must show that the debtor obtained "cash advances" in excess of $750 within 70 days of the bankruptcy filing. The Plaintiff contends that between November 8, 2005 and November 29, 2005, the Debtor obtained "advances" totaling $8,609.00. The Plaintiff appears to contend that these advances include a balance transfer of $2,042.11 on November 8, 2006, and a balance transfer of $566.89 on

November 17, 2006 whereby the Debtor used "balance transfer checks" to pay off other credit card balances. The Debtor contends that a balance transfer is not a "cash advance" for purposes of § 523(a)(2)(C) and is not entitled to a presumption of nondischargebility.

The term "cash advance" is not defined by § 523(a)(2)(C). The commonly understood meaning of the term is one by which a cardmember obtains "cash" by drawing down against the credit line extended by the card issuer, such as through the use of an automated teller machine or writing a check to "Cash." *See Citicorp Nat'l Credit & Mortgage Services v. Welch (In re Welch)*, 208 B.R. 107, 111 (S.D.N.Y. 1997). When a cardmember utilizes the "balance transfer" feature of a credit account, he is not obtaining cash, but instead is paying another obligation with a credit card. It is in no sense a "cash" transaction; it is merely the satisfaction of one debt with a separate credit line.

In *Chase Manhattan Bank USA v. Poor (In re Poor)*, 219 B.R. 332 (Bankr. D.Me. 1998), the court examined the issue of whether a balance transfer is a cash advance for purposes of § 523(a)(2)(C). The court concluded in light of the legislative history and policy and purpose underlying § 523(a)(2)(C) that the debtor's balance transfer did not constitute a "cash advance." *Poor*, 219 B.R. at 336-338. The *Poor* court, relying on a Senate Report on a pre-enactment version of § 523(a)(2)(C), reasoned that § 523(a)(2)(C) was "aimed at what Congress identified as 'unconscionable or fraudulent debtor conduct' described as 'loading up' on credit card type debt through a 'buying spree' on the eve of bankruptcy." *Poor*, 219 B.R. at 337 (*quoting* S.Rep. No.98-65 at 58 (1983)). The court explained that the use of a balance transfer feature could not be fairly characterized as fraudulent or part of a buying binge based on the characteristics of the transaction itself. The court emphasized that the balance transfer did not result in a "loading up" or buying spree because the debtor received no cash in pocket and the balance transfer did not increase the

debtor's overall debt load. *Id.* at 337-338. Other courts have also concluded that a "balance transfer" does not constitute a "cash advance" for purposes of 523(a)(2)(C). *E.g., National City Bank v. Manning (In re Manning)*, 280 B.R. 171 (Bankr. S.D. Ohio 2002); *First Deposit Nat'l Bank v. Cameron (In re Cameron)*, 219 B.R. 531 (Bankr. W.D. Mo. 1998); *see also MBNA America Bank, NA v. Ashland (In re Ashland)*, 307 B.R. 317, 321 (Bankr. D.Mass. 2004).

The Court concurs with the analysis in *Poor* and concludes that a balance transfer whereby a debtor does not directly receive cash does not constitute a cash advance for purposes of § 523(a)(2)(C). The Cardmember Agreement and Account Summaries attached to the Affidavit in support of the Plaintiff's Motion for Summary Judgment support this conclusion. The Cardmember Agreement specifically differentiates between "Cash Advances" and "Balance Transfers" in its explanation of usages of the cardmember's account. Further, the Account Summary for the period of November 8, 2005 through December 6, 2005, the period in which all the alleged advances were made, indicates that the Plaintiff identified not only the $2,042.11 and $566.89 transactions as balance transfers, but, indeed, classified *all* $8,609.00 in transactions as balance transfers. The Plaintiff's account summary does not identify any amount as a "cash advance." Accordingly, the Court concludes that the portion of the debt attributable to balance transfers is not entitled to a presumption of nondischargebility under § 523(a)(2)(C). Because these balance transfers are not entitled to a presumption of nondischargeability, to succeed on its § 523(a)(2)(A) claim the Plaintiff must prove a trial that the Debtor incurred the balance transfer portion of the debt with the actual subjective intent not to pay the Plaintiff.

Cash advances

The Plaintiff contends that the Debtor received cash advances of $3,000 on November 16, 2005, and $3,000 on November 29, 2005 that are entitled to a presumption of

nondischargebility under § 523(a)(2)(C).[3] The Debtor does not dispute that he received cash advances within 70 days of filing bankruptcy, but contends that he can rebut the presumption of nondischargebility.

The Debtor's Affidavit states that when the Debtor obtained the cash advances he was unemployed, looking for work, and owed the Internal Revenue Service $6,000. (Debtor's Affidavit at ¶¶ 6, 16, 19). While looking for work, the Debtor was withdrawing funds from his IRA to cover expenses. He obtained the advances to obtain cash to pay the IRS and to avoid late penalties or interest. (*Id.* at. ¶¶ 17, 19). After depositing the cash in his account, he discovered he had been denied unemployment benefits. (*Id.* at ¶ 18). Rather than use further IRA funds and incur penalties, the Debtor used $4,000 of the $6,000 cash advances to pay household and necessary expenses. (*Id.* at. ¶ 20). The Debtor further states that he had approximately $2,000 in his checking account at the time he filed bankruptcy. (*Id.* at ¶ 21). Finally, the Debtor avers that "at all times prior to consulting with my bankruptcy attorney, I fully intended to pay the debt owed on the Discover credit card." (*Id.* at ¶ 23).

There is no dispute that these are cash advances obtained within 70 days of filing bankruptcy that trigger § 523(a)(2)(C)'s presumption of nondischargeability. The burden then shifts to the Debtor to rebut the presumption with evidence that the debt was not incurred without the actual, subjective intent to pay. The Debtor has offered his affidavit which tends to show he did not obtain the cash advances in an attempt to defraud the Plaintiff. In contrast, the Plaintiff sets forth the circumstances surrounding Debtor's finances prior to filing bankruptcy that suggest he lacked the actual subjective intent to pay. (Plaintiff's Memorandum of Law in Support of Motion

[3]Notwithstanding the fact that the Plaintiff's account statement characterizes these two transactions as balance transfers, the Debtor concedes that he obtained cash.

for Summary Judgment at 2-3). Ultimately, this is an issue of intent and credibility that is not suitable for resolution by summary judgment. Because the Plaintiff has established entitlement to a presumption of nondischargeability under § 523(a)(2)(C), at trial the burden shifts to the Debtor to put on evidence regarding his intent. The ultimate burden of proof remains with the Plaintiff to establish nondischargeability under § 523(a)(2)(A). *See* FED. R. EVID. 301.

Conclusion

In conclusion, there is a factual dispute as to whether the debt, or any part of it, was incurred by the Debtor with the subjective intent not to pay. The Court finds that the presumption of nondischargeability does not apply to the balance transfers and the charges at Bob McDonald and Meineke. At trial, the burden of proof is on the Plaintiff to establish that these debts are nondischargeable pursuant to § 523(a)(2)(A). The court finds that the presumption of nondischargeability applies to the charges made at Tiffany & Co., Nordstrom, and Delta, and the cash advances of $6,000. At trial, the burden shifts to the Debtor for this portion of the indebtedness, though the ultimate burden of proof remains with the Plaintiff to establish nondischargeability under § 523(a)(2)(A). Because discovery has closed in this proceeding, the Court will schedule this matter for a pretrial conference to discuss scheduling and other related matters. It is unnecessary for the parties to submit a pretrial order prior to the conference.

Based on the foregoing, it is

ORDERED that the Plaintiff's motion for summary judgment is granted in part and denied in part. The presumption of nondischargeability does not apply to the balance transfers and the charges at Bob McDonald and Meineke. At trial, the burden of proof is on the Plaintiff to establish that these debts are nondischargeable pursuant to § 523(a)(2)(A). The presumption of nondischargeability applies to the charges made at Tiffany & Co., Nordstrom, and Delta, and the

cash advances of $6,000. At trial, the burden shifts to the Debtor for these portions of the indebtedness, though the ultimate burden of proof remains with the Plaintiff to establish nondischargeability under § 523(a)(2)(A). It is

FURTHER ORDERED that the Court will hold a pretrial conference on **February 13, 2007**, at **10:30 a.m.**, in Courtroom 1401, U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia. It is unnecessary for the parties to submit a pretrial order prior to the conference.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Atlanta, Georgia, this 25 day of January, 200

PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE

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