IT IS ORDERED as set forth below:

Date: July 18, 2008

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
	:	
TRUNG HU HUYNH	:	BANKRUPTCY CASE
HA HUYNH,	:	NO. 07-10239-WHD
	:	
Debtors.	:	
_____	:	
	:	
CHASE BANK, USA,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 07-1026
v.	:	
	:	
HA HUYNH,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Motion for Summary Judgment, filed by Chase Bank, USA (hereinafter the "Plaintiff") against Ha Huynh (hereinafter the "Defendant"). The Motion

is unopposed. This matter arises from a complaint objecting to the dischargeability of a particular debt and, accordingly, constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

The Plaintiff filed a statement of undisputed facts to which the Defendant failed to respond. Accordingly, pursuant to Bankruptcy Local Rule 7056-1, the following facts have been established.

The Defendant paid $1,700 in fees and costs to her bankruptcy attorney on January 8, 2007 and filed a voluntary petition under Chapter 7 of the Bankruptcy Code on February 1, 2007. (Plaintiff's Statement of Undisputed Facts, ¶ 24). During the preceding Fall, the Defendant applied for and received a credit card account from the Plaintiff. (Plaintiff's Statement of Undisputed Facts, ¶ 5). Between the time of receiving the credit card account (hereinafter the "Account") and filing bankruptcy, the Defendant incurred a total debt of $2,447.33 in charges on the Account. (Plaintiff's Statement of Undisputed Facts, ¶¶ 2, 13). By the petition date, the Defendant had exceeded the credit limit on the Account. (Plaintiff's Statement of Undisputed Facts, ¶ 25).

According to the Defendant's bankruptcy schedules, the debt incurred on the Account was in addition to over $81,000.00 of unsecured debt owed to other creditors. Moreover, the Defendant had a negative cash flow of $912.65, resulting from a monthly income of

$2,803.92 and monthly expenses of $3,719.57. (Plaintiff's Statement of Undisputed Facts, ¶ 15-17). The Defendant did not have the financial ability to repay the charges made to the Account and to service her other debts. (Plaintiff's Statement of Undisputed Facts, ¶18.) The Defendant received monthly statements indicating the amount of the balance and new charges and knew, at the time she incurred the charges, that she would be financially unable to pay for the charges made on the Account. (Plaintiff's Statement of Undisputed Facts, ¶¶10, 19).

All charges on the Account were authorized by the Defendant. (Plaintiff's Statement of Undisputed Facts, ¶ 7). At no time prior to bankruptcy did the Defendant notify the Plaintiff of any dispute or objection to a charge on the Account. (Plaintiff's Statement of Undisputed Facts, ¶ 11). The Defendant received all goods, services, consumer items, and cash that were purchased using the Account. (Plaintiff's Statement of Undisputed Facts, ¶ 12-13). The Defendant's actions have damaged the Plaintiff to the extent of $2,447.33, which is the total debt incurred by charges on the Account. (Plaintiff's Statement of Undisputed Facts, ¶ 13).

CONCLUSIONS OF LAW

The Plaintiff argues that the Defendant's debts were incurred through false representation and fraud and are, therefore, nondischargeable under section 523(a)(2)(A), which provides that "[a] discharge under § 727, 1141, 1228(b) or 1328(b) of this title does

not discharge an individual debtor from any debt- (2) for money, property, services… obtained by- false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). The Plaintiff moves for summary judgment on the basis that all facts described above are admitted as a result of Defendant's failure to respond or contest the Plaintiff's statement of undisputed facts.

A. Standard for Summary Judgment

Rule 7056 of the Federal Rules of Bankruptcy Procedure makes Rule 56(c) of the Federal Rules of Civil Procedure applicable to adversary proceedings. Rule 56(c) provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Not only is the Court to ensure that no material fact is in dispute, but the Court must "view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Maniccia v. Brown*, 177 F.3d 1364, 1367 (11th Cir. 1999). Moreover, "the party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact . . . . If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by

going through the pleadings, that there exist genuine issues of material fact." *Fleet Credit Card Services v. Kendrick (In re Kendrick)*, 314 B.R. 468, 471 (N.D. Ga. 2004) (quoting *Hairston v. Gainesville Sun. Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993)).

B. Section 523(a)(2)(A)

The Plaintiff, as creditor, has the burden of proving all the elements of fraud under 523(a)(2)(A) by a preponderance of the evidence. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994) (quoting *Grogan v. Garner*, 498 U.S. 279, 291 (1991)). Specifically, the creditor must show that: "1) the debtor made a false representation with the purpose of deceiving the creditor; 2) the creditor relied upon the debtor's representation; 3) such reliance by the creditor was justified; 4) the creditor suffered a loss as a result of that reliance." *In re Rusu*, 188 B.R. 325, 328 (N.D. Ga. 1995).

When the debt in question is the result of credit card use, a false representation can only be established if the debtor used the credit card after the issuer revoked it. *In re Roddenberry,* 701 F.2d 927 (11th Cir. 1983); *FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834, 838 (N.D. Ga. 2004). Fraud cannot be established under the so-called "implied representation theory," which asserts that a debtor's mere use of a credit card constitutes a representation of the debtor's ability and/or intent to pay the creditor. *Id.* As the court in *Alam* wrote, "[e]ven if use of a credit card could be considered to be a representation by a debtor of intent to repay, the debt is nondischargeable under the false pretenses or false

representation dischargeability exception only if the representation was knowingly false. To establish this element, the creditor must show that the debtor possessed an actual, subjective fraudulent intent … , [which] 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 839 (citations omitted).

Accordingly, the Plaintiff's reliance on the fact that the Defendant's use of the card constitutes a false representation of the ability or intent to pay must fail. That being said, the Plaintiff also alleges the Defendant committed actual fraud, *i.e.,* possessed a fraudulent intent. A false representation is not necessary to prove actual fraud under section 523(a)(2)(A), as "actual fraud is a broader term than false representation or false pretenses." *Kendrick*, 314 B.R. at 471. "Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." *McClellan v. Cantrell (In re Cantrell)*, 217 F.3d 890, 893 (7th Cir. 2000) (citations omitted).

In this regard, the court in *Kendrick* explained that, "under these principles, a debtor commits actual fraud for purposes of § 523(a)(2)(A) if the debtor uses a credit card without the actual, subjective intent to pay the debt thereby incurred." *Kendrick*, 314 B.R. at 472. Thus, while a debt cannot be determined to be nondischargeable based solely on implied representations, a debt may still be determined to be nondischargeable if the creditor

establishes the “debtor’s actual, subjective intent (based on something other than implied representations)” not to pay the debt. *Id.*; *see also Citibank (South Dakota, N.A. v. Brobsten (In re Brobsten)*, 2001 WL 340763522 (Bankr. C.D. Ill. Nov. 20, 2001).

Therefore, in order for a debt to be nondischargeable under section 523(a)(2)(A), the creditor must establish that the debtor possessed the actual, subjective intent not to pay the charge when the credit card debt was incurred. Rather than rely upon a plaintiff's conclusory allegations that a debtor lacked an objective intent to repay a charge, this Court will require the plaintiff to establish specific facts from which the Court could infer that the debtor lacked the subjective intent to pay the charges incurred. In making this determination, the Court considers the "totality of the circumstances test" employed by the Ninth Circuit Bankruptcy Appellate Panel in *Citibank v. Dougherty (In re Dougherty),* 84 B.R. 653, 657 (9th Cir. BAP 1996). This test allows a bankruptcy court to infer a debtor's fraudulent intent from "the totality of the circumstances," by considering "twelve, non-exclusive factors." *See In re Ettell*, 188 F.3d 1141 (9th Cir. 1999) (citing *In re Eashai*, 87 F.3d 1082 (9th Cir. 1996)).

> These factors include: "(1) the length of the time between the charges made and the filing of bankruptcy; (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of charges made; (5) the financial condition of the debtor at the time the charges were made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospect for employment; (10) the financial sophistication of

> the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases were made for luxuries or necessities."

Ettell, 188 F.3d at 1144 n.2.

As it is not likely that a debtor would admit that she incurred charges without the intent to pay them, the Court may infer this intent from the facts of the case. *Id*. at 1145 ("Because fraud lurks in the shadows, it must usually be brought to light by consideration of circumstantial evidence."). Consideration of these factors provides a reasonable method of determining whether the debtor intended to repay the charges at the time she incurred them.

In this case, although the Defendant has not come forth with evidence to counter the facts alleged by the Plaintiff, the Court finds insufficient facts from which to infer that the Defendant lacked the subjective intent to pay for the charges. The Plaintiff has established that the Defendant incurred charges of $2,447.33 from the time the card was issued until the petition date. The Plaintiff has not shown, however, when the card was issued, other than that it was in the Fall of 2006, or exactly what portion of the charges were incurred as of the time the Defendant first consulted with her bankruptcy attorney. Accordingly, the Court cannot determine whether its likely that the Defendant charged the bulk of the charges at a time in which she was contemplating filing bankruptcy. The Court is also uninformed as to the number of charges made, the nature of the charges, whether the debtor made multiple charges on the same day, and whether this type of charging was out of character for

the Defendant.

While the Plaintiff has established that the Defendant had a negative cash flow each month of $915.65, owed over $81,000.00 in unsecured debt, and knew, at the time she made these charges that she could not pay the charges, maintain payments on other debt, and pay her regular household expenses, these facts do not convince the Court that the Defendant incurred these charges without the intent to repay the Plaintiff. These facts simply establish that the Defendant was insolvent and did not have the cash to purchase items without borrowing. As the court in *Alam* noted, to establish actual fraud, a creditor must show that the "debtor possessed an actual, subjective fraudulent intent . . . , [which] 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."

CONCLUSION

For the reasons stated above, the Court finds that the Motion for Summary Judgment, filed by the plaintiff, Chase Bank, USA, should be, and hereby is, **DENIED**.

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