IT IS ORDERED as set forth below:

Date: April 19, 2007

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 06-73086
Rakim McGraw,	CHAPTER 7
Debtor.	JUDGE MASSEY
Chase Bank USA, N.A.,	
Plaintiff,	
v.	ADVERSARY NO. 07-6016
Rakim McGraw,	
Defendant.	

ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

In this adversary proceeding, Plaintiff seeks a determination that a debt allegedly owed to it by Defendant is non-dischargeable pursuant to section 523(a)(2) of the Bankruptcy Code. The certificate of service indicates service to Defendant via first class mail, postage prepaid on

January 17, 2007. Defendant has not filed an answer or otherwise responded to the complaint, as indicated by the Clerk's entry of default on March 16, 2007. Plaintiff moves for default judgment.

Plaintiff alleges that Defendant made false representations of his intent to repay credit card charges he incurred during the 90 days prior to his bankruptcy petition. As of October 17, 2006, the petition date, Defendant made charges on his account with Plaintiff totaling $7,021.91. This total includes $1,914 in retail charges incurred by Defendant between August 28, 2006 and September 8, 2006. Plaintiff seeks default judgment that the $1,914 in retail charges made during this period constitute a non-dischargeable debt under section 523(a)(2)(a) of the Bankruptcy Code.

A court's entry of default judgment is discretionary under Fed. R. Civ. P. 55(b), made applicable in adversary proceedings by Fed. R. Bankr. P. 7055. "A defendant's default does not in itself warrant the court in entering default judgment. There must be a sufficient basis in the pleadings for the judgment entered." *Nishimatsu Constr. Co. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Upon the Clerk's entry of default, the defaulting defendant is deemed to "admit[] the plaintiff's well-pleaded allegations of fact," *id.*, but "is not held to admit facts that are not well-pleaded or to admit conclusions of law." *Id.*

Section 523(a)(2)(A) excepts from discharge debts:

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

11 U.S.C. § 523(a)(2)(A). In order for a false representation to render a debt non-dischargeable under this section, the creditor must prove the traditional elements of common law fraud. *See SEC v. Bilzerian (In re Bilzerian)*, 153 F.3d 1278, 1281 (11th Cir. 1998). Accordingly, the "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." *Id*.

The factual allegations deemed admitted by Defendant's default are as follows. Defendant represented an intention to repay the charges made on his account with Plaintiff when he opened the line of credit and when he used the credit card. He incurred $1,914 in retail charges on this account between August 28, 2006 and September 8, 2006. At the time he made these charges, he had no ability or intent to repay the debts. Plaintiff also alleges that it reasonably relied on the false representations made when the card was used.

The first question presented is what does the allegation that "Defendant had no ability or objective intent" to pay the charges mean? An allegation that (1) Defendant had nether the ability nor the objective intent to pay or that (2) Defendant had no ability and no intent to pay would make it clear that Defendant lacked both the ability and the intent to pay. An allegation that Defendant had no ability or no intent to pay would mean that one or the other but not both statements are true. Does the allegation that "Defendant has no ability or intent to repay" mean the same thing or does it mean that both conditions are met either because "or" means "and" or because there an implied "no" before the word "intent?"

The phrase "Defendant had no ability or objective intent" to pay the charges could mean all of the above. It could mean that Defendant either had no ability to pay or had no intent to pay. It could also mean that Defendant had no ability and no intent to pay.

Because of this ambiguity, and even though the Court strongly suspects that Plaintiff meant "Defendant had no ability and no objective intent" to pay, the Court declines to conclude that by failing to answer this allegation Defendant admitted he had no intent to repay the debt. A debtor's inability pay the charge at the time it was made would not alone establish fraudulent intent. Although the lack of ability to pay could be an element of proof in showing the absence of intent to pay, plenty of people make charges for they have no cash in the bank to pay but intend to, and do, pay the charges out of future income.

The second deficiency in Plaintiff's allegations concerns the element of justifiable reliance. Plaintiff attempts to satisfy this element by alleging that it reasonably relied on the representations made by Defendant. Justifiable reliance, not reasonable reliance, is standard required by section 523(a)(2)(A). *See Field v. Mans*, 516 U.S. 59, 74-75 (1995) (holding that section 523(a)(2)(A) requires justifiable reliance). To the extent that a showing of reasonable reliance could satisfy the lower justifiable reliance standard, reasonable reliance is a legal conclusion and hence not deemed admitted by Defendant's default. *See Nishimatsu Constr. Co.*, 515 F.2d at 1206. Thus, Defendant is not deemed to have admitted the legal conclusion that Plaintiff's reliance was justified.

Moreover, the complaint contains no well-pleaded facts from which the Court can conclude that Plaintiff's reliance was justified. "Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than

of the application of a community standard of conduct to all cases." *Id.* at 71. Plaintiff, a sophisticated credit card issuer, possesses easy access to Defendant's credit history and his history of repayment on this account. To show that its reliance was justified, Plaintiff must allege facts that, if true, would prove that a creditor in its position at the time of the charges would not have any substantial reason to believe that Defendant would not repay the charges, such as that Defendant was current on the account, that Plaintiff had no notice of defaults on debts owed to other creditors, etc.

The complaint also fails to satisfy the lower showing required for non-dischargeability under section 523(a)(2)(C). Section 523(a)(2)(C) provides that:

> (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;

11 U.S.C. § 523(a)(2)(C). Plaintiff has not alleged that the retail charges made by Defendant were for luxury goods or services, an element essential for the presumption of non-dischargeability of section 523(a)(2)(C)(i)(I) to arise. Plaintiff has not provided any information concerning the charges at issue beyond broadly characterizing these charges as "retail charges." Additionally, it has not included a list of the businesses at which these charges were incurred from which the Court could infer that they are for luxury goods. Section 523(a)(2)(C)(ii)(II) provides that "the term 'luxury goods or services' does not include goods or services reasonably

necessary for the support or maintenance of the debtor or a dependant of the debtor." Plaintiff's allegations fail to show that the retail charges at issue were not made for "goods or services reasonably necessary for the support or maintenance of the debtor or a dependant of the debtor." 11 U.S.C. § 523(a)(2)(C)(ii)(II).

In summary, the facts alleged in the complaint are insufficient to support entry of a default judgment determining that a portion of the debt owed by Defendant to Plaintiff is non-dischargeable pursuant to section 523(a)(2). If facts entitling Plaintiff to a judgment exist, it may amend the complaint within 30 days of entry of this Order to allege those facts and to file with an amended complaint a certificate of service showing service on Defendant. Otherwise, the Court will schedule a trial of this adversary proceeding sometime this summer.

For these reasons, it is

ORDERED that Plaintiff's motion for default judgment is DENIED. The Clerk is directed to serve a copy of this order on Plaintiff's counsel, Defendant's counsel, and Defendant.

END OF ORDER