IT IS ORDERED as set forth below:

Date: August 10, 2009

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN THE MATTER OF:	:	CASE NUMBER: R08-40479-PWB
MARTIN SANTIAGO, JR. and LY VANH SANTIAGO,	:	
Debtors.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
CHASE BANK, USA, N.A..,	:	
Plaintiff	:	ADVERSARY PROCEEDING NO. 08-4029
v.	:	
MARTIN SANTIAGO, JR.,	:	
Defendant.	:	

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Chase Bank USA, N.A. (the "Plaintiff") seeks entry of summary judgment on its claim that its debt, consisting of $3,500 in cash advances and/or convenience check charges incurred by

the Debtor, Martin Santiago, Jr., approximately 26 days prior to filing bankruptcy, is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(C).[1] For the reasons stated herein, the Plaintiff's motion is denied.

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 that

> (C)(i) for purposes of subparagraph (A) -
>
> (I) consumer debts owed to a single creditor and aggregating more than $550 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 $825 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 "Between 01/24/2008 and 01/25/2008 Defendant incurred $3,500.00 in cash advance and/or convenience check charges. The check was made to Ly

[1]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.

Santiago." (Complaint, ¶ 8). Thus, from the complaint it appears that the debt at issue consists of the Debtor's use of a convenience check in the amount of $3,500.00 payable to his wife (a joint debtor in this case, but not a co-obligor on this debt) during the presumption period.

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." *E.g., Citicorp Nat'l Credit & Mortgage Svcs. for Citibank, N.A. v. Welch (In re Welch)*, 208 B.R. 107, 111 (S.D.N.Y. 1997).

It appears that Plaintiff contends that a convenience check is a cash advance for purposes of § 523(a)(2)(C). This poses a mixed problem of law and fact. First, there is nothing to establish that a convenience check is in actuality a cash advance. The Plaintiff has attached no contract or cardholder agreement to its complaint or motion for summary judgment that defines the term "convenience check." Nor has the Plaintiff cited any legal authority standing for the proposition that a convenience check is a cash advance as a matter of law.

Second, the complaint alleges that a third party, the Debtor's wife, was the payee on the check, not the Debtor himself. To the extent that a debtor obtains cash by writing a check to himself or to "cash," a convenience check may indeed be a cash advance. *See AT&T Univ. Card Svcs. Corp. v. Feld (In re Feld)*, 203 B.R. 360, 363-364 (Bankr. E.D. Pa. 1996). But barring evidence that the usage of the convenience check payable to the Debtor's wife was an intentional strategy and that the Debtor indeed obtained cash himself, the Court cannot conclude that the execution of a convenience check to a third party without further evidence constitutes a cash advance for purposes of § 523(a)(2)(C).

Because the Plaintiff has not demonstrated that its debt falls within the presumption of nondischargeability of § 523(a)(2)(C), the Court turns to whether it has established nondischargeability under § 523(a)(2)(A).

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). In *Alam*, the plaintiff, a credit card company, contended that each use of the debtor's available credit line for a purchase or a cash advance was a representation that he had the ability and intent to repay the debts incurred (the "implied representation theory"). The Court rejected this implied representation theory and instead held that, in order for a Plaintiff to prevail on a false representation or false pretenses claim, the plaintiff must show an express, affirmative representation made by the debtor to the plaintiff or use of the card after clear communication of its revocation. *Alam*, 314 B.R. at 838-839 *(citing First Nat. Bank of Mobile v. Roddenberry (In re Roddenberry)*, 701 F.2d 927 (11th Cir. 1983)). With respect to actual fraud, the Court also rejected the implied representation theory and held that "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." *Id.* at 841. Such a claim is established by showing sufficient facts from which the Court may draw an inference of the debtor's actual, subjective fraudulent intent. *Id*. at 843.

As an initial matter, the Court concludes that the Plaintiff has not set forth a factual basis for false pretenses or false representation since the Plaintiff has failed to allege that the Debtor made an express, affirmative representation or that it had revoked the Debtor's use of the account. Further, in *Alam*, the Court expressly rejected the implied representation theory with respect to false pretenses or false representation claims that this complaint pleads.

With respect to actual fraud, the Plaintiff's complaint also fails. Here, the Plaintiff's complaint is deficient because it (1) relies on the implied representation theory (Complaint, ¶¶ 15, 20); and (2) alleges that the Debtor had no "*objective* intent" to repay the debt to support its claim for fraud. (Complaint, ¶ 20). In reality, these two arguments are one and the same; they are both flawed because they rely on the theory that a debtor's intent not to pay may be inferred solely from the inability to pay. *See Alam*, 314 B.R. at 839-840.

For purposes of actual fraud, the Court's focus is instead on whether the Debtor had the actual *subjective* intent to pay the debt. "Objective" intent is not the standard for nondischargeability under § 523(a)(2)(A).

Under the subjective intent analysis, the Plaintiff has offered no evidence from which the Court can draw an inference of the Debtor's actual, subjective fraudulent intent. *Alam*, 314 B.R. at 843. The Plaintiff contends that the Debtor's fraudulent intent is demonstrated as follows (Plaintiff's Brief in Support of Motion for Summary Judgment at 5):

> a. [Debtor] does not show a marked decrease in income over the last several years.
>
> b. [Debtor] admits through his schedules and through admissions that he knew he did not have the financial ability to repay his debts and that he represented to Chase that he did.
>
> c. As of the January 17, 2008 statement, the beginning balance was $0.00.

Essentially, the Plaintiff argues that fraud exists because the Debtor used the card for a large transaction while insolvent, the Debtor did not have the current or prospective ability to pay,

and did not pay. These allegations alone, even if admitted,[2] do not state a claim for relief because they do not demonstrate a subjective, fraudulent intent.

Based on the foregoing, the Court concludes that the Plaintiff has failed to set forth a factual or legal basis for judgment on its § 523(a)(2)(A) and (C) claims. Accordingly, it is

ORDERED that the Plaintiff's motion for summary judgment is denied. It is

FURTHER ORDERED that the Court shall hold a status conference on **September 16, 2009**, at **11:00 a.m.**, in Courtroom 342, U.S. Courthouse, 600 East First Street, Rome, Georgia.

End of Order

[2]The allegation that [Debtor] admits through his schedules and through admissions that he knew he did not have the financial ability to repay his debts and that he represented to Chase that he did" is somewhat perplexing. By "admits through his schedules" the Court presumes that the Plaintiff is contending that the Debtor's disclosure of insolvency is an "admission" of an inability to pay. The Debtor's schedules speak for themselves and to the extent they reveal the debtor's insolvency, there is no dispute. Ultimately, however, it does not establish fraud since its relevance is founded on the implied representation theory of fraud. What the other "admissions" are is unclear. Nothing in the Statement of Material Facts in support of the motion is based on the Debtor's responses (or lack thereof) to Requests for Admission in discovery. Perhaps the Plaintiff is referring to the Debtor's amended answer (Amended Answer, ¶ 2) which appears to admit the allegation, "Defendant incurred the debts when Defendant had no ability to repay the debts and/or no objective intent to repay them." (Complaint, ¶ 20). Even construing the inartfully drafted amended answer as an admission, however, does not help the Plaintiff because the Plaintiff's implied representation theory does not provide a basis for establishing fraud. No admission occurs as to "facts that are not well-pleaded." *Nishimatsu Construction Co. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).

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