IT IS ORDERED as set forth below:

Date: June 01, 2010

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	Chapter 7
GEORGINA ANGELA LONGMORE,	:	Case Number: 09-68096-MGD
Debtor,	:	Judge Diehl
FIA Card Services, N.A. (f.k.a. MBNA America, Bank, N.A.),	:	
Plaintiff,	:	
v.	:	Adversary Proceeding No: 09-06374
GEORGINA ANGELA LONGMORE,	:	
Defendant.	:	

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

This case is before the Court on Plaintiff's Motion for Default Judgment ("Motion") filed on March 2, 2010. (Docket No. 6). Plaintiff commenced the above-styled adversary proceeding against Defendant on July 2, 2009, seeking a determination that Defendant's debt to Plaintiff was

nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (C). It appears that the summons and complaint were properly served on Defendant, and no answer has been filed. As identified below, for purposes of nondischargeability under § 523(a)(2)(A), Plaintiff has alleged sufficient facts to create a presumption of nondischargeability under § 523(a)(2)(C) for the cash advances and, therefore, Plaintiff's Motion is GRANTED as to that claim. Plaintiff's Motion also seeks an additional $250.00 for damages and court costs. There is no legal basis for this award and that portion of the Motion will be DENIED.

I. FACTS

Defendant had a credit line with the Plaintiff. (Complaint, ¶ 6). The outstanding balance on the account as of Defendant's petition date, March 31, 2009, was $8,516.28. (Complaint, ¶ 6). Defendant secured cash advances in the amount of $2,700.00 on March 17, 2009 and in the amount of $3,000.00 on March 12, 2009, both within the 70 days preceding Defendant's Chapter 7 petition. (Complaint, ¶¶ 8 & 9; Docket # 6, Exh. A). Plaintiff alleges that these cash advances are consumer debt. (Complaint, ¶ 10).

The parties entered into a loan agreement, and the terms of the agreement included that Defendant would repay all amounts extended under the agreement. (Complaint, ¶¶ 11-12). Plaintiff alleges that each time Defendant used credit, such use constituted a misrepresentation that Defendant would repay the amount. (Complaint, ¶¶ 11-13). Plaintiff alleges that Defendant's misrepresentations are based on her inability to pay. (Complaint, ¶¶ 21 & 22). The complaint states that Defendant's net income is negative $1,248.56. (Complaint, ¶ 19) Plaintiff alleges that these misrepresentations were made with the intent and purpose of deceiving Plaintiff. (Complaint, ¶ 23). Plaintiff alleges that Defendant had no objective intent to repay the debts. (Complaint, ¶ 18).

Plaintiff also alleges that it justifiably relied on Defendant's misrepresentation and was induced to extend credit based upon such misrepresentations.[1] (Complaint, ¶ 16).

II. DISCUSSION

Plaintiff has moved for a default judgment. The Court has discretion as to the entry of a default judgment. Federal Rules of Civil Procedure 55(b), made applicable to bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 7055, provides that the court *may* enter judgment by default (emphasis added). "[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., Ltd. v. Houston Nat'l Bank,* 515 F.2d 1200, 1206 (5th Cir. 1975); *see also Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988), *cert. denied*, 493 U.S. 858 (1989); *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985). Plaintiff seeks a determination that Defendant's debt is nondischargeable pursuant to 11 U.S.C.§ 523 (a)(2)(A) and § 523 (a)(2)(C). Section 523(a)(2)(C) creates a presumption of nondischargeability for the purposes of § 523(a)(2)(A).

For purposes of this motion for default , the Court must analyze two categories of debts: (1) the two cash advances totaling $5,700; and (2) the damages and court costs in the amount of $250.00. Because Plaintiff has alleged facts sufficient to create a presumption of nondischargeability under § 523 (a)(2)(C) but there is no legal basis to award damages and court costs to Plaintiff, the Court concludes that Plaintiff is entitled to default judgment only as to the cash advances.

Plaintiff seeks a determination that Defendant's debt owed to Plaintiff is presumed

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[1] *In re Alam*, 314 B.R. 834, 840 (Bankr. N.D. Ga. 2004) ("[R]egardless of whether a claim of nondischargeability alleges false pretenses, false representation, or actual fraud, . . . an implied representation can never serve as the basis for the claim.").

nondischargeable under 11 U.S.C. § 523(a)(2)(C) for the purposes of 11 U.S.C. § 523(a)(2)(A). (Complaint, ¶ 26). Section 523(a)(2)(C) provides that, for the purposes of 11 U.S.C. § 523 (a)(2)(A), "cash advances aggregating more that $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 petition are "presumed to be nondischargeable." 11 U.S.C. § 523(a)(2)(C)(i)(II). Plaintiff alleges that two cash advances were secured by Defendant. The first, in the amount of $2,700.00, was secured on March 17, 2009, and the second, in the amount of $3,000.00, was secured on March 12, 2009. The petition date is March 31, 2009.

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."). 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 she did not make charges or advances without the actual, subjective intent to pay them. *In re Goodman*, 2007 Bankr. LEXIS 613 at *7 (Bankr. N.D. Ga. 2007); *see also FIA Card Servs., N.A. v. George (In re George)*, 381 B.R. 911, 914-915 (Bankr. M.D. Fla. 2007) ("Once the plaintiff has established the requirements of 11 U.S.C.

§ 523(a)(2)(C), the burden shifts to the defendant to rebut the presumption of fraud."); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986). This is the context in which the Court must examine the Plaintiff's motion.

A default judgment of nondischargeability based on a presumption of nondischargeability under § 523(a)(2)(C) is justified for the cash advances. The necessary elements of § 523(a)(2)(C) have been sufficiently alleged, and, therefore, the statutory presumption of nondischargeability under § 523(a)(2)(C) applies. The cash advances totaling $5,700 exceed the required statutory minimum of $825 for petitions filed before April 1, 2010. § 523(a)(2)(C)(i)(II). These cash advances qualify as consumer debt under 11 U.S.C. § 101(8) and the credit line qualifies as an open end credit plan. Furthermore, the cash advances on March 11, 2009, and March 14, 2009, were both obtained within the 70-day presumption period under § 523(a)(2)(C)(i)(II). Therefore, Plaintiff established that the two cash advances, totaling $5,700.00, are presumptively nondischargeable under § 523(a)(2)(C)(i)(II). Since Defendant has not filed an answer or any other pleading in this action, Defendant failed to rebut that presumption by demonstrating that she did not make charges or advances without the actual, subjective intent to pay them. There is sufficient basis to enter a default judgment against Defendant under § 523(a)(2)(C) for the cash advances totaling $5,700.00.

Plaintiff seeks damages and court costs in the amount of $250.00. Plaintiff does not cite any law in support of this request. Pursuant to 11 U.S.C. § 523(d), "the court shall grant judgment in favor of the *debtor* for costs of . . . the proceeding if the court finds that the position of the creditor was not substantially justified." 11 U.S.C. § 523(d) (emphasis added). Without any legal basis to award court costs to Plaintiff, any additional judgment against Defendant is not warranted. Accordingly, it is

ORDERED that Plaintiff's Motion for Default Judgment pursuant to 11 U.S.C. § 523(a)(2)(C) for cash advances totaling $5,700.00 is hereby **GRANTED.** A separate judgment in favor of Plaintiff will be entered contemporaneously with this Order.

The Clerk is directed to serve a copy of this Order upon Plaintiff, Plaintiff's counsel, and Defendant.

END OF DOCUMENT