IT IS ORDERED as set forth below:

Date: June 06, 2011

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
Debra K. Coulter,	:	Case Number: 10-83513-MGD
Debtor,	:	Judge Diehl
FIA Card Services, N.A. (f.k.a. MBNA America, Bank, N.A.),	:	
Plaintiff,	:	
v.	:	Adversary Proceeding No: 10-6598
Debra K. Coulter,	:	
Defendant.	:	

ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

This case is before the Court on Plaintiff's Motion for Default Judgment ("Motion"). (Docket No. 6). Plaintiff commenced the above-styled adversary proceeding against Defendant on October 27, 2010, seeking a determination that the debt owed to Plaintiff was nondischargeable

pursuant to 11 U.S.C. § 523(a)(2)(A). A summons was issued commanding Defendant to file and serve an answer to the complaint. According to the certificate of service, it appears service was proper under Rule 7004(b) of the Federal Rules of Bankruptcy Procedure. (Docket No. 3). Rule 7012 of the Federal Rules of Bankruptcy Procedure requires a defendant to "serve an answer within 30 days after the issuance of the summons." Defendant did not file a response or otherwise make an appearance within the 30-day period, and, upon Plaintiff's request, entry of default was made February 15, 2011. Following Plaintiff's Motion, Defendant, *pro se*, filed a letter directed to the U.S. Bankruptcy Court on March 24, 2011. (Docket No. 7). The letter explains and acknowledges borrowing funds to pay off other debts. The letter also states Debtor's intention to repay the debt. Debtor's letter attaches letters from the credit card company and a copy of a returned check.

As explained below, Plaintiff has failed to allege sufficient facts to make out a § 523(a)(2)(A) claim and § 523(a)(2)(C)'s presumption of nondischargeability is not available to Plaintiff. Therefore, Plaintiff's Motion is denied.

I. FACTS

Defendant had a charge account with the Plaintiff. (Complaint, ¶ 6). The outstanding balance on the account as of Defendant's petition date, August 12, 2010, was $13,673.00. (Complaint, ¶ 6). Between June 6, 2010 and June 11, 2010 Defendant incurred $13,000.00 in "cash advances and/or convenience check charges", which is within the 70 days preceding Defendant's Chapter 7 petition. (Complaint, ¶ 8). "This charge was a direct deposit for $13,000.00." (Complaint, ¶ 8). Plaintiff alleges that the debt owing is consumer debt incurred under an open-ended credit plan. (Complaint, ¶ 11).

The parties entered into a card member agreement, and the terms of the agreement included

that Defendant would repay all charges incurred under the agreement. (Complaint, ¶¶ 12-13). Plaintiff alleges that each time Defendant used credit, such use constituted a misrepresentation that Defendant would repay the amount. (Complaint, ¶ 14). Plaintiff alleges that these misrepresentations were made with the specific intent and purpose of deceiving Plaintiff and that Defendant had no objective intent to repay the debts. (Complaint, ¶¶ 18 & 24). Plaintiff alleges that it justifiably relied on Defendant's misrepresentation and was induced to extend credit based upon such misrepresentations. (Complaint, ¶¶ 15, 17 & 23). According to Defendant's schedules and statements, she has net income of $157.98. (Complaint, ¶ 20).

Defendant made at least two payments on the debt, on July 9, 2010 and August 9, 2010, each payment was in the amount of $153.00. (Docket No. 6; Account Summary attached to Plaintiff's Affidavit). Plaintiff, through its agent, Weinstein & Riley P.S., issued a refund to Defendant in the amount of $153.00 on December 28, 2010. (Docket No. 7, pg. 4). Plaintiff suffered damages in the amount of $13,000 (Complaint, ¶ 26), and seeks a determination that $13,000 of the debt owed to Plaintiff is non-dischargeable.

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). (Complaint, ¶ 26).

Plaintiff asserts that it is entitled to § 523(a)(2)(C)'s presumption of nondischargeability based on the alleged facts of the debt at issue. 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 "[b]etween June 10, 2010 and June 11, 2010 Defendant incurred $13,000.00 in cash advance and/or convenience check charges. This charge was a direct deposit for $13,000.00." (Complaint, ¶ 8). Debtor filed a Chapter 7 petition on August 12, 2010.

A creditor has the burden of proving by a preponderance of the evidence that a debt is nondischargeable under § 523(a)(2)(A). *See Grogan v. Garner*, 498 U.S. 279, 291 (1991). Section 523(a)(2)(C) does not create a separate class of nondischargeable debts; it 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. It is the creditor's initial burden to establish that the presumption applies. *E.g.*, *In re Manning*, 280 B.R. 171, 179 (Bankr. S.D. Ohio 2002). Courts agree that the presumption can be rebutted but courts disagree as to whether the presumption applies to a debtor's intent to deceive or the entire issue of nondischargeability. *In re Ritter*, 404 B.R. 411, 822-23 n. 13 (Bankr. E.D. Pa. 2009). 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.").

This Motion does not require a determination as to the scope of the presumption because Defendant can rebut the presumption and it remains the Plaintiff's burden to make out the elements of its nondischargeability claim whether asserted with or without the benefit of the presumption. Generally, evidence establishing that the debtor did not incur debt in contemplation of bankruptcy will suffice to rebut the presumption. *E.g.*, *In re LaBovick*, 355 B.R. 508, 515 (Bankr. W.D. Pa. 2006); S. REP NO. 98-65, 98th Cong. 1st Sess. 58 (1983). A debtor may also demonstrate that she did not make charges without the actual, subjective intent to pay them to rebut the presumption. *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). When a debtor demonstrates that he or she incurred the debt without a fraudulent intent, this evidence can also rebut the presumption. *In re Ellingsworth*, 212 B.R. 326, 340 (Bankr. W.D. Mo. 1997). This is the context that the Court examines the Motion and Defendant's response.

First, the Court must analyze whether Plaintiff can avail itself of § 523(a)(2)(C)'s presumption of nondischargeability. Defendant's failure to file and serve an answer as commanded in the complaint results in an admission of all of the complaint's well plead facts. FED. R. CIV. P. 8(b)(6). "A defendant, even though in default, is still entitled to contest the sufficiency of the complaint and its allegations to support the judgment being sought." *Tyco Fire & Sec., LLC v.*

Hernandez Alcocer, 218 Fed. Appx. 860, 863 (11th Cir. 2007) (citations omitted). Here, Plaintiff alleges and Defendant admits that Defendant incurred $13,000 in "cash advances and/or convenience check charges" during the 70-day period before filing, and that $13,000.00 "charge" was transferred by direct deposit. These factual allegations invoke § 523(a)(2)(C)'s presumption, yet Defendant's response remains relevant to assess whether the presumption has been rebutted.

Defendant's response rebuts the presumption in two ways. First, the response demonstrates Defendant's subjective intent to repay the debt. Defendant's response explicitly includes a statement regarding her intentions. "I had every attention [sic] to pay back the money and was making payment until FIA Card Services attorney Weinstein & Riley P.S. return [sic] my check dated December 28, 2010 of $153.00, attached copy with this letter." (Docket No. 7). Demonstrating an actual, subjective intent to pay the debt rebuts the presumption of nondischargeability. *In re Goodman*, 2007 Bankr. LEXIS 613 at *7 (Bankr. N.D. Ga. 2007). Defendant's statement regarding her intent to repay the debt is bolstered by the two payments she made on the debt. Plaintiff's own exhibits attached to the Motion's supporting affidavit evidence Defendant's payment history on the debt. Defendant made at least two payments, on July 9, 2010 and August 9, 2010, each in the amount of $153.00. The August 9, 2010 payment was made three days prior to Debtor's Chapter 7 filing.

Defendant's response also raises the issue of whether the debt at issue qualifies under § 523(a)(2)(C). This Order will not provide any ruling on whether any portion of the debt was a balance transfer, which may disqualify the debt from § 523(a)(2)(C)'s presumption of nondischargeability. However, Defendant's assertions regarding the use of such funds serve to rebut the presumption of nondischargeability because it demonstrates a legitimate, non-fraudulent intent

for incurring the debt. It seems that a portion of the debt at issue did not result in cash to Defendant but, instead, was used by Defendant to pay off other debts. *See Discover Fin. Servs. v. Goodman (In re Goodman)*, 2007 Bankr. LEXIS 613 (Bankr. N.D. Ga. Jan. 25, 2007); *Nat'l 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) (holding balance transfers do not constitute "cash advances" for purposes of § 523(a)(2)(C)).

Plaintiff's § 523(a)(2)(A) claim, on its own, fails to allege sufficient facts to award judgment. The requisite elements of a § 523(a)(2)(A) claim are the traditional elements of common law fraud:

> 1. The debtor made a false representation with the purpose and intent of deceiving the creditor;
> 2. The defendant/debtor knew the representations were false at the time they were made;
> 3. The creditor relied upon such representations;
> 4. The creditor's reliance was justified; and
> 5. The creditor sustained a loss as a result of such representation.

SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998); *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996); *Grogan v. Garner*, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755(1991). The facts in the complaint do not sufficient allege Defendant's intent to deceive or defraud Plaintiff.

Defendant failed to answer and is in default. Rule 8 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7008, provides that "each allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). The Supreme Court has explained that while this does not require "detailed factual allegations," a pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 557). Instead, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. at 570. Plaintiff's complaint fails to allege sufficient facts that allow the Court to infer Defendant's subjective intent to defraud. Plaintiff's complaint provides mere legal conclusions, reciting statutory language. Further, any implied representation fraud theory that Plaintiff relies upon fails as a matter of law in the Eleventh Circuit. *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.").

Taking the well plead facts in the complaint as true, Plaintiff has failed to make out Defendant's subjective intent to deceive Plaintiff when she incurred the debt at issue. Defendant's response sufficiently rebuts any presumption available in § 523(a)(2)(C) by demonstrating an intent to repay the debt, which includes at least two payments on the debt. Accordingly, it is

ORDERED that Plaintiff's Motion for Default Judgment is hereby **DENIED.**

It is **FURTHER ORDERED** that a status conference will be held in the above-styled shall be held on **July, 21 2011** at **11:00 a.m.** in Courtroom 1201, United States Courthouse, Richard B. Russell Federal Building, 75 Spring Street, Atlanta, Georgia.

The Clerk is directed to serve a copy of this Order upon the parties on the attached distribution list.

END OF DOCUMENT

Distribution List

FIA Card Services, N.A.
(f.k.a. MBNA America Bank, N.A.)
C/O WEINSTEIN & RILEY PS
2001 Western Ave Ste 400
Seattle, WA 98121

Elizabeth H. Parrott
Weinstein & Riley PS
P.O. Box 23408
Nashville, TN 37202

Debra K. Coulter
4845 Chapelle Court
Marietta, GA 30066