IT IS ORDERED as set forth below:

Date: September 6, 2012

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: 12-51133-PWB
RAYMOND JOHN EVANS, JR.,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
FIA CARD SERVICES, N.A.,	:	
Plaintiff	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 12-5226
RAYMOND JOHN EVANS, JR.,	:	
Defendant.	:	

ORDER DENYING MOTION TO DISMISS

The Debtor seeks dismissal of FIA Card Services, N.A.'s complaint to determine the dischargeability of its debt pursuant to 11 U.S.C. § 523(a)(2) on the ground that the complaint fails to state a claim upon which relief may be granted. For the reasons stated herein, the Court denies

the motion to dismiss.

To survive a motion to dismiss under Rule 12(b)(6), a complaint "does not need detailed factual allegations," but those allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim must have "facial plausibility," which is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

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).

The Debtor contends that the Plaintiff's complaint fails to state a claim for relief under § 523(a)(2)(A) because (1) the complaint relies on the implied representation theory; and (2) the complaint fails to allege facts to support its claim, namely it does not allege facts with respect to the Debtor's intent to deceive.

The Court discerns two theories asserted by the Plaintiff in its complaint for nondischargeability of its debt of $9,375.00 under § 523(a)(2). First, the Plaintiff contends that the Debtor represented an intent to repay the charges by the use of the card. (Complaint, ¶ 27).[1] Second, the Plaintiff contends that the Debtor engaged in a credit card kiting scheme whereby the

[1]"By incurring charges in accordance with the contract and making minimum payments since the incurrance [sic] of the charges, [Debtor] represented that [Debtor] would repay the charges incurred."

Debtor's use of multiple credit cards concealed his true financial circumstances. (Complaint, ¶¶ 24, 25). In addition, the Plaintiff sets forth assertions regarding the Debtor's financial circumstances at or near the time of the bankruptcy filing as reflected in his schedules and statement of financial affairs. (Complaint, ¶¶ 10, 15-16, 18-23).

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." *Alam*, 314 B.R. 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 Court concludes that the Plaintiff's complaint states a claim for relief, but under only one of its two theories.

To the extent the Plaintiff asserts that actual fraud may be established under the implied representation theory, this theory of fraud fails. The Plaintiff's complaint is deficient because it (1) asserts that the Debtor represented an intent to repay by using the card (Complaint, ¶¶ 27, 28); and (2) alleges that the Debtor had no "*objective* intent" to repay the debt. (Complaint, ¶ 30). 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.

The proper focus, instead, is on the Debtor's subjective intent. To that end, the Plaintiff's assertion that the Debtor engaged in a credit card kiting scheme states a claim for actual fraud for purposes of § 523(a)(2)(A). Although the parties have focused their discussion on the fraud in the context of a false representation made with an intent to deceive, actual fraud is a much broader term and may encompass "deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another." *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) (citation omitted).

The Plaintiff contends any payments made on debtor's five credit card accounts, at a time when the debtor had no net monthly income in his budget for the payment, could only have come from the use of the cards in a kiting scheme which concealed his true financial circumstances from the creditors. In other words, the debtor took advances from one to pay another in a calculated scheme to defraud. The Court concludes that this assertion satisfies *Iqbal's* "facial

plausibility" requirement[2].

The complaint also sets forth a number of other factual assertions regarding the Debtor's financial circumstances at the time the debts were incurred and at the time of the bankruptcy filing, including:

-The Debtor exceeded the account's credit limit (¶ 13);

-The Debtor's schedules reflect $17,245 in unsecured debt, all of which was for credit card debt (¶ 15);

-The Debtor's scheduled average monthly budget was $0 (¶ 15);

-In order to service the credit card debt, an additional payment of over $500 per month would have been necessary (¶ 17);

-The Debtor had liquid assets of $0 in unencumbered unexempt property (¶ 18);

-The charges made on the account with the Plaintiff represented 32% of the Debtor's 2011 income and total credit card debt represented 58% of income (¶¶ 21-23).

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[2]The two paragraph assertion (¶¶ 24,25) that the Debtor engaged in a kiting scheme is barely sufficient to survive a Rule 12(b)(6) motion to dismiss. If the Plaintiff fails to prove its case at trial, the Debtor may be entitled to costs and fees pursuant to 11 U.S.C. § 523(d). Section 523(d) provides that when a creditor unsuccessfully seeks a determination of dischargeability under § 523(a)(2), the court "shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust."

Section 523(d)'s requirement that a party be "substantially justified" is drawn from 28 U.S.C. § 2412(d)(1)(A) (the "Equal Access to Justice Act"), which permits a prevailing party to recover attorney's fees and costs unless the plaintiff's position was "substantially justified or that special circumstances make an award unjust." *Citizens National Bank v. Burns (In re Burns)*, 894 F.2d 361, 362 n. 2 (10th Cir.1990). In order to establish that its position was substantially justified for purposes of 28 U.S.C. § 2412(d)(1)(A), a party must show "a reasonable basis for the facts asserted; a reasonable basis in the law for the legal theory proposed; and support for the legal theory by the facts alleged." *Harris v. Railroad Retirement Bd.*, 990 F.2d 519, 520–21 (10th Cir.1993).

These facts can be viewed two ways. Coupled with the Plaintiff's theory that the Debtor engaged in a credit card kiting scheme, these facts may be circumstantial evidence to buttress other facts demonstrating a lack of subjective intent to pay. To the extent these facts tend to show that the Debtor was insolvent, however, they do not establish fraudulent intent. Again, the Court notes that subjective intent 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.

The Court concludes that the Plaintiff's complaint states a claim for relief under § 523(a)(2)(A).[3] The Plaintiff's assertion that the Debtor engaged in a credit card kiting scheme

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[3]The Plaintiff's complaint and brief assert that certain transactions fall within the presumption period of § 523(a)(2)(C). Although the Debtor has not sought dismissal of the Plaintiff's claim with respect to § 523(a)(2)(C), the Court makes the following observation.

Section 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. If the presumption is not applicable, then a creditor must establish its debt is excepted from discharge under § 523(a)(2)(A).

The complaint on its face does not establish an entitlement to the presumption of nondischargeability. The complaint asserts, "Between 09/20/2011 and 11/07/2011 [Debtor] accumulated $2,775.00 in retail charges and incurred $6,600.00 in cash advance and/or convenience check charges" and "$2,104.00 of these transactions were made within the presumption period pursuant to 11 U.S.C. § 523(a)(2)(C)." (Complaint, ¶¶ 8-9). The Debtor filed the chapter 7 case on January 17, 2012.

In order for retail charges to be presumptively nondischargeable under § 523(a)(2)(C)(i)(I), the charges must be for "luxury goods or services." Though the term "luxury goods and services" is not defined, § 523(a)(2)(C)(ii)(II) explains that it "does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor."

The Plaintiff's complaint merely alleges that the Debtor accumulated $2,775.00 in retail charges between September 20 and November 7. At least of some of these charges are beyond the 90 days prior to bankruptcy and none is alleged to be for luxury goods and services. With respect to cash advances, the presumption does not appear to apply at all. The cash advances made between September 20 and November 7 were not made on or within 70 days prior to entry of the order for relief. The reference to $2,104 of "transactions" being within the presumption period is too vague and does not adequately permit the Debtor to prepare a defense to the claim with respect to either the cash advances or the retail charges.

The Court makes no determination that a plaintiff must specifically plead an entitlement

states a claim for actual fraud under § 523(a)(2)(A). The Plaintiff's reliance on the implied representation theory to prove fraud under § 523(a)(2)(A), however, does not state a claim for relief. Accordingly, it is

ORDERED that the motion to dismiss (Doc. 5) is denied.

End of Order

Distribution List

John Brookhuis
King & King, PC
215 Pryor Street, SW
Atlanta, GA 30303

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

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to the presumption of § 523(a)(2)(C) in a complaint. But to the extent the Plaintiff asserts that the presumption applies, the Court merely notes that the facts, as alleged, do not demonstrate it is necessarily so.