UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
CHRISTOPHER JAY BRUMFIELD,	)	CASE NO. **12-62797** - MHM
	)	
Debtor.	)	
	)	
	)	
FIA CARD SERVICES, N.A.,	)	
	)	
Plaintiff,	)	ADVERSARY PROCEEDING
v.	)	NO. **12-5402**
	)	
CHRISTOPHER JAY BRUMFIELD,	)	
	)	
Defendant.	)	

ORDER

Plaintiff filed a complaint initiating this adversary proceeding August 6, 2012. No response was filed, and Plaintiff requested entry of default March 12, 2013 (Doc. No. 5). On October 1, 2013, Plaintiff filed a *Motion for Default Judgment* (Doc. No. 6) (the "Motion"). For the reasons set forth below, the Motion will be ***denied.***

A credit card debt is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A) to the extent that money, property, services, or an extension, renewal, or refinancing of credit, was obtained by

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or insider's financial condition[.]

The burden of proof is upon the creditor to show by a preponderance of evidence that the debt is nondischargeable. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991).

First, Plaintiff asserts Debtor made false representations pursuant to an unidentified inference: by regularly incurring charges and repaying them in the past, Plaintiff argues, Debtor had *represented* that he would continue to abide by the terms and conditions of the credit card agreement. Thus, Plaintiff asserts, by yet another impermissible inference, that by making the present charges *without* the intent to repay (the inference), Debtor misrepresented his intent to repay. This is an old argument that carries no weight in 523(a)(2)(A) analysis.

Plaintiff's argument is precluded by binding precedent of the Eleventh Circuit and case law from this district.[1] In *First National Bank of Mobile v. Roddenberry,* 701 F. 2d 927, 932 (11th Cir. 1983)[2], the Eleventh Circuit concluded that *mere use* of a credit card without the ability or intent to repay does not constitute obtaining credit by false pretenses or false representation, noting that credit card companies routinely "encourage or willingly suffer credit extensions beyond contractual credit limits." The court concluded

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[1] The Motion repeatedly cites to case law from New York bankruptcy courts; however, Plaintiff has not argued that those cases are binding in the present proceeding. To the extent cases from other districts contradict binding precedent in this court, the persuasive value of those cases is negligible or nonexistent.

[2] Although *Roddenberry* was decided under §17a(2) of the Bankruptcy Act, the similarities between §17a(2) and §523(a)(2)(A) give the case law construing §17a(2) precedential value in §523(a)(2)(A) cases. *Birmingham Trust National Bank v. Case,* 755 F. 2d 1474 (11th Cir. 1985); *Chase Manhattan Bank v. Carpenter,* 53 B.R. 724 (Bankr. N.D. Ga. 1985).

that §17a(2) "should not be construed to afford additional protection for those who unwisely permit or encourage debtors to exceed credit limits." *Id.* The court, therefore, held

> Voluntary assumption of risk on the part of a [credit card company] continues until it is clearly shown that the [credit card company] unequivocally and unconditionally revoked the right of the cardholder to further possession and use of the card, and until the cardholder is aware of this revocation.

Id.

The *Roddenberry* court noted in footnote 3 the addition of actual fraud to §523(a)(2)(A) [formerly §17(a)2] and hypothesized that addition "may alter the outcome in certain cases where debtors obtain credit without a present intention of repayment." This "actual fraud" issue is addressed in *Chase Manhattan Bank v. Carpenter,* 53 B.R. 725 (Bankr. N.D. Ga. 1985) (J. Kahn) and subsequent cases, which note that the elements of actual fraud – (1) that debtor made representations (2) he knew at the time were false (3) with the intent and purpose of deceiving the creditor, (4) who *reasonably relied* on those representations and (5) sustained damages as a result – must be shown by clear and convincing evidence, not generalized allegations. *See, also, FIA Card Services, N.A. v. Quinn*, 492 B.R. 341 (N.D. Ga. 2013) (J. Hagenau); *In re Morrow*, 488 B.R. 471 (Bankr. N.D. Ga. 2012) (J. Sacca); *Chase Manhattan Bank, NA v. Ford (Matter of Ford),* 186 B.R. 312 (Bankr. N.D. Ga. 1995) (J. Drake). The *Carpenter* case concludes that, in dischargeability proceedings involving credit cards, the first step in showing actual fraud

is demonstrating that the debtor used the credit card with no present intention to repay. However, ***an inability to pay*** – hopeless insolvency – **does *not* support an inference that the debtor lacked an intent to repay,** nor does mere violation of contractual provisions in the credit agreement establish actual fraud. *Id.* Cases following *Carpenter* have considered a Debtor's subjective intent to repay by weighing a number of factors. For example, in *Matter of Ford,* the court considered

1. the length of time between the charges made and the bankruptcy;
2. whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made;
3. the number of charges made;
4. the amount of the charges;
5. the financial condition of the debtor at the time the charges were made;
6. whether the debtor made multiple charges on the same day;
7. whether the debtor was employed;
8. the debtor's prospects for employment;
9. whether the debtor's buying habits suddenly changed; and
10. whether the purchases were made for luxuries or necessities.

186 B.R. at 320 (also noting a debtor's inability to pay at the time of incurring a charge may be a factor among others to consider regarding the debtor's intent; however, this is contrary to *Roddenberry* at p. 932); *see, also, In re Morrow*, 488 B.R. at 480 (listing the same factors as in *Ford,* but adding Debtor's financial sophistication and whether the charges exceeded the credit limit of the account, as mentioned in *Chambers*); *contra,*

Roddenberry, 701 F.2d at 932 ("The mere breach of credit conditions is of minimum probative value ... risk [of nonpayment] is factored into the finance charges.").[3] Plaintiff's complaint does not allege facts with respect to whether an attorney had been consulted in anticipation of bankruptcy prior to any of the charges; the number and amounts of charges made; the financial condition of Debtor *at the time the charges were made;* whether Debtor made multiple charges on the same day (and details thereof); whether Debtor was employed or had prospects of employment; whether Debtor's buying habits suddenly changed; whether the purchases made were luxury items; or Debtor's financial sophistication. However, the actual facts alleged and proven must be plausible and strong to meet Plaintiff's burden of pleading. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Plaintiff fails to allege *necessary facts.*

With respect to the timing and amount of the charges, Plaintiff asserts Debtor's credit card balance was $9,837.72 at the time Debtor's Chapter 7 case was initiated May 21, 2012, and that $4,178 of those charges were incurred from January 19, 2012 to March 5, 2012[4] – *i.e.* between 77 and 123 days before Debtor filed his bankruptcy petition. Plaintiff further asserts $707 of charges were made during the "presumption period" of

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[3] To the extent exceeding the credit limit speaks to a debtor's subjective intent to repay, it should be noted that Plaintiff acknowledged that Debtor did not exceed the credit limit.

[4] Because Plaintiff's prayer for relief seeks a judgment for $4,178 and nondischargeability of that debt, it appears Plaintiff asserts that only those charges made from January 19, 2012, through March 5, 2012, were improper.

11 U.S.C. §523(a)(2)(C) (*e.g.,* luxury goods purchased within 90 days before a petition is filed); however, Plaintiff neither alleged nor proved that any of the $4,178 in charges were for luxury goods or fit within the remainder of subparagraph (C)'s requirements.

As to Debtor's financial condition, Plaintiff asserts that, *at the time of filing,* May 21, 2012, Debtor carried $39,920 in credit card debt, and Debtor's year-to-date gross income was $19,275.65[5]. Plaintiff did note that, at the time of filing, Debtor's income exceeded Debtor's expenses, excluding debt servicing, by only $48.71; including minimum credit card payments of 3% of the outstanding balance, Debtor's expenses would exceed his income by $1,148.89. However, Debtor's financial condition at the time of filing a bankruptcy petition does not speak to his intent to pay the charges incurred 77 to 123 days prior – *i.e.,* the subjective intent required cannot be inferred from his financial condition. *Roddenberry,* 702 F.2d 927. And, counter to a finding of actual fraud, Plaintiff's allegations show that Debtor was employed.

In addition to the elements listed in *Ford*, Plaintiff alleges Debtor obtained credit counseling in anticipation of bankruptcy February 29, 2012, and engaged in "kiting" (see discussion below). Arguably, the effort to obtain credit counseling might speak to Debtor's state of mind in the same way consulting a divorce attorney would, if Debtor later filed for divorce; thus, here it might show that Debtor was contemplating

[5] Debtor's Schedules show approximately $73,800 annual gross income and $48,156 annual take-home income.

bankruptcy, so that any debts incurred after that time might be inferred to have been made without the intent to pay. Such inferences may be rebuttable by transactions, etc. in evidence.

Plaintiff also asserts Debtor has engaged in "kiting." This court notes that the phrase "kiting" implies an illegal practice; the term initially related to checks and deposits among bank accounts, not credit cards. As the 9th Circuit stated in *Citibank (South Dakota) v. Eashai (In re Eashai)*, 87 F.3d 1082 (9th Cir. 1996), "A debtor who uses cash advances on one credit card to make minimum payments on another credit card *and has no intention* to pay for the money, property or services received, (*sic*) engages in credit card kiting." *Compare, In re Lippert*, 206 B.R. 136 (Bankr. N.D. Ohio 1997) (Distinguishing the illegal practice of check kiting – "an improper and probably criminal scheme of writing checks on bank accounts that have insufficient funds" (*i.e.*, using the float to keep a kiting scheme going) – from credit card kiting – "a credit card ... embodies a continuing invitation ... to make purchases or take advances ... . There is nothing illegal or improper about ... accepting that invitation ... over a period of adversity[.]") In *Eashai*, the court explained that, by engaging in so-called credit card "kiting," a debtor creates a false impression of his ability to service the credit card debt. *Id.* at 1089. However, the 9th Circuit noted, "Clearly, it is not actual fraud simply to make a minimum payment with a cash advance from another credit card. This action ... must be coupled with a lack of intent to repay the debt." *Id.* at 1089-90; *see, also, In re Broerman*, 1999 WL 35020115

(Bankr. S.D. Iowa 1999) (holding a credit card debt is nondischargeable where a debtor engaged in so-called credit card "kiting," the court cited *Eashai* for the proposition that the *intent to deceive* is the most important element of establishing a kiting scheme); *In re Lippert*, 206 B.R. 136 (Bankr. N.D. Ohio 1997) (distinguishing the check kiting analogy where the evidence did not suggest debtor had no intention to pay or belief that he could not pay eventually); *In re Dietzel*, 245 B.R. 747 (Bankr. D. Mass. 2000) (credit card debt was dischargeable, even though the debtor admitted to credit card "kiting," because the evidence did not show an intent to deceive at the time of the cash advances). In *Morrow*, the court noted that such "kiting" could be evidence of a debtor's subjective intent not to pay, but cautioned that it cannot be construed as a "false representation of [a debtor's] financial condition" because such statements are excluded from § 523(a)(2)(A) and, under § 523(a)(2)(B), must be in writing. *In re Morrow*, 488 B.R. at 481 (collecting cases).

Notably, Plaintiff's allegations of kiting appear to be based upon Debtor's income and expenses on the petition date. (Complaint at ¶ 21) ("Any payments made on the credit card accounts, which because (*sic*) the monthly average budget (sic - plaintiff presumably means the extent to which income exceeded expenses on a cash flow basis) was $48.71 without making any payments on the $39,920.00 of credit card debt, could only have come from another credit card."). For the same reasons Debtor's financial condition at the time of filing does *not* show an intent *not* to pay at the time of making a charge,

Debtor's financial condition at the time of filing does not show an intent to deceive at the time of making a cash advance. Plaintiff's elisions in logic are noticeable and fatal.

The court has wide discretion in determining whether to enter a default judgment. *Riehm v. Park,* 272 B.R. 323 (Bankr. D. N.J. 2001); *Owens-Illinois, Inc. v. Garrett,* 3 B.R. 557 (Bankr. N.D. Ga. 1980). In the instant case, the allegations in Plaintiff's complaint are insufficient to establish that Debtor, at the time of each charge, lacked the present intention to repay. Accordingly, it is hereby

ORDERED that Plaintiff's motion for default judgment is ***denied.***

IT IS SO ORDERED this the 18th day of October, 2013.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE