IT IS ORDERED as set forth below:

Date: December 5, 2012

James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	}	Case No.: 12-65662
	}	
CHRISANGELA SHUNTA SIMS,	}	
	}	Chapter 7
Debtor.	}	

1ST FRANKLIN FINANCIAL CORP.,	}	ADVERSARY PROCEEDING
	}	
Plaintiff,	}	No. 12-05460-JRS
	}	
v.	}	
	}	
CHRISANGELA SHUNTA SIMS,	}	
	}	
Defendant.	}	

ORDER

This matter is before the Court on Plaintiff's Amended Motion for Default Judgment [Doc. 6]. Plaintiff filed a Complaint commencing this adversary proceeding which alleged that

its claim against Debtor is nondischargeable pursuant to § 523(a)(2)[1] of the Bankruptcy Code. Debtor did not file an Answer or any other responsive pleading or motion. After the time to file an Answer had passed, the Clerk entered default. Plaintiff filed a Motion for Default Judgment, which it later amended. The Court now considers this Amended Motion for Default Judgment.

Federal Rule of Civil Procedure 55—which Bankruptcy Rule 7055 makes applicable to adversary proceedings—provides for entry of default and default judgment. Entry of default is mandatory when a defendant fails to timely respond to a complaint. *See* Fed. R. Civ. P. 55(a). On the other hand, the Court has discretion whether to enter default judgment following entry of default. *See* Fed. R. Civ. P. 55(b); *Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *FDS National Bank v. Alam* (*In re Alam*), 314 B.R. 834, 837 (Bankr. N.D. Ga. 2004). A defendant's default alone does not necessarily warrant entry of default judgment. *Nishimatsu Const. Co*, 515 F.2d at 1206. For the Court to grant default judgment, "[t]here must be a sufficient basis in the pleadings for the judgment entered." *Id.* In other words, the plaintiff "must prove a prima facie case in order to succeed on a motion for default judgment." *Citibank (South Dakota), N.A. v. Han (In re Chong U. Han)*, 04-69046-MGD, 2005 WL 6488968 (Bankr. N.D. Ga. Mar. 25, 2005) (citation omitted). The defendant's default functions as an admission of the plaintiff's "well-pleaded allegations of fact" but not "facts that are not well-pleaded" or "conclusions of law." *Nishimatsu Const. Co.*, 515 F.2d at 1206. Thus for the Court to grant Plaintiff's motion for default judgment, the Complaint must contain sufficiently well-pleaded facts to state a claim for which relief can be granted.

[1] Unless otherwise specified, all Code references refer to the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

Plaintiff seeks a determination that its claim against Debtor is nondischargeable pursuant to § 523(a)(2)(A). (Compl. ¶ 7). Section 523(a)(2)(A) provides that a chapter 7 discharge does not apply to debts 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). For this section to apply, the creditor bears the burden of proving the elements of fraud by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir.1994); *Fleet Credit Card Services, L.P. v. Kendrick (In re Kendrick)*, 314 B.R. 468, 471 (Bankr. N.D. Ga. 2004). The requisite elements are the same as for common law fraud:

> (1) the debtor made a false representation to deceive the creditor,
> (2) the creditor relied on the misrepresentation,
> (3) the reliance was justified, and
> (4) the creditor sustained a loss as a result of the misrepresentation.

SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998) (footnote omitted).

Although a false representation (or material omission) is ordinarily required to prove common law fraud, "a false representation is not essential to an actual fraud claim under § 523(a)(2)(A)." *Kendrick*, 314 B.R. at 471–72. "Actual fraud" is broadly defined and includes "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another." *Id*. But merely breaking a promise to pay does not amount to fraud; instead, the debtor must have incurred the debt with no intent to repay it. *FIA Card Services v. Lee (In re Lee)*, 450 B.R. 231, 234 (Bankr. N.D. Ga. 2011). A debtor commits actual fraud by borrowing money or incurring charges "without the actual, subjective intent to pay the debt thereby incurred." *Kendrick*, 314 B.R. at 472 (citations omitted). Thus the Court must

focus on the debtor's subjective—not objective—intent. *Chase Bank, USA, N.A. v. Santiago (In re Santiago)*, R08-40479-PWB, 2009 WL 6498533 (Bankr. N.D. Ga. Aug. 10, 2009).

Under certain circumstances, §523(a)(2)(C) creates a presumption that the debtor had fraudulent intent for purposes of §523(a)(2)(A).[2] Section 523(a)(2)(C) provides that "for purposes of subparagraph (A)" certain debts are "presumed to be nondischargeable." 11 U.S.C. §523(a)(2)(C). Two types of debts will trigger this presumption. The first consists of consumer debts for luxury goods or services incurred shortly before filing for bankruptcy. 11 U.S.C. § 523(a)(2)(C)(i)(I). The second—which is relevant to this case based on Plaintiff's allegations—consists of "cash advances aggregating more that $875 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before" filing a bankruptcy petition. 11 U.S.C. § 523(a)(2)(C)(i)(II).

Here, little doubt exists that Debtor is an individual debtor. Also, Plaintiff has alleged that Debtor received a cash advance over $875 within 70 days before filing for bankruptcy.

---

[2] Courts are divided on whether §523(a)(2)(C) applies only to the issue of the debtor's deceptive intent or to the ultimate issue of nondischargeability under §523(a)(2)(A). *FIA Card Services, N.A. v. Coulter (In re Coulter)*, 10-83513-MGD, 2011 WL 3269341 at *2 (Bankr. N.D. Ga. June 7, 2011) (citing *Chase Bank USA v. Ritter (In re Ritter)*, 404 B.R. 811, 822 (Bankr. E.D. Pa. 2009)). The better view is that the presumption applies specifically to the debtor's deceptive intent. As Judge Diehl has pointed out, "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)." *Id*. Judge Somers of the District of Kansas has explained the underlying reasoning well:

> Congress' motive for adding § 523(a)(2)(C) to the Bankruptcy Code in 1984 was to rectify a perceived practice by debtors of "loading up," or going on credit buying sprees in contemplation of bankruptcy. The subsections presume that the debtor purchased the items or obtained the cash advance without intending to repay the creditor. To rebut the presumption of fraudulent intent, the debtor therefore must directly attack the presumed fact and raise substantial doubt in the mind of the trier of fact as to the existence of the presumed intent. The presumption can be rebutted by evidence that the portion of such claim was not incurred in contemplation of . . . discharge in bankruptcy.

Commerce Bank, N.A. v. Fuller (In re Fuller), 2007 WL 3245404, at *2 (Bankr.D.Kan. Nov. 2, 2007) (citations and punctuation omitted).

(Compl. ¶ 5). But it is unclear whether the amount loaned was in fact a cash advance or whether this allegation is in fact an unsupported legal conclusion.[3] Further, Plaintiff has not alleged that the money it loaned Debtor was an extension of consumer credit under an open end credit plan. First, Plaintiff does not specify in the Complaint whether the loan in question was an extension of consumer credit. Rather, the purpose of the loan is unclear based on the allegations in the Complaint. Also, the Complaint does not allege that the money was obtained under an open end credit plan. To the contrary, Plaintiff has characterized this transaction as a "loan," as opposed to a cash advance under an open line of credit. The Court is unable to determine based on the allegations in the Complaint whether Debtor had an open line of credit with Plaintiff at all. Due to these deficiencies, the Complaint is insufficient to trigger the presumption of nondischargeability under § 523(a)(2)(C). And because the Complaint does not contain any other facts necessary to satisfy the elements of fraud under §523(a)(2)(A), entry of default judgment is inappropriate. Accordingly, it is

ORDERED that Plaintiff's Motion for Default Judgment is DENIED without prejudice. Plaintiff may amend its complaint to address these issues within 30 days after entry of this Order. Plaintiff shall serve any amendment on Debtor and her counsel in accordance with Fed. R.

[3] The Bankruptcy Code does not define the term "cash advance." Debtors most commonly take cash advances against a credit card account. "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.'" *Chase Bank, USA, N.A. v. Santiago (In re Santiago)*, R08-40479-PWB, 2009 WL 6498533 (Bankr. N.D. Ga. Aug. 10, 2009) (citing *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)). This case does not appear to involve a credit card account, so it is questionable whether 11 U.S.C. § 523(a)(2)(C)(i)(II) applies at all. According to the complaint, Debtor "obtained a loan" from Plaintiff and "received cash." (Compl. ¶ 4). These allegations do not reveal whether this transaction was in fact a cash advance or instead some other kind of loan.

Bankr.P. 7004. Debtor shall have 30 days after service to file responsive pleadings.[4] If no response is timely filed to an amended complaint, Plaintiff may file a second motion for default judgment. It is

FURTHER ORDERED that, if Plaintiff fails to amend and serve its complaint as set forth above within 30 days from entry of this Order, the Court will enter an order and judgment dismissing the complaint.

[END OF ORDER]

[4] Even if Plaintiff ultimately proves that the §523(a)(2)(C) nondischargeability presumption applies here, "[t]his presumption may be overcome by Debtor by showing that she experienced a change in her situation or that she was not contemplating seeking bankruptcy relief or without a sincere intent to pay for what she received on credit at the time of said transactions." *FIA Card Services v. Lee (In re Lee)*, 450 B.R. 231, 234 (Bankr. N.D. Ga. 2011); *see also Sears, Roebuck & Co. v. Green (In re Green)*, 296 B.R. 173, 179–80 (Bankr.C.D.Ill.2003); *see also Nationwide Nw. Ltd. P'ship v. Andersen (In re Andersen)*, 2007 WL 2848405 (Bankr.W.D.Wash. Mar.8, 2007); *cf. Citibank (S.D.), N.A. v. Kim (In re Young Song Kim)*, 2005 WL 6488989 (Bankr.N.D.Ga. Mar. 14, 2005); *accord Citibank (SD.), N.A. v. Spradley (In re Spradley)*, 313 B.R. 119, 128 (Bankr.E.D.N.Y.2004).