IT IS ORDERED as set forth below:

Date: April 30, 2013

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 12-73933-WLH
NOVELL LAMAN MCGLOSTER,	:	CHAPTER 7
Debtor.	:	
AMERICAN EXPRESS CENTURION BANK,	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO: 12-05664
v.	:	
NOVELL LAMAN MCGLOSTER,	:	
Defendant.	:	

ORDER ON PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

This matter came before the Court on the Plaintiff's Motion for Entry of Default Judgment (the "Motion") [Docket No. 6] pursuant to Fed. R. Civ. Proc. 55(b), made applicable

under Fed. R. Bankr. P. 7055. On September 26, 2012, Debtor filed his Chapter 7 petition. On December 21, 2013, Plaintiff filed a complaint to determine the dischargeability of certain credit card debt related to an account opened by Defendant in January 2006 (the "Account"). On February 7, 2013, Plaintiff moved for entry of default [Docket No. 5], which the clerk entered on February 8, 2013. Now, Plaintiff seeks a judgment under 11 U.S.C. § 523(a)(2)(A) that its claim in the amount of $13,619.83 plus attorneys' fees is non-dischargeable and that it have a judgment in that amount against Debtor. Plaintiff has submitted an affidavit attaching the credit card statements which the Court has considered, mindful that the Debtor has not admitted the facts stated in the Affidavit. Debtor has not opposed the Motion. As this matter arises in connection with a complaint to determine dischargeability, it constitutes a core proceeding over which this Court has subject matter jurisdiction. See 28 U.S.C. § 157(b)(2)(I); § 1334.

I. Standard for Motion for Default Judgment

Entry of default judgment under Fed. R. Bankr. P. 7055 is discretionary. In re Alam, 314 B.R. 834, 837 (Bankr. N.D. Ga. 2004). "[A] defendant's default does not in itself warrant the court in entering a 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). A default only admits well-pled allegations of fact and does not admit conclusions of law. Id. "[F]acts which are not established by the pleadings …, or claims which are not well-pleaded, are not binding and cannot support the [default] judgment." Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988).

In determining whether the allegations in a complaint are sufficient, the Supreme Court has recently provided guidance in both Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In these cases, the Supreme Court explained that, while "detailed factual

allegations" are not required, the pleading must offer more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action …". Twombly, 550 U.S. at 555. Instead, the complaint must contain "enough facts to state a claim to relief that is plausible on its face. …" Twombly, 550 U.S. at 570. Under Section 523(a)(2)(A), this Court may therefore enter a default judgment if Plaintiff's well-pled complaint contains facts to establish either "false pretenses" or a "false representation" or that Defendant committed "actual fraud". Lastly, the Court notes the denial of the Debtor's discharge is a severe remedy and not one to be granted lightly. With this background, the Court will now turn to the specific allegations in the Complaint.

II. Dischargeability Under 11 U.S.C. § 523(a)(2)(A) in Credit Card Cases

Count I of Plaintiff's Complaint seeks a determination that Plaintiff's claim is non-dischargeable under Section 523(a)(2)(A) of the Bankruptcy Code. Section 523(a)(2)(A) withholds a discharge from any 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 burden is on the creditor to prove non-dischargeability under this section. Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 304 (11th Cir.1994)(citing Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). The elements required to assert a Section 523(a)(2)(A) claim for false representation are: (1) the debtor made a false representation to deceive the creditor (2) the creditor relied on the representation, (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); Matter of Ford, 186 B.R. 312, 316 (Bankr. N.D. Ga. 1995). False pretenses is defined as "[A] series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or false and misleading understanding of a transaction, in

which a creditor is wrongfully induced by the debtor to transfer property or extend credit to the debtor …" In re Burke, 405 B.R. 626, 645 (Bankr. N.D. Ill. 2009) *aff'd sub nom* ColeMichael Investments, L.L.C. v. Burke, 436 B.R. 53 (N.D. Ill. 2010). Actual fraud under Section 523(a)(2)(A) "embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another … [I]t includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." Id. at 646 (citing McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir.2000)). Breach of a mere promise to pay on a contract, without more, does not constitute false representation, false pretenses, or actual fraud. E.g., Chase Manhattan Bank (U.S.A.), N.A. v. Carpenter (In re Carpenter), 53 B.R. 724, 730-731 (Bankr.N.D.Ga.1985).

a. False Pretenses or False Representations:

Numerous decisions in the Northern District of Georgia lay out the applicability of Section 523(a)(2)(A) to credit card debt, and the analysis will not be fully restated here. It is clear in the Eleventh Circuit that implied representations are not sufficient to establish that the use of a valid credit card constitutes false pretenses or false representations. First National Bank of Mobile v. Roddenberry, 701 F.2d 927 (11th Cir. 1983) (reversing and remanding for evidence on prior revocation of debtor's right to use and possession of credit card)[1]; In re Morrow, 488 B.R. 471 (Bankr. N.D. Ga. 2012) (holding facts plead sufficient to defeat motion to dismiss); In re Matveyev, 2010 WL 2036690 (Bankr. N.D. 2010) (denying default judgment); In re Alam, 314 B.R. 834 (Bankr. N.D. Ga. 2004) (denying default judgment); Citibank (South Dakota) v. Kim (In re Kim), 2003 U.S. Dist. LEXIS 25566 (March 26, 2003) (affirming denial of default

[1] Although Roddenberry was decided under Section 17a(2) of the Bankruptcy Act, the similarities between Section 17a(2) and Section 523(a)(2)(A) give the case law construing Section 17a(2) precedential value in Section 523(a)(2)(A) cases. In re Chowdhury, 05-75674-MHM, 2006 WL 6589910 * 1 (Bankr. N.D. Ga. 2006).

judgment). A creditor is considered to assume a risk of non-payment "until it is clearly shown that the [creditor] 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." Alam, 314 B.R. at 834 (*quoting* Roddenberry at 923). The bankruptcy court in Alam concluded that "non-dischargeability based on false pretenses or false representation requires an express, affirmative representation[.]" Id. at 838. In Roddenberry, the court held that using a credit card after revocation constitutes an affirmative representation that one is entitled to possess and use the card. Parties are free to allege other affirmative representations. However, the Plaintiff in this case has not alleged any affirmative representation made by the Defendant, nor that Defendant's credit card was revoked prior to the Defendant's incurrence of the charges on the credit card. Moreover, because Section 523(a)(2)(A) excludes statements respecting the debtor's financial condition, the Defendant's use of the credit card cannot be deemed a representation that he had the ability to repay. Such statements must be in writing in order to be actionable. 11 U.S.C. § 523(a)(2)(B). Consequently, the Plaintiff has not sufficiently alleged and cannot recover a default judgment against Defendant under the theories of false pretenses or false representation.

b. Actual Fraud:

As with false pretenses or representations, an implied representation will not establish actual fraud under Section 523(a)(2)(A). Morrow, 488 B.R. at 479. However the existence of a fraudulent representation is not a prerequisite to establishing actual fraud. Actual fraud encompasses a wider range of behavior than false representations or false pretenses. McClellan, 217 F.3d at 893.

To establish actual fraud under Section 523(a)(2)(A), a creditor must prove a debtor used a credit card without the actual, subjective intent to pay the debt thereby incurred. Alam, 314

B.R. at 841. "Objective" intent is not the standard for non-dischargeability under Section 523(a)(2)(A). Matveyev, 2010 WL 2036690 * 2. "[S]ubjective 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." Alam, 314 B.R. at 839. Plaintiff must advance facts that show Defendant used the card while possessing the subjective intent not to repay.

Whether a particular debtor had no intention to repay the charges is a determination made on a case by case basis in light of the totality of the circumstances. See Carpenter, 53 B.R. at 730; In re Huynh, 2008 WL 7874785 *3-4 (Bankr. N.D. Ga. 2008). When analyzing subjective intent, relevant points of consideration on the question should include: (1) the length of time between the charges made and the bankruptcy; (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges are 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 are made; (6) [whether] the debtor [made] multiple charges on the same day; (7) whether or not the debtor was employed; (8) the debtor's prospects for employment; (9) whether there was a sudden change in the debtor's buying habits; and (10) whether the purchases were made for luxuries or necessities. Ford, 186 B.R. at 320 (referencing Carpenter, at 730). The presumption of 11 U.S.C. § 523(a)(2)(C) does not arise here since the purchases were incurred greater than ninety (90) days before Defendant's bankruptcy filing. The Court now turns to the Complaint.

As with many discharge cases involving credit cards, the facts point the Court in different directions. Here, the Debtor made 145 charges in about two and a half months, more than doubling his balance from $8,216.97 on February 1, 2012 to $21,187.29 by the end of April 2012. Debtor's default admits this was a sudden change in the Debtor's spending habits. Some of the charges appear questionable as necessities. For example, $4,124.82 was incurred at

Lamps Plus, $1,666.00 was incurred at SinksFaucetsandMore.com and $1,444.00 was incurred at home stores like ArtMax, SpaceMakers and Cantoni.

On the other hand, the Debtor had opened the account in 2006 and had a six-year history with American Express. (The Complaint does not describe this history.) The card does not appear to have been established for the purpose of bankruptcy. The unusual charges ceased in April 2012, and bankruptcy was not filed until September 2012. There is no evidence the Debtor had consulted an attorney. It therefore does not appear the charges were made in anticipation of bankruptcy. While the Complaint alleges the Debtor was unemployed at the time the petition was filed, Schedule I states he became unemployed in August 2012, after the charges were incurred. His pay advices for the period July 15, 2012 through August 11, 2012 filed with the Court reflect an annual salary of approximately $60,000 with Morehouse School of Medicine, consistent with his income the prior two years according to the Statement of Financial Affairs. The Debtor's Statement of Financial Affairs and Schedules also show he owned real property to which he moved in April 2012 and on which he incurred a mortgage in February 2012 of approximately $33,000. The purchase of the real property may explain some of the charges on the card. The new home loan in February 2012 further suggests the Debtor was employed when his change in spending habits occurred. Moreover, incurring debt without the ability to pay is insufficient to establish subjective intent. Alam, 314 B.R. at 839

Based on Eleventh Circuit law, as stated above, the facts alleged in the Complaint and affidavit are insufficient to establish non-dischargeability as false representations or false pretenses under 11 U.S.C. § 523(a)(2)(A). Plaintiff is left with establishing by a preponderance of the evidence an actual subjective intent on the part of the Debtor not to pay the credit card charges when they were incurred, considering the totality of the circumstances. Given the mixed nature of the facts alleged, the fact that the allegations can also justify an inference of intent to

pay, and that granting a default judgment is discretionary, Alam, 314 B.R. at 837, the Court declines to grant the default judgment on all charges.

III. Attorneys' fees and costs

In Count II of the Complaint, Plaintiff additionally seeks attorneys' fees of $1,270 and costs of $293.00. The provisions in the account agreement between Plaintiff and Defendant call for payment of reasonable attorneys' fees, all costs, and other expenses expended by American Express in the collection of the account. In the Eleventh Circuit, attorneys' fees and costs may be included as part of a judgment of non-dischargeability where the parties previously agreed to a grant of costs and attorneys fees in collection of the account. TranSouth Fin. Corp. of Florida v. Johnson, 931 F.2d 1505 (11th Cir. 1991); Matter of Rusu, 188 B.R. 325, 330 (Bankr. N.D. Ga. 1995). However, a contractual provision for attorneys' fees is enforceable only if the creditor gives ten days written notice of the principal and interest due and its intent to enforce the contractual attorneys' fee provision, and the debtor subsequently fails to pay. O.C.G.A. § 13-1-11(a)(3). Although the contract between the parties provides for payment of Plaintiff's attorneys' fees and costs, there is no evidence that Plaintiff complied with the requirements of O.C.G.A. § 13-1-11(a)(3) prior to the filing of this bankruptcy case. Accordingly, the Court cannot award attorneys' fees to Plaintiff at this time.

IV. Conclusion

In light of the forgoing, Plaintiff's Motion is DENIED and Plaintiff is directed to contact chambers to set a time for trial.

END OF DOCUMENT

DISTRIBUTION LIST

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