UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: PHILLIP BERNARD SCOTT, Debtor.	CASE NO. 14-65398-BEM CHAPTER 7
NAVY FEDERAL CREDIT UNION, Plaintiff, v. PHILLIP BERNARD SCOTT, Defendant.	ADVERSARY PROCEEDING NO. 14-5378-BEM

O R D E R

This matter comes before the Court on Plaintiff's Second Motion for Default Judgment (the "Second Motion"). [Doc. 27]. Plaintiff filed a Complaint to Determine the Dischargeability of Debt Pursuant to 11 U.S.C. § 523 (the "Complaint"). [Doc. 1]. The complaint and summons were properly served and Defendant failed to respond. The Clerk

entered default on March 24, 2015, which was followed by Plaintiff's Motion for Default Judgment (the "First Motion"). [Doc. 14]. The First Motion was denied on the grounds that Plaintiff did not plead sufficient facts to support a grant of default judgment. [Doc. 16]. At a status conference held on July 15, 2015, Plaintiff informed the Court that Plaintiff intended to file an amended complaint. The Court construed this as an oral motion to amend the Complaint and granted leave to amend. [Doc. 20].

Plaintiff filed an Amended Complaint on August 7, 2015 (the "Amended Complaint"). [Doc. 22]. On November 24, 2015 Plaintiff filed the Second Motion. At a status conference held December 12, 2015 the Court directed Plaintiff to Request Entry of Default for the Amended Complaint, which Plaintiff did. [Doc. 28]. On December 30, 2015 the Clerk entered default.

Through the Amended Complaint, Plaintiff seeks a determination that Defendant's indebtedness to Plaintiff in the amount of $16,979.41 is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), (a)(2)(C) and (a)(6).

I. STANDARD

Default judgments are governed by Federal Rule of Civil Procedure 55(b), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7055. Whether to enter default judgment is within the discretion of the Court. *In re Spejcher*, No. 06-62501, Adv. No. 06-6347, 2006 WL 6592065, *1 (Bankr. N.D. Ga. Oct. 30, 2006) (Massey, J.) (citing *Hamm v. DeKalb County*, 774 F.2d 1567, 1576 (11th Cir. 1985)). To warrant entry of a default judgment, "[t]here must be sufficient basis in the pleading for the judgment entered." *Nishimatsu Constr. Co. Ltd. v. Houston Nat'l. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). Under Fed. R. Civ. P. 9(b) (made applicable through Fed. R. Bankr. P. 7009) "[i]n alleging fraud

or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). When the defendant fails to answer, the plaintiff's well-pleaded factual allegations are deemed admitted. *Nishimatsu Const*., 515 F.2d at 1206. Facts that are not well pleaded and conclusions of law are not deemed admitted. *Id.* Therefore, the Court must determine whether Plaintiff's well-pleaded factual allegations are sufficient to justify entry of judgment.

II. FACTUAL ALLEGATIONS

In the Amended Complaint, Plaintiff alleges the following facts: Defendant submitted a credit application (the "Application") to Plaintiff on May 5, 2014. [Doc. 22 ¶ 27, Ex. A]. Plaintiff approved Defendant for a credit card based on Defendant's statements in the Application, specifically that he was employed by the U.S. Marine Corps, had been so employed for 5 years and 8 months and had a monthly salary of $3,833.00 per month or $46,000 per year. [Doc. 22 ¶¶ 29, 30, 45]. In the Statement of Financial Affairs filed on August 7, 2014, Defendant states that he had employment income of $750 in 2014 (for the period January 1, 2014 through August 5, 2014) and only earned $5,600 in employment income for all of 2013. [*Id.* ¶ 31]. In addition to the employment income disclosed in Defendant's Statement of Financial Affairs, Defendant disclosed non-employment income of $8,992 from VA education benefits and $13,800 GI bill income for 2014 and $13,800 each from VA education benefits and GI bill income for 2013. [*Id.* ¶ 32]. Contrary to the information provided in the Application, Defendant listed his occupation as a student in Schedule I. [*Id.* ¶ 33]. The information provided in the Application is directly contradicted by that provided in his Schedules and Statement of Financial Affairs. [*Id.* ¶ 34, 35]. Defendant filed a chapter 7 petition on August 6, 2014. [*Id.* ¶ 6].

Plaintiff alleges further that Defendant made his first charge on the credit card on May 14, 2014 and his last charge on June 30, 2014. [*Id.* ¶ 36]. During the ninety (90) days prior to filing his bankruptcy petition Defendant accumulated $16,979.41 in charges. [*Id.* ¶ 36]. These charges were mainly comprised of consumer debts for luxury goods or services including: "$1,294.00 at various bars and for the purchase of alcohol; $106.14 at tattoo parlors and smoke shops; approximately $975.00 at 'gentlemen's clubs'; $1,287.41 on luxury clothing and shoes; $1,270.67 on non-grocery food and restaurants; $951.94 at various gas stations; and approximately $318.50 on other entertainment." [*Id.* ¶¶ 37, 55]. Defendant also charged "$1,282.40 to a property management company that does not manage Defendant's current address or his previous address" as well as "$4,093.00 in non-bankruptcy related attorney fees and costs." [*Id.* at 55]. The account history attached as Exhibit "B" to the Amended Complaint shows that Defendant paid a $12.00 fast card fee, presumably for expedited delivery of the card, but otherwise made no payments on the account. [*Id.* ¶ 36].

III. JURISDICTION

This Court has jurisdiction in this proceeding and authority to enter a final judgment pursuant to 28 U.S.C. § 157(b)(2)(I).

IV. ANALYSIS

A. § 523(a)(2)

Exceptions to discharge under § 523(a) are to be narrowly construed in favor of the debtor. *See In re St. Laurent*, 991 F.2d 672, 679 (11th Cir. 1993), as corrected on reh'g (June 22, 1993); *In re Hunter*, 780 F.2d 1577, 1580 (11th Cir. 1986) abrogated on other grounds by *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654 (1991). Creditors must prove by a

preponderance of the evidence that their claims come squarely within the exception to discharge. *See Grogan*, 498 U.S. at 283, 111 S. Ct. at 657.

Section 523(a)(2) excepts from discharge debts incurred "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained" by either of two categories of misrepresentations which are spelled out in §§ 523(a)(2)(A) and (B). Section 523(a)(2)(A) includes "false pretenses, a false representation, or actual fraud" while §523(a)(2)(B) addresses "a statement in writing – (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive." 11 U.S.C. §§ 523(a)(2)(A), (B).

Plaintiff relies on the alleged falsity of the Application, which is written, to assert that Defendant's obligations to it should be excepted from discharge. As a result the Court will first consider whether the Application is a statement concerning Defendant's financial condition within the meaning of § 523(a)(2)(B).

The Code does not define the phrase "respecting financial condition," and courts are split on the scope of the phrase. Some courts apply a broad definition that "includes any communication that has a bearing on the debtor's financial position," including statements "addressing the status of a single asset or liability …." *Prim Capital Corp. v. May (In re May),* 368 B.R. 85, 2007 WL 2052185, at *6 (B.A.P. 6th Cir. July 19, 2007) (unpublished) (citing *Cadwell v. Joelson (In re Joelson),* 427 F.3d 700, 705 (10th Cir. 2005)). Other courts apply a narrow or strict interpretation, limiting it to statements addressing "overall net worth, overall financial health, or equation of assets and liabilities." *Id.; see also, Roberts v. Pacific Resource Credit Union (In re Roberts),* case no. 14-1176, 2016 Bankr. LEXIS 252 *16-17 (B.A.P. 9th Cir.

January 27, 2016) (citing *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700, 705 (10th Cir. 2005)). The Eleventh Circuit has not ruled on the question, but bankruptcy courts in this circuit have generally applied the strict interpretation. *Allen v. Morrow (In re Morrow)*, 508 B.R. 514, 525 (Bankr. N.D. Ga. 2014) (Massey, J.) (citing *In re Bandi*, 683 F.3d 671. 676 (5th Cir. 2012) (holding that "financial condition" connotes "the overall net worth of an entity or individual.")); *Lamar, Archer & Cofrin, LLP v. Appling (In re Appling)*, 500 B.R. 246, 251 (Bankr. M.D. Ga. 2013); *Generac Power Sys. v. Dato (In re Dato)*, 410 B.R. 106, 111 (Bankr. S.D. Fla. 2009); *The Cit Group/Sales Fin'g, Inc. v. Kim (In re Kim)*, No. 04-94694, AP No. 04-6521, 2005 WL 6488240, at *4 (Bankr. N.D. Ga. Sept. 29, 2005) (Murphy, J). The Court agrees with this analysis and believes the strict interpretation which considers the debtor's or an insider's overall financial condition is the appropriate interpretation of the language in §§ 523(a)(2)(A) and (B).

The Application contains information limited to Defendant's annual salary, place of employment, length of employment and monthly mortgage payment. As a result the Application fails to provide a picture of Defendant's overall financial health because it does not provide information regarding all of Defendant's expenses, or any information regarding Defendant's assets and non-mortgage liabilities. Thus, the Court concludes that Plaintiff's claim under §523(a)(2)(B) fails because the Application is not a statement of Defendant's financial condition.

Because the Application is not a statement respecting Defendant's financial condition, consideration of Plaintiff's claims pursuant to § 523(a)(2)(A) is appropriate. The elements necessary to establish that a debt is excepted from discharge under § 523(a)(2) are as follows: "(1) the Defendant made a false representation with the intention of deceiving the creditor; (2) the creditor relied on the false representation; (3) the reliance was justified; and (4)

the creditor sustained a loss as a result of the false representation." *Taylor v. Wood* (*In re Wood*), 245 Fed. Appx. 916, 917 (11th Cir. 2007) (citing *In re Bilzerian*, 153 F.3d 1278, 1281 (11th Cir.1998)). Section 523(a)(2)(A) contemplates "a misrepresentation that is intentional or made with reckless indifference to the truth." *Id.* 918 (citing *In re* Booth, 174 B.R. 619, 623) (Bankr. N.D. Ala. 1994). Whether Defendant has the requisite deceptive intent is determined from Defendant's subjective intent at the time the representation is made, and may be inferred from the totality of the circumstances. *Deady v. Hanson* (*In re Hanson*), 432 B.R. 758, 772 (Bankr. N.D. Ill. 2010); *Sargis v. Aguilar* (*In re Aguilar*), 511 B.R. 507, 512-13 (Bankr. N.D. Ill. 2014); *Andrews v. Chamblee* (*In re Chamblee*), 510 B.R. 370, 378-79 (Bankr. N.D. Ala. 2014). Whether Plaintiff has justifiably relied on the misrepresentation "is gauged by an *individual standard* of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case." *In re Vann*, 67 F.3d 277, 283 (11th Cir. 1995) (quoting Prosser & Keeton on Torts § 108, at 751 (5th ed. 1984)) (emphasis in original). "[I]t is only where, under the circumstances, the facts should be apparent to one of [plaintiff's] knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." *Id.* (quoting Prosser & Keeton on Torts, at 752). *See also Field v. Mans*, 516 U.S. 59, 71-72, 116 S. Ct. 437, 443-44 (1995).

With respect to § 523(a)(2)(A) Plaintiff alleges that Defendant provided false information creating the impression that Defendant was steadily employed by the U.S. Marine Corps and received a regular salary and further created the impression that Defendant had been employed for years and should continue to maintain employment in the future. [Doc. 22 ¶ 46].

Defendant's statements on the Application, that he earned $46,000 per year and had been employed for more than 5 years, appear to be false when compared with the Statement of Financial Affairs and Schedule I Defendant filed in his chapter 7 case. Defendant has admitted these allegations by virtue of his failure to answer the Amended Complaint. Plaintiff alleges that it relied on the information provided in the Application when deciding to extend credit to Defendant. The Application contains very little information, but it does indicate that Plaintiff has income and has steady employment. It appears from a review of the Application that Plaintiff obtained Defendant's credit score, so it would appear that Plaintiff relied on the Application and perhaps the credit score in extending credit to Defendant. It is unclear how much weight the Application was given versus the credit score, and Plaintiff makes no allegation other than that it relied on the Application. The Court finds that Plaintiff's reliance on Defendant's statements about his income and work was justified because there were no red flags on the face of the Application – Plaintiff's age was such that he could have been employed by the Marines for the previous 5 years and 8 months and there were no inconsistencies on the face of the Application. Thus, it appears that nothing within Plaintiff's observation indicated that Defendant was not truthful on the Application. Finally, Plaintiff sustained a loss as a result of the false representation when Defendant accumulated $16,979.41 in charges.

While the Court can reasonably infer fraudulent intent from the foregoing circumstances, §523(a)(2)(C) also creates a presumption that a debtor possessed fraudulent intent for purposes of §523(a)(2)(A). *1st Franklin Financial Corp. v. Sims (In re Sims)*, case no. 12-65662, 2012 Bankr. LEXIS 6060 at * 5 (Bankr. N.D. Ga. December 5, 2012) (Sacca, J.) (citations omitted). The presumption provided in § 523(a)(2)(C) applies to consumer debts for luxury goods or services incurred within the 90 days before the petition date and certain cash

advances. 11 U.S.C. § 523(a)(2)(C). Plaintiff alleges that certain of the charges Defendant made constitute a consumer debt for luxury goods or services incurred within 90 days of the petition date. A consumer debt "means debt incurred by an individual primarily for personal, family, or household purpose." 11 U.S.C. § 101(8). And, luxury goods or services "do[ ] not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of debtor." 11 U.S.C. §523(a)(2)(C)(ii)(II).

Here, Defendant filed his voluntary petition on August 6, 2014, meaning that the 90-day period began May 8, 2014. Defendant made his first charge on the credit card on May 14, 2014 and his last charge on June 30, 2014, thus all charges made fall within the 90-day period. Defendant is an individual, so the two questions remaining with respect to whether the presumption applies, is whether the debt was primarily for personal, family or household purposes and whether such purchases were reasonably necessary for the support or maintenance of the Defendant.[1]

Plaintiff alleges that a number of the purchases made with the credit card it issued are comprised of consumer debts for luxury goods and services, including "$1,294.00 at various bars and for the purchase of alcohol; $106.14 at tattoo parlors and smoke shops; approximately $975.00 at 'gentlemen's clubs'; $1,287.41 on luxury clothing[2] and shoes; $1,270.67 on non-grocery food and restaurants; $951.94 at various gas stations; and approximately $318.50 on other entertainment." [*Id.* ¶ 55]. With respect to some of the charges, such as those made at gas stations, Wal-Mart, Target and Marshall's it could be argued that the purchases made there, at discount retailers were not for luxury goods. However, Defendant did not answer the Amended

[1] Defendant does not claim any dependents in his schedules.
[2] Plaintiff references Exhibit B which lists the following clothing and shoe stores: Walmart ($946.91), Macy's ($209.73), Charlotte Russe ($57.25), Foot Locker ($208.44), Target ($50.58), Marshall's ($16.04), Express ($211.55), Nike ($106.50), Puma ($297.46), and Bebe ($57.23). These amounts total $2,215.69 and it is not clear which items Plaintiff used to calculate $1,287.41.

Complaint, and Plaintiff's factual allegations are deemed admitted. *Nishimatsu Const*., 515 F.2d at 1206. With respect to whether the items were obtained for personal, family or household purposes, given that Plaintiff has alleged that Defendant is a student the Court can reasonably infer that the charges made at various retail establishments are for personal purposes. These expenditures total $7,486.06 which is over $650, and the presumption of § 523(a)(2)(C) applies to these amounts. The application of the presumption is unnecessary however, because the Court can reasonably infer fraudulent intent from the totality of the circumstances. Thus, Plaintiff is entitled to entry of judgment under § 523(a)(2)(A) in the amount of $16,979.41 for all of the charges Defendant made.

B. § 523(a)(6)

A debt is excepted from discharge if it is "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). An injury is willful when the debtor "commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *Maxfield v. Jennings* (*In re Jennings*), 670 F.3d 1329, 1334 (11th Cir. 2012) (internal quotation marks and citation omitted); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 61-62, 118 S. Ct. 974, 977 (1998) (the debtor must intend the injury, not just the act that results in injury). A malicious injury is one that is "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *Hope v. Walker* (*In re Walker*), 48 F.3d 1161, 1164 (11th Cir. 1995) (internal quotation marks and citations omitted). "Malice may be implied or constructive" and does not require specific intent to cause harm. *Id.* "[D]ebts procured by fraud may be nondischargeable under section 523(a)(6) as arising from conduct causing willful and malicious injury to an entity or property of an entity." 4-523 Collier on Bankruptcy P 523.12 (15th 2015). "But § 523(a)(6) cannot make all debts procured by fraud

nondischargeable, because that would make superfluous § 523(a)(2), § 523(a)(4), and § 523(a)(11), all of which make different sorts of debts procured by fraud nondischargeable." *Berkson v. Gulevsky (In re Gulevsky)*, 362 F.3d 961, 963-964 (7th Cir. Ill. 2004).

The Court has previously held that that § 523(a)(6) is not applicable to a fraud claim. *Delic v. Gore (In re Gore)*, Case No. 14-52792, Adv. Pro. 14-5141, March 20, 2015; *See also IndyMac Bank, FSB v. Mitchell (In re Mitchell)*, 2005 Bankr. LEXIS 1924 (Bankr. N.D. Ga. 2005) (Massey, J.) (holding that fraud is not the type of intentional tort that can be pursued under § 523(a)(6)); *Woolner v. LaFevor (In re LaFevor)*, 2007 Bankr. LEXIS 3045 (Bankr. N.D. Ga 2007) (Massey, J.). Thus, Plaintiff's claim that Defendant's fraud was willful and malicious must fail.

IV. CONCLUSION

Plaintiff has alleged sufficient facts to support entry of a judgment by default pursuant to 11 U.S.C. §§ 523(a)(2)(A), therefore the Court will enter a separate judgment excepting $16,979.41 from discharge.

END OF ORDER

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