UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G13-20614-REB
DONALD EDWARD ELLER and JILL THOMAS ELLER,	:	
Debtors.	:	
	:	ADVERSARY PROCEEDING NO. 13-2111
MOUNTAIN VALLEY COMMUNITY BANK,	:	
Plaintiff,	:	
v.	:	CHAPTER 7
DONALD EDWARD ELLER and JILL THOMAS ELLER,	:	
Defendants.	:	JUDGE BRIZENDINE

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the Motion of Plaintiff Mountain Valley Community Bank, filed on October 17, 2013, for entry of summary judgment on its complaint as filed against Defendant-Debtors named above on May 30, 2013. In the complaint, Plaintiff seeks judgment against Debtors in the amount of $29,925.00 plus costs, fees, and interest, and a determination that this indebtedness as owed by Debtors is excepted from discharge herein under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(4). Debtors, who are proceeding *pro se*, filed a Response to the Motion on October 22, 2013, as well as a document entitled Response to Plaintiffs' Statement of Material Facts on November 8, 2013. Based upon a review of the record, the Court concludes that Plaintiff's Motion should be denied for the reasons set forth

hereafter, and that this matter will be set for trial.

Plaintiff alleges that Debtor Jill Thomas Eller, a regular customer of Plaintiff, deposited a certain check with the Bank on September 7, 2012 in the amount of $29,925.00 into the account of Debtors' business, Quality Electrical Systems, Inc.[1] Plaintiff was subsequently notified by the Federal Reserve Bank of Atlanta that this check had actually been submitted for payment on a prior occasion, and after an investigation, Plaintiff discovered that the check presented by Ms. Eller was a photocopy and, therefore, counterfeit.[2] Before learning of same, however, Plaintiff advanced funds to Debtors in reliance upon this check as deposited. This indebtedness is acknowledged by Debtors on their Schedule F as a "bad check payment." In their answer herein, while Debtors admit depositing the check in question, Debtors deny any allegations of fraud in connection with this transaction.

Summary judgment may be granted pursuant to Rule 56 of the Federal Rules of Civil Procedure, applicable herein by and through Rule 7056 of the Federal Rules of Bankruptcy Procedure, if "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Further, all reasonable doubts should be resolved in favor of the non-moving party, and "if reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied." *Twiss v. Kury*, 25 F.3d 1551, 1555 (11th Cir. 1994), citing *Mercantile Bank & Trust*

---

[1] The check was drawn on the account of RPC General Contractors, Inc. and made payable to the order of "Quality Electrical Systems or Hagemeyer North America, Inc." *See* Exhibit "B," attached to Plaintiff's complaint.

[2] Plaintiff claims RPC paid the original check directly to Hagemayer North America.

Co. v. Fidelity & Deposit Co., 750 F.2d 838, 841 (11th Cir. 1985). Presumptions or disputed inferences drawn from a limited factual record cannot support entry of summary judgment, and the court cannot choose between competing inferences. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997).[3]

To succeed under Section 523(a)(2)(A), Plaintiff must prove facts showing that the Debtors "committed positive or actual fraud involving moral turpitude or intentional wrongdoing."[4] Hence, under Section 523(a)(2)(A), Plaintiff must establish that Debtors obtained money, property, or credit from Plaintiff: (1) by false representation, pretense, or fraud; (2) knowingly made or committed; (3) that

---

[3] Once the party moving for summary judgment has identified those materials demonstrating the absence of a genuine issue of material fact, the non-moving party cannot rest on mere denials or conclusory allegations, but must go beyond the pleadings and designate, through proper evidence such as by affidavits on personal knowledge or otherwise, specific facts showing the existence of a genuine issue for trial. *See* Fed.R.Civ.P. 56(e); *see also Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946, 948-49 (11th Cir. 1993); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).

[4] *Bracciodieta v. Raccuglia (In re Raccuglia)*, 464 B.R. 477, 485 (Bankr. N.D.Ga. 2011). Section 523(a)(2)(A) provides in pertinent part as follows:

> (a) A discharge under section 727...does not discharge an individual debtor from any debt—
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by -
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition ....

11 U.S.C. § 523(a)(2)(A). Exceptions to discharge are narrowly construed and must be proven by a preponderance of the evidence. *See Terkune v. Houser (In re Houser)*, 458 B.R. 771, 776 (Bankr. N.D.Ga. 2011); *see also Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991); *League v. Graham (In re Graham)*, 191 B.R. 489, 493 (Bankr. N.D.Ga. 1996); *accord City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277 (11th Cir. 1995).

occurred with the intent to deceive Plaintiff or to induce its acting on same; (4) upon which Plaintiff actually and justifiably relied; and (5) that Plaintiff suffered damages, injury, or loss as a result thereof. *HSSM # 7 Ltd. Pshp. v. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 892 (11th Cir. 1996); *Sterling Factors, Inc. v. Whelan (In re Whelan)*, 245 B.R. 698, 705-06 (N.D.Ga. 2000); *Lusk v. Williams (In re Williams)*, 282 B.R. 267, 272 (Bankr. N.D.Ga. 2002). In addition, "legal or constructive fraud, which involves an act contrary to a legal or equitable duty that has a tendency to deceive, yet not originating in an actual deceitful design, is insufficient." *Raccuglia*, 464 B.R. at 485; *see also Agricredit Acceptance Corp. v. Gosnell (In re Gosnell)*, 151 B.R. 608, 611 (Bankr. S.D.Fla. 1992); *see also Burroughs v. Pashi (In re Pashi)*, 88 B.R. 456, 458 (Bankr. N.D.Ga. 1988).

This provision addresses deceit or artifice rooted "in a specific intent to mislead, trick, or cheat another person or entity," and such intent to deceive may be established using circumstantial evidence addressing the totality of a situation. *Raccuglia*, 464 B.R. at 485.[5] Further, along with affirmative misrepresentations, fraud may include intentional silence or concealment of a material fact. *See FCC Nat'l Bank v. Gilmore (In re Gilmore)*, 221 B.R. 864, 872 (Bankr. N.D.Ala. 1998); *see also Duncan v. Bucciarelli (In re Bucciarelli)*, 429 B.R. 372, 375-76 (Bankr. N.D.Ga. 2010).

From a review of the record, the Court concludes that as the party moving for summary judgment who also bears the burden of proof, Plaintiff has not demonstrated the absence of a genuine dispute with respect to material facts in support of its claims. Plaintiff relies upon its requests for admission of fact to which Debtors failed to respond in a timely manner, and asserts that same are thereby deemed

---

[5] Reckless disregard for the truth or falsity of a statement can also supply the necessary basis for a determination of nondischargeability under this provision in the proper circumstances. *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985), *superseded on other grounds* by Pub.L.No. 98-353, 98 Stat. 333 (1984).

admitted under Fed.R.Civ.P. 36, as adopted herein through Fed.R.Bankr.P. 7036. *See* Affidavit of Thomas E. Austin, Jr. (Docket Entry No. 9-5), attached Plaintiff's Motion for Summary Judgment and Brief in Support; *see also Fleet Credit Card Serv., L.P. v. Kendrick (In re Kendrick)*, 314 B.R. 468, 473 (Bankr. N.D.Ga. 2004); *American Express Travel Related Serv. Co. v. Rusu (In re Rusu)*, 188 B.R. 325, 329-30 (Bankr. N.D.Ga. 1995). In particular, based on its requests for admission, Plaintiff contends Debtors have conceded that the document presented to Plaintiff was a photocopy of a check and that they tendered a counterfeit check, that Debtors withdrew funds based on Plaintiff's crediting of a deposit of the check, that Debtors owe Plaintiff the sum of $29,925.00, and that they violated Sections 523(a)(2)(A) and 523(a)(4).

Debtors counter variously that they had not received Plaintiff's requests for production of documents or admissions of fact (*see* Response to Plaintiff's Statement of Material Facts, ¶ 2, filed on November 8, 2013 (Docket Entry No. 15)), although counsel for Plaintiff avers he properly served same upon them on August 26, 2013. Affidavit, ¶ 2.[6] Debtors also state in their Response to Motion (¶ 6, filed on October 22, 2013 (Docket Entry No. 10)), that they did respond to the request for admissions as evidenced by their rebuttal "filed on the 29th day." The docket reflects that the only document filed on 'a 29th day' appears to be a certificate of service filed on October 29, 2013, which in turn, makes reference to the Response. From the state of the present record, the Court cannot conclusively determine whether and what, if any, response Debtors have offered specifically with respect to the numbered requests for admission, though they have filed two response documents in connection with Plaintiff's

[6] Plaintiff claims none of its discovery requests as served upon Debtors were ever returned. *See* Plaintiff's Supplemental Reply, filed on November 15, 2013 (Docket Entry No. 16).

motion for summary judgment.[7]

In any event, Debtors do affirmatively state that it was "never the intent of the Debtors to falsely deposit a check that was not an original," and "[t]here was no way that Jill Thomas Eller had any knowledge that the instrument was a photocopy." *See* Response to Motion, ¶ 5(a), p. 3 (Docket Entry No. 10). They assert that the check had been sent to them "in the usual fashion," along with a release of lien, and that a month or so passed before they were contacted by a branch loan officer. Response, ¶ 5(a), p. 3. Even if Debtors failed to offer a timely response to the requests for admission, and even though their statement is not in the form of an affidavit, it is apparent that they do contest the issue of fraudulent intent in connection with their presentment of the instrument in question.

Moreover, the Court finds that even if the requests are deemed admitted, they are not sufficient to establish grounds for granting relief to Plaintiff. It does appear that the debt is clearly listed in Debtors' bankruptcy schedules and is not shown as disputed, but they denied same in their answer. For purposes of Section 523(a)(2)(A), Plaintiff should be able to establish whether or not Debtors contest that they obtained money from Plaintiff and that Plaintiff incurred a loss as a result. A more involved issue of fact, however, remains regarding Plaintiff's allegation of fraud and/or Debtors' knowingly making a false representation with an intent to deceive Plaintiff in connection with the presentment of the check and withdrawal of funds from the account following same.[8]

---

[7] The Court also notes that Debtors' response to Plaintiff's statement of material facts only contains six paragraphs, whereas the statement itself lists twelve paragraphs. Further, it does not appear that Debtors have contested the statement in paragraph 11 that they had failed to respond to Plaintiff's requests for admission as of October 17, 2013.

[8] Similarly, with respect to Plaintiff's allegations of larceny, under federal bankruptcy law, larceny means "the fraudulent and wrongful taking and carrying away of property of another with intent to convert it to the taker's use and with intent to permanently deprive the owner of such property." *DiCrispino v. Adams (In re Adams)*, 348 B.R. 368, 373 (Bankr. E.D.La. 2005), quoting

Upon examination of the requests for admission, the Court concludes that same do not support an entitlement to summary judgment. For instance, an admission that the instrument was counterfeit and that Debtors tendered a photocopy of a check does not establish that at the time of its presentment, Debtors acted with knowledge of same and with fraudulent intent. Further, such knowledge or intent is not established by merely citing a violation of Section 523(a)(2)(A), as same lacks the necessary content identifying those specific allegations of fact to which a response is being requested.[9]

In addition, although the Court has reviewed the Affidavit of Michelle Williams (Docket Entry No. 9-4), who is identified as Vice President of Deposit Operations for the bank, the Court concludes that Plaintiff has not established that it justifiably relied on the alleged misrepresentation of Debtors. Such an inquiry centers on whether or not the falsity of the instrument at issue was or should have been apparent to the person or persons to whom it was made when the check was presented for payment. While counsel offers argument in support of Plaintiff's acceptance of the instrument in its reply brief and describes features of its appearance, the record does not contain a sufficient factual statements of same using those types of materials as referenced in Rule 56(c). The notarized statement of a teller at the bank named Shanda Kilgore, attached as Exhibit "D" to the complaint, also does not specifically address her reliance or the grounds for same in terms of the apparent authenticity of the instrument presented by Debtors.

The Cadle Co. v. Hartman (In re Hartman), 254 B.R. 669, 674 (Bankr. E.D.Pa. 2000). Thus, fraudulent intent must also be established to prevail using this exception to dischargeability.

[9] The decision of the Hall County District Attorney not to prosecute Debtors under a criminal statute in connection with the utterance of the instrument in question is not determinative herein on the question this Court must decide. Debtors attempt to boost their contention that they lacked knowledge regarding authenticity by questioning how Plaintiff's own employees could have honored the check if it was 'so obviously' not genuine.

Based upon a review of the Motion, responses, and other pleadings of record, the Court concludes that a genuine dispute of fact exists on the issue whether Debtors had the requisite knowledge and intent to defraud Plaintiff at the time of presentment of the false instrument in question. Given the unsuitability of ascertaining subjective intent by summary disposition on motion, along with issues of knowledge or state of mind as well as fraud, the Court will, therefore, convene a trial where it may hear Debtors' respective testimony and observe their demeanor during cross-examination before making any findings on Plaintiff's allegations concerning such intent or knowledge. Under Fed.R.Bankr.P. 7056 and cited case authority, disputed issues of fact cannot be decided, the evidence weighed, inferences drawn or construed against the non-movant, or matters of credibility determined on a motion for summary judgment, and the existence of fact questions in the record precludes entry of relief for Plaintiff against Debtors on its Motion.

Accordingly, it is

ORDERED that the Motion of Plaintiff for summary judgment herein be, and the same hereby is, **denied**.

This matter will be set for trial on separate written notice.

The Clerk is directed to serve a copy of this Order upon Defendant-Debtors, counsel for Plaintiff, the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 26th day of November, 2013.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE