

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO**

In Re:)	
)	JUDGE RICHARD L. SPEER
Barbara Bovine)	
)	Case No. 05-3347
Debtor(s))	
)	(Related Case: 05-36964)
Citibank, SD)	
)	
Plaintiff(s))	
)	
v.)	
)	
Barbara Bovine)	
)	
Defendant(s))	

DECISION AND ORDER

This cause comes before the Court on the Motion for Summary Judgment filed by the Plaintiff, Citibank (South Dakota) N.A., with a supporting brief. The Defendant did not file any response. The Court has now had the opportunity to review the Plaintiff's Motion and Brief, as well as the entire record in this case. Based upon that review, and for the reasons herein stated, the Court finds that the Plaintiff's Motion for Summary Judgment should be Granted.

FACTS

The Defendant/Debtor, Barbara Bovine (hereinafter referred to as the "Defendant"), held a credit-card account with the Plaintiff, Citibank (South Dakota) N.A. (hereinafter referred to as the "Plaintiff"). During the period between April 13, 2005 and May 12, 2005, the Defendant charged

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to this account a total of \$4,382.88, a substantial amount of which were cash advances made at a casino. On July 11, 2005 the Defendant petitioned this Court for relief under Chapter 7 of the United States Bankruptcy Code. Thereafter, the Plaintiff timely commenced the instant adversary proceeding seeking to have the Defendant's obligation held nondischargeable.

DISCUSSION

The Plaintiff's complaint for dischargeability is brought under § 523(a)(2)(A) of the Bankruptcy Code. This section provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 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[.]

Under 28 U.S.C. § 157(b)(2)(I), a determination as to the dischargeability of a debt under this section is deemed to be a core proceeding. Thus, this matter is a core proceeding.

On its complaint to determine dischargeability, the Plaintiff moved this Court for Summary Judgment. The standard for summary judgment is set forth in FED.R. CIV.P. 56, which is made applicable to this proceeding by Bankruptcy Rule 7056, and provides in pertinent part: A movant will prevail on a motion for summary judgment if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In making this determination, the Court is directed to view all facts in the light most favorable to the nonmoving

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party. *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 586-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *see also In re Bell*, 181 B.R. 311 (Bankr.N.D.Ohio 1995). With this standard in mind, the Court now turns to the merits of the Plaintiffs' cause of action under 11 U.S.C. § 523(a)(2)(A).

When based upon fraud, a creditor bears the burden to establish, by at least a preponderance of the evidence, the existence of five elements in order to except a debt from discharge under § 523(a)(2)(A): (1) the debtor made a false representation; (2) the debtor knew the representation to be false at the time it was made; (3) the representation was made with the intent to deceive the creditor; (4) the creditor relied on the representation; and (5) the creditor's loss was the proximate result of the misrepresentation having been made. *In re Mayerson (Colonial Pacific Leasing v. Mayerson)*, 254 B.R. 407, 410 (Bankr. N.D.Ohio 2000); *Rembert v. AT & T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir.1998). In looking to the applicability of these elements, the focus of the litigants is normally placed on the third element: fraudulent intent. And with the Defendant having failed to respond to the Plaintiff's Motion for Summary Judgment, there is nothing to suggest that the dispute between the Parties does not likewise center on only this element.¹

Whether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard. *Rembert v. AT&T Universal Card Services, Inc.; Citibank South Dakota (In re Rembert)*, 141 F.3d 277, 281. But as a debtor is unlikely to actually admit to acting with the intent to deceive – this case being no exception – this requirement may be inferred from the debtor's conduct and from other surrounding circumstances. *Araps v. DeBaggis (In re DeBaggis)*, 247 B.R. 383, 391 (Bankr.D.N.J.1999). In this regard, the Sixth Circuit Court of Appeals

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For this purpose, the Court specifically makes a finding at this time that the Plaintiff has sustained its burden regarding the applicability of the other four necessary elements of § 523(a)(2)(A)

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has held that where, as here, credit-card transactions are at issue, the following considerations, although not exclusive, may be of assistance when making a determination as to the debtor's intent:

- (1) the length of time between the charges made and the filing of bankruptcy;
- (2) whether or not an attorney has 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 are made;
- (6) whether the charges were above the credit limit of the account;
- (7) whether the debtor made multiple charges on the same day;
- (8) whether or not the debtor was employed;
- (9) the debtor's prospects for employment;
- (10) financial sophistication of the debtor;
- (11) whether there was a sudden change in the debtor's buying habits; and
- (12) whether the purchases were made for luxuries or necessities.

In re Rembert, 141 F.3d 277 at 282, fn.3. Yet, in the end the Sixth Circuit stated: "What courts need to do is determine whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent." *Id.* at 282.

Being a subjective standard, intent issues under § 523(a)(2)(A) will often hinge on the trier-of-fact – the Court – making a credibility determination as to the debtor, and any other supporting and impeaching witnesses. But as previously noted by this Court in a similar context:

[c]redibility determinations are within the province of the fact-finder. Only through live cross-examination can the fact-finder observe the demeanor of a witness and assess his credibility. A cold transcript of a deposition is

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generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

Colonial Pacific Leasing v. Mayerson (In re Mayerson), 254 B.R. 407, 412 (Bankr. N.D.Ohio 2000), citing *Guillory v. Domtar Industries, Inc.*, 95 F.3d 1320, 1327 fn.4 (5th Cir.1996). Hence, it is the general rule that summary judgment – whose function serves to eliminate the trial/hearing at which a party’s credibility may be assessed – is normally not considered the appropriate vehicle by which to resolve matters going to intent, § 523(a)(2)(A) being no exception. *Kand Medical, Inc. v. Freund Medical Prods., Inc.*, 963 F.2d 125, 127 (6th Cir.1992).

Yet, this rule is not absolute, and when a party fails to respond to a summary judgment motion, and all reasonable inferences that could be drawn from the evidence clearly defeat the non-movant’s position, summary judgment can be the appropriate vehicle for adjudication. *Bernard Lumber Co. v. Billy Joe Patrick (In re Billy Joe Patrick)*, 265 B.R. 782, 787 (2001); *see also Kand Medical, Inc. v. Freund Medical Prods., Inc.*, 963 F.2d 125, 127 (6th Cir.1992) (generally summary judgment is considered inappropriate where the issue of intent is involved). The type of situation that is now before the Court perfectly fits this mold.

Most problematic for the Defendant is the close timing of events. In particular, the charges and cash advances made by the Defendant were incurred from April 13, 2005 through May 12, 2005 and - without any attempt to pay down the obligation - the Defendant filed her bankruptcy shortly thereafter, in July of 2005. Standing alone, the close proximity of these salient events raises a very strong inference that the Defendant incurred her obligations to the Plaintiff in contemplation of bankruptcy. In fact, had the timing of events been any closer together, the presumption of fraud as provided in § 523(a)(2)(C) would have arisen. Things, however, do not stop here; other indicia of fraudulent intent continue to go in this same direction, with the following being the most prominent.

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First, the Court is troubled with the Defendant's financial condition at the time the charges and cash advances were made. The Defendant's schedule I shows a total monthly income of just \$592.00, derived solely from Social Security benefits. Yet, despite having a limited income, the Defendant charged \$4,382.88 on her credit card in just one month's time, an amount that equals approximately 7.5 times her monthly salary. Thus, it hard to see how the Defendant could have ever hoped to pay the obligation. Additionally, this fact becomes even more problematic when it is considered that the charges and cash advances were not made for necessities, but rather were made at a Casino, presumably for gambling.

In conclusion, while the Defendant is to be afforded the benefit of any reasonable doubt, the only reasonable inference that can be drawn from the circumstances of this case is that the Defendant acted with fraudulent intent. As such, the Defendant was required to come forth with evidence tending to refute this inference, but which, in not responding to the Plaintiff's Motion for Summary Judgment, she has failed to do. Accordingly, the Plaintiff is entitled, as a matter of law, to the entry of judgment in their favor. In reaching all the conclusions found herein, the Court has considered all of the evidence, exhibits, and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that the Motion for Summary Judgment submitted by the Plaintiff, Citibank (South Dakota) N.A, be, and is hereby, GRANTED.

It is **FURTHER ORDERED** that the claim held by the Plaintiff, Citibank (South Dakota) N.A., against the Defendant/Debtor, Barbara Bovine, be, and is hereby, determined to be a NONDISCHARGEABLE DEBT pursuant to 11 U.S.C. § 523(a)(2)(A).

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It is ***FURTHER ORDERED*** that the Plaintiff is awarded judgment in the amount of Four Thousand Three Hundred and Eighty Two Dollars and 88/100 (\$4,382.88), plus interest at the contract rate from July 11, 2005.

Dated:

Richard L. Speer
United States
Bankruptcy Judge