UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| In Re: | ) | Case No.: 04-38032 |
| | ) | |
| Rebecca Elaine James, | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | Adv. Pro. No. 05-3015 |
| | ) | |
| Capital One Bank, | ) | Hon. Mary Ann Whipple |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | |
| | ) | |
| Rebecca Elaine James, | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM OF DECISION AND ORDER DENYING MOTION TO DISMISS**

Debtor and defendant Rebecca Elaine James ("Defendant") is before the court on the Motion to Dismiss with Memorandum in Support that she filed on January 19, 2005. After reviewing the motion, the supporting brief, and the opposing memorandum filed by Capital One Bank ("Plaintiff"), the court will deny the motion.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and the general order of reference entered in this district. Actions to determine dischargeability are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I).

On September 24, 2004, Defendant filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On January 12, 2005, Plaintiff filed the complaint initiating this proceeding, alleging that Defendant made eleven purchases on Plaintiff's credit card, totaling $7,801.33, between June 24, 2004, and August 26, 2004, and that Defendant has made only three payments on the account, totaling $641.14, during or after that period. The complaint further alleges that the total balance of the account is $20,809.87, and that the entire debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A) due to fraud. The complaint

avers that Defendant implicitly represented, at the time of each credit purchase, that she intended to repay the charge, that the implied representations were

false and made knowingly and recklessly and with intent to induce Plaintiff to extend credit to Defendant. The complaint also alleges that Plaintiff actually and justifiably relied on the representations, and that it suffered damages as a result in the full amount of the debt.

Although the motion to dismiss does not identify the authority therefor, it appears that the motion is made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as made applicable in bankruptcy adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure. "Rule 12(b)(6) allows a dismissal for failure to state a claim only when 'it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.'" *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "The court must construe the complaint in a light most favorable to the plaintiff, and accept all of her factual allegations as true. When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor." *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998). "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

In general, a pleading's allegations need only "show that the pleader is entitled to relief." Fed. R. Bankr. P. 7008(a); Fed. R. Civ. P. 8(a). However, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Bankr. P. 7009; Fed. R. Civ. P. 9(b). "In ruling upon a motion to dismiss under Rule 9(b) for failure to plead fraud "with particularity," a court must factor in the policy of simplicity in pleading which the drafters of the Federal Rules codified in Rule 8. . . . Indeed, Rule 9(b)'s particularity requirement does not mute the general principles set out in Rule 8; rather, the two rules must be read in harmony." *Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674, 679 (6th Cir. 1988). Thus, the averments of fraud need only "provide a defendant fair notice of the substance of a

plaintiff's claim in order that the defendant may prepare a responsive pleading." *Id.* This liberal reading[1] of the rule requires the

"plaintiff, at a minimum, to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993).

The motion to dismiss asserts that the complaint does not contain sufficient allegations regarding the misrepresentations, their falsity, or Plaintiff's reliance. Regarding the misrepresentations, the Sixth Circuit has held that "[t]he use of a credit card represents either an actual or implied [representation of] intent to repay the debt incurred." *Rembert v. AT & T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998).[2] Assuming the truth of the complaint's allegation of an implied intent to repay the debt, that allegation does state the time, place, and content of the alleged misrepresentation and is, therefore, sufficient to withstand a motion to dismiss. *See, e.g., Colonial Nat'l Bank USA v. Leventhal (In re Leventhal)*, 194 B.R. 26, 31-32 (Bankr. S.D.N.Y. 1996); *Household Credit Servs., Inc. v. Peterson (In re Peterson)*, 182 B.R. 877, 879-80 (Bankr. N.D. Okla. 1995). As for whether Defendant, at the times the charges were incurred, had intended not to pay the charges thereby making the implied representations false, "intent . . . and other condition of mind of a person may be averred generally." The complaint does include a general

[1] It appears that this complaint would not survive in other jurisdictions where Rule 9(b) is not as liberally applied. *See, e.g., Chase Manhattan Bank, USA, N.A. v. Giuffrida (In re Giuffrida)*, 302 B.R. 119, 126-27 (Bankr. E.D.N.Y. 2003). This court is, of course, bound to follow Sixth Circuit precedent.

[2] The court rejected the proposition that credit card use also constitutes an implied representation of an *ability* to pay, *Rembert*, 141 F.3d at 281, but the complaint in this proceeding alleges only an implied representation of an *intent* to pay.

allegation of such intent, so the complaint need not be dismissed for this reason.[3] Nor can the court say that Plaintiff can prove

no set of facts showing that it reasonably relied on the implied representations as the complaint alleges.

Having established that credit card charges constitute implied representations of an intent to repay as a matter of law, the thrust of Defendant's motion is that Plaintiff cannot prove that the implied representations were false or that it reasonably relied on them. Thus, Defendant does not challenge the sufficiency of the complaint's allegations; rather, she disputes the truth of those allegations, but offers no evidence in support of her position.[4] The time will come when the court will determine whether Plaintiff has proven the truth of the allegations, at trial or perhaps on a motion for summary judgment. But, on a Rule 12(b)(6) motion to dismiss, this court must assume the truth of the allegations and may not dismiss the case

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[3] The court is ruling only that the complaint was legally sufficient, and is not commenting on whether Plaintiff will be able to prove an intent not to repay, which requires evidence as to all the circumstances surrounding the credit card charges, and not merely whether the debtor did, in fact, pay the debt. *Rembert*, 141 F.3d at 281-82. If, after an opportunity for completing discovery, Plaintiff is unable to prove circumstances demonstrating Defendant's intent, it has an affirmative obligation to dismiss its complaint. Fed. R. Bankr. P. 9011; *e.g.*, *Runfola & Assocs., Inc. v. Spectrum ReportingII, Inc.*, 88 F.3d 368, 373-74 (6th Cir. 1996) (imposing sanctions for pursuing claim "after the pleader has or should have become aware that it lacks merit"). "'[T]he reasonable inquiry under Rule 11 is not a one-time obligation.' '[T]he plaintiff is impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11.'" *Runfola & Assocs.*, 88 F.3d 374 (citation omitted). Mere survival of an action following a Rule 12(b)(6) motion to dismiss does not prevent the imposition of Rule 11 sanctions. *Id.*; *see also* 11 U.S.C. § 523(d).

[4] Rule 12(b) permits the court to consider "matters outside the pleading," thereby converting a motion to dismiss into a motion for summary judgment. The court will not exercise its discretion to do so, *see, e.g.*, *Shelby County Health Care Corp. v. S. Council of Indus. Workers Health & Welfare Trust Fund*, 203 F.3d 926, 931 (6th Cir. 2000), particularly in that Defendant has not submitted any pleadings, discovery, affidavits, or other evidence of her intent or of a lack of reasonable reliance by Plaintiff, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (movant for summary judgment has burden of presenting such documentary evidence); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 (3d ed. 2004) (mere allegations and arguments do not constitute "matters outside the pleading" bringing the conversion-to-summary-judgment provision into play).

"based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

**THEREFORE**, for the foregoing reasons,

**IT IS ORDERED** that Debtor's motion to dismiss [Doc. #6] is denied. A separate scheduling order shall issue.

Mary Ann Whipple
United States Bankruptcy Judge