

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
WILLIAM F. ROSS,	*	
	*	CASE NUMBER 05-40081
Debtor.	*	
	*	
*****	*	
	*	
MBNA AMERICA BANK, N.A.,	*	
	*	ADVERSARY NUMBER 05-4080
Plaintiff,	*	
	*	
vs.	*	
	*	
WILLIAM F. ROSS,	*	
	*	THE HONORABLE KAY WOODS
Defendant.	*	
	*	

M E M O R A N D U M O P I N I O N

This cause is before the Court on an unopposed motion for summary judgment filed by MBNA America Bank, N.A. ("Plaintiff").¹ Plaintiff initiated this adversary proceeding to determine if credit card debt owed by Debtor/Defendant William F. Ross ("Debtor") to Plaintiff is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

¹Plaintiff's Motion for Summary Judgment did not contain any legal analysis, but rested entirely on the admissions in Plaintiff's First Request for Admission to Defendant.

I. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then

shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

II. FACTS

On January 10, 2005, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Subsequently, on April 11, 2005, Plaintiff initiated this adversary proceeding seeking a determination that certain credit card debt incurred by Debtor and owed to Plaintiff is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Debtor filed an Answer on May 6, 2005.

The Court conducted a telephonic status conference on January 30, 2006. At that time, Debtor's counsel represented that he had not been in contact with his client for four (4) months and that Debtor had either failed or refused to return his phone calls and respond to his letters. Furthermore, during the telephonic

conference, Plaintiff informed the Court that Debtor has failed to respond to discovery requests forwarded to Debtor's counsel on June 3, 2005. Included in Plaintiff's discovery was Plaintiff's First Request for Admission to Defendant. The Court instructed Debtor's counsel to answer all outstanding discovery within two weeks (*i.e.*, by February 13, 2006) or the requests for admission would be deemed admitted and Debtor would be prohibited from using any documents at trial that should have been produced to the Plaintiff. See FED. R. BANKR. P. 7036 and FED. R. CIV. P. 36.

Subsequently, on February 21, 2006, the Court conducted a final pretrial hearing, at which Debtor and Debtor's counsel failed to appear. At the hearing, Plaintiff informed the Court that it had not received any answers to its discovery requests. Because Debtor failed to answer the discovery requests by February 13, 2006, the Court held that all the requests for admissions were deemed admitted. *Id.*

Plaintiff's First Request for Admission to Defendant contained the following requests, which were deemed admitted:

1. Admit that you applied for and received a credit card with Plaintiff under Account XXXXXX1516 (the "Account").
2. Admit that you received a copy of the terms and conditions for the Account.
3. Admit that collectively, you and any party or parties that you authorized incurred all of the charges on the Account.
4. Admit that you are indebted to Plaintiff for all of the charges on the Account.

5. Admit that you do not hold any defense, counter-claim, or set-off to your indebtedness for any of the charges on the Account.

6. Admit that you received the monthly account statements which reflect the charges incurred on the Account.

7. Admit that you did not notify Plaintiff of any dispute or objection to the charges at any time prior to filing your bankruptcy petition.

8. Admit that you received the goods, services, or consumer items that were purchased through the charges on the Account

9. Admit that at the time the charges were incurred, you did not have the financial ability to repay them as required under the terms of the account [sic] agreement.

10. Admit that Plaintiff relied on your representations that you had the financial ability and intent to repay the charges as required under the terms of the Account agreement.

11. Admit that at the time the charges were incurred, you did not have the financial ability to repay them and remit current payments on all of your other unsecured debt and living expenses.

12. Admit that at all times during the period that the charges were incurred on the Account, you knew and understood that you had insufficient income and financial resources to remit payments to Plaintiff and your various credit accounts and pay your other living and household expenses.

13. Admit that by accepting and using the cash advances and/or convenience checks received from Plaintiff, you agreed to be bound by the terms and conditions under which the credit card was issued.

14. Admit that the balance on Account XXXXXX1516 as of 01/10/2005 was \$8,974.62.

III. DISCUSSION

Based on Debtor's failure to oppose Plaintiff's Motion for Summary Judgment and Debtor's admissions, it appears that there are no genuine issues of material fact regarding the facts and issues

for which Plaintiff requested admissions. The issue before the Court is whether, in applying the law to these facts, Plaintiff has established all of the necessary elements of its cause of action. The statutory basis for Plaintiff's Complaint Objecting to Dischargeability of Indebtedness (11 U.S.C. § 523) rests entirely on the discharge exception in 11 U.S.C. § 523(a)(2)(A).² Section 523(a)(2) states in pertinent part:

(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.

It is well established that in order to except debt from discharge under § 523(a)(2)(A), a creditor must prove: (1) the debtor obtained money through a material misrepresentation that, at the time the representation was made, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the reliance was the proximate cause of the loss. *Longo v. McLaren (In re McLaren)*,

²Plaintiff's complaint generically refers to 11 U.S.C. § 523(a)(2). Section 523(a)(2) of the Bankruptcy Code contains subsections A, B and C. Subsection B is inapplicable because Debtor did not use a statement in writing as required by 11 U.S.C. § 523(a)(2)(B). Subsection C is inapplicable because the charges and cash advances, incurred between July 23, 2004 through July 28, 2004, were not made within 60 days before the petition date as required by 11 U.S.C. § 523(a)(2)(C).

3 F.3d 958, 961 (6th Cir. 1993). The creditor must prove each of the aforementioned elements by a preponderance of the evidence. *Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). Furthermore, exceptions to discharge are to be strictly construed against the creditor. *Id.*

The Court will first focus on elements (1) and (2) of the *McLaren* test. These elements require proof of fraudulent intent, which is measured by a subjective standard. *Id.* Therefore, Plaintiff must prove that Debtor made representations to Plaintiff with fraudulent intent.

In *In re Rembert* the Sixth Circuit Court of Appeals distinguished, at length, a debtor's ability to pay compared to his intent to defraud. Because *In re Rembert* deals with a situation that closely resembles the instant facts, this Court sets forth that analysis, in full, herein, as follows:

The use of a credit card represents either an actual or implied intent to repay the debt incurred. *See, e.g., Chevy Chase Bank, FSB v. Briese (In re Briese)*, 196 B.R. 440, 449-50 (Bankr. W.D. Wis. 1996); *Chase Manhattan Bank v. Murphy (In re Murphy)*, 190 B.R. 327, 332 (Bankr. N.D. Ill. 1995); *The GM Card v. Cox (In re Cox)*, 182 B.R. 626, 628 (Bankr. D. Mass. 1995). Subject to more debate, however, is the issue of whether the debtor's representation includes a representation that she has an **ability** to repay the debt. Compare *Anastas v. American Savings Bank (In re Anastas)*, 94 F.3d 1280, 1287 (9th Cir. 1996) (the representation made by the card holder in a credit card transaction is not that he has an ability to repay the debt), and *AT&T Universal Card Serv. Corp. v. Feld (In re Feld)*, 203 B.R. 360, 367 (Bankr. E.D. Pa. 1996) ("We therefore reject those cases that measure a debtor's intention to repay by her ability to pay."), with *Mercantile Bank v. Hoyle (In re Hoyle)*, 183 B.R. 635, 638 (Bankr. D. Kan. 1995) (debtor implied that he had ability to repay when he took out cash advances) and *Bank One Columbus, N.A. v. McDonald (In re McDonald)*, 177 B.R.

212, 216 (Bankr. E.D. Pa. 1994) (the act of using a credit card carries the implied representation that the debtor has the ability to repay the debt).

We believe that "the representation made by the cardholder in a credit card transaction is not that he has an ability to repay the debt; it is that he has an intention to repay." *Anastas*, 94 F.3d at 1287. To measure a debtor's intention to repay by her ability to do so, without more, would be contrary to one of the main reasons consumers use credit cards: because they often lack the ability to pay in full at the time they desire credit. See *Feld*, 203 B.R. at 368 (citing *Briese*, 196 B.R. at 448). Further, the language of § 523(a)(2)(A) expressly prohibits using a "statement respecting the debtor's or an insider's financial condition" as a basis for fraud. As noted by the Ninth Circuit, the focus should not be on whether the debtor was hopelessly insolvent at the time he made the credit card charges. A person on the verge of bankruptcy may have been brought to that point by a series of unwise financial choices, such as spending beyond his means, and if ability to repay were the focus of the fraud inquiry, too often would there be an unfounded judgment of non-dischargeability of credit card debt. Rather, the express focus must be solely on whether the debtor maliciously and in bad faith incurred credit card debt with the intention of petitioning for bankruptcy and avoiding the debt. A finding that a debt is non-dischargeable under 523(a)(2)(A) requires a showing of actual or positive fraud, not merely fraud implied by law. . . . While we recognize that a view to the debtor's overall financial condition is a necessary part of inferring whether or not the debtor incurred the debt maliciously and in bad faith, . . . the hopeless state of a debtor's financial condition should never become a substitute for an actual finding of bad faith.

Anastas, 94 F.3d at 1285-86 (citations omitted). Thus, we hold that the proper inquiry to determine a debtor's fraudulent intent is whether the debtor subjectively intended to repay the debt.

We are not unsympathetic to Appellants' claim that a subjective analysis of a debtor's fraudulent intent is extremely difficult to establish. Clearly, debtors have an incentive to make self-serving statements and will rarely admit an intent not to repay. In particular, compulsive gamblers often will have a subjective (albeit often baseless) intent to repay their gambling debts with their "expected" winnings, which is fueled by the very

nature of their addictions. Thus, a debtor's intention -- or lack thereof -- must be ascertained by the totality of the circumstances. See *Feld*, 203 B.R. at 367.

Some courts have adopted a nonexclusive list of twelve factors to consider when determining whether a debtor intended to repay the debt. (FN 3 omitted) See, e.g., *Ellingsworth v. AT&T Universal Card Serv.* (*In re Ellingsworth*), 212 B.R. 326, 334-35 (Bankr. W.D. Mo. 1997). Although we believe that "factor-counting" is inappropriate when applying a subjective standard, see *Murphy*, 190 B.R. at 334, the enumerated factors could help to determine the debtor's state of mind when she represented her intention to repay. "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. This determination will require a review of the circumstances of the case at hand, but not a comparison with circumstances (a/k/a/ 'factors') of other cases." *Id.*

In re Rembert, 141 F.3d at 281-82. (Emphasis in original).

Although the Sixth Circuit dismissed "factor-counting" as inappropriate, the Court set forth the twelve factors to consider in determining whether a debtor intended to repay the debt.

These factors are: (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. See *Citibank South Dakota, N.A. v. Dougherty* (*In re Dougherty*), 84 B.R. 653, 657 (9th Cir. B.A.P. 1988) (citing *Sears Roebuck and Co. v. Faulk* (*In re Faulk*), 69 B.R. 743, 757 (Bankr. N.D. Ind. 1986)), abrogated on other grounds, *Grogan v. Garner*, 498 U.S. 279, 112 L. Ed. 2d 755, 111 S. Ct. 654 (1991). It should be noted that even the Ninth Circuit, which decided *Dougherty*, has recognized that the twelve-factor test has "been criticized because it does not

consider all the common law elements of fraud, particularly misrepresentation and reliance." *Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1088 (9th Cir. 1996) (citing *The GM Card v. Cox (In re Cox)*, 182 B.R. 626, 637 (Bankr. D. Mass. 1995)).

Id., at 282, n3.

Turning to the present case, the admissions establish that Debtor did not have the financial ability to pay the credit card debt at the time the charges were incurred. See Admission Nos. 9, 11 and 12. However, Plaintiff has failed to set forth any evidence that Debtor had the subjective intent to defraud Plaintiff at the time the charges were incurred. Plaintiff relies solely on Plaintiff's First Request for Admission to Defendant, which does not include any request for Debtor to admit an intent to defraud the Plaintiff. Additionally, Plaintiff fails to submit any other evidence to establish Debtor's intent to defraud. As a result, the instant case involves a genuine issue of material fact regarding Debtor's intent to defraud. Therefore, Plaintiff has not established all of the elements necessary to find judgment in its favor.

Arguendo, even if the Sixth Circuit had adopted the "factor-counting" test, Plaintiff fails to set forth evidence to satisfy the twelve factors in footnote 3 in *In re Rembert*. Plaintiff relies entirely on the admissions in Plaintiff's First Request for Admission to Defendant, which do not include request admissions regarding each of the factors listed in footnote 3. As a result, even if the Sixth Circuit adopted the "factor-counting" test, there would still be genuine issues of material fact, thus precluding summary judgment in favor of Plaintiff.

IV. CONCLUSION

Viewing the evidence and its inferences in the light most favorable to Debtor, Plaintiff failed to meet its burden to prove that Debtor possessed the fraudulent intent required by the *McLaren* test. Since fraudulent intent is an essential element to except the debt from discharge, pursuant to 11 U.S.C. § 523(a)(2)(A), there exists a genuine issue of material fact.

Accordingly, Plaintiff's Motion for Summary Judgment is hereby denied.

An appropriate order will enter.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, Plaintiff's Motion for Summary Judgment is hereby denied. Therefore, trial shall begin on April 3, 2006, at 2:00 p.m.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE