Dated: August 22 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 05-74877
	)	
Rong Zeng,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 06-3058
	)	
American Express Centurion Bank,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Rong Zeng,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER ON MOTION FOR DEFAULT JUDGMENT

This adversary proceeding is before the court upon Plaintiff American Express Centurion Bank's Complaint to Determine Dischargeability of a Debt ("Complaint") [Doc. #1]. Defendant is the debtor in the underlying chapter 7 bankruptcy case. The Clerk issued a summons and notice of pretrial conference on January 31, 2006 [Doc. #5]. The executed summons required an answer or other response to the Complaint to be filed by March 2, 2006. On March 7, 2006, the court held a pre-trial scheduling

conference. An Attorney for Plaintiff appeared in person. There was no appearance by or on behalf of Defendant and no answer or other response to the Complaint had been served or filed at that time. Plaintiff then filed and duly served a Motion for Default Judgment ("Motion") against Defendant on March 13, 2006. [Doc. #10]. The court scheduled a hearing on the Motion and notice of this hearing was properly served on Defendant [Doc. ## 12,13]. On April 11, 2006, the court held a hearing on the Motion. An Attorney for Plaintiff appeared in person. There was no appearance by or on behalf of Defendant at the hearing and the record shows that no answer or other response to the complaint had been filed.

After review of the entire record, the court has determined that, pursuant to Fed. R. Civ. P. 55, made applicable through Fed. R. Bankr. P. 7055, Plaintiff's Motion for Default Judgment will be GRANTED.

The legal basis for the Complaint is 11 U.S.C. § 523(a)(2)(A), pursuant to which debts incurred through false representations or actual fraud, other than through a statement in writing as to the debtor's financial condition, may be excepted from a debtor's discharge. The court has jurisdiction over the Defendant's/ Debtor's underlying Chapter 7 bankruptcy case. 28 U.S.C. § 1334. The case and all related proceedings, including this adversary proceeding, have been referred to this court for decision. 28 U.S.C. § 157(a) and General Order No. 84-1 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This adversary proceeding is a core proceeding in which this court can make a final determination because it involves a determination as to dischargeability of a debt. 28 U.S.C. § 157(b)(2)(I).

The court finds that notice, including the service of the summons and Complaint pursuant to Fed. R. Bankr. P. 7004, has duly and properly been served upon Defendant. Specifically, service was effected by first class United States mail, postage prepaid, sent to Defendant at the address shown in the petition and to Defendant's lawyer. *See* Fed. R. Bankr. P. 7004(b)(9). No mailings by the court to Debtor have been returned. In addition, notice of the filing of the complaint was electronically served on

counsel for Debtor according to the court's records. Service by mail is presumed to be complete on mailing. Thus, the court finds that Defendant failed timely to appear, plead, or otherwise defend this action as required by the Federal Rules of Bankruptcy Procedure. Plaintiff has also provided the required evidence under the Service Members Civil Relief Act that Defendant is not in the military service of the United States of America. [Doc. #10].

Defendant's failure to answer the complaint does not, standing alone, entitle Plaintiff to a default judgment as a matter of right. *American Express Centurion Bank v. Truong (In re Truong)*, 271 B.R. 738, 742 (Bankr. D. Conn. 2002); *Webster v. Key Bank (In re Webster)*, 287 B.R. 703, 709(Bankr. N.D. Ohio 2002); *Columbiana County Sch. Emples. Credit Union, Inc. v. Cook (In re Cook)*, 2006 Bankr. LEXIS 446 at *9--*10 (B.A.P. 6th Cir. Apr. 3, 2006). In determining whether a default judgment is appropriate, "the court should [accept] as true all of the factual allegations of the complaint, except those relating to damages" and afford plaintiff "all reasonable inferences from the evidence offered." *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981). Yet the court mus still decide whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law. *Smith v. Household Fin. Realty Corp. Of New York (In re Smith)*, 262 B.R. 594, 597 (Bankr. E.D.N.Y. 2001). Where the claim sounds in fraud, the court must evaluate the evidence presented to assure that the plaintiff has presented a prima facie case. *In re Truong*, 271 B.R. at 742.

Plaintiff relies on § 523(a)(2) of the Bankruptcy Code in contending that Defendant's indebtedness to it is nondischargeable. The statute provides, in pertinent part:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud.

11 U.S.C. § 523(a)(2)(A). The Sixth Circuit has enumerated the elements of a cause of action under this provision as follows:

> In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material mis-

> representation that, at the time, 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) its reliance was the proximate cause of loss.

Rembert v. AT & T Universal Card Services, Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998). The party seeking the exception to discharge bears the burden of proof on each element of its claim by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

The Sixth Circuit also held in *Rembert* that "[w]hether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard." *Id.* at 281. However, "gross recklessness is sufficient to establish an intent to deceive." *Bank One, Lexington, N.A. v. Woolum (In re Woolum),* 979 F.2d 71, 73 (6th Cir. 1992). "Because direct proof of intent, the Debtor's state of mind, is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred." *ITT Fin. Serv. v. Long (In re Long),* 124 B.R. 54, 56 (Bankr. N.D. Ohio 1991); *accord, e.g., Palmacci v. Umpierrez,* 121 F.3d 781, 789 (1st Cir. 1997) (quoting *Anastas v. Am. Sav. Bank (In re Anastas),* 94 F.3d 1280, 1286 n.3 (9th Cir. 1996)); *Equitable Bank v. Miller (In re Miller),* 39 F.3d 301, 305 (11th Cir. 1994); *First Nat'l Bank v. Kimzey (In re Kimzey),* 761 F.2d 421, 424 (7th Cir. 1985); *Crawford v. Monfort (In re Monfort),* 276 B.R. 793, 796 (Bankr. N.D. Ohio 2001); *Citibank v. Weaver (In re Weaver),* 139 B.R. 677, 679 (Bankr. N.D. Ohio 1992); *see Alport v. Ritter (In re Alport),* 144 F.3d 1163, 1167 (8th Cir. 1998).

As for the creditor's reliance, the Supreme Court has made clear that the reliance must be justified, but need not be reasonable. *Field v. Mans,* 516 U.S. 59, 74-75 (1995). The test is a subjective one rather than an objective one. *Id.* at 70-71. The pertinent question is thus whether the creditor was justified in relying on the representation, rather than whether a reasonable person would have done so. A creditor is not required to conduct an investigation as to the truth or falsity of the statement. *Id.* at 70.

The court finds that the well-pleaded averments of Plaintiff's Complaint constitute a valid cause

of action under § 523(a)(2) and *Rembert*, and deems them as true as a result of Defendant's default. The Complaint and attached exhibits show that Defendant incurred substantial and unusual charges on account on two credit cards issued by Defendant, many of which appear to involve luxury goods and unnecessary items (furniture, substantial amounts for consumer electronics, restaurant food, airline charges to Orlando, Florida) leading up to the commencement of the Chapter 7 bankruptcy case. Debtor filed the underlying Chapter 7 bankruptcy case on October 14, 2005. On one account, Debtor had a zero balance on the account when charges commenced on July 22, 2005. [Exh. A to Complaint]. On the other account, Debtor had a balance of $3,366.83, with a small payment of $70.00 made in July 2005. [Exh. B to Complaint]. The statements show that additional charges totaling $14,156.38 on both accounts were all incurred in a very short period of time almost all in July, 2005. It is these amounts, not the entire balance, upon which Plaintiff properly premises its claim.

The factual averments in the Complaint are very detailed and supported by exhibits showing the charges. The nature of the charges and their timing, coupled with the failure to make any payment on the account thereafter, and Debtor's lack of income and general financial circumstances at the time show a debtor on a pre-bankruptcy spending spree without an intent to repay Plaintiff, contrary to the representation made by use of the credit extended by Plaintiff. *Rembert*, 141 F.3d at 281. Given the relatively small balance (at least in relation to the amounts charged) carried on the one account and the zero balance on the other account before the charges in issue commenced, and the very short time period in which they were run up, Plaintiff's reliance on Defendant's representations of an intent to repay was justifiable. That reliance was the proximate cause of the loss incurred as a result of the new charges incurred in July 2005 shortly before the filing of the bankruptcy case. As a result of the factual averments in the Complaint and the attached exhibits, the court finds that Defendant owes Plaintiff a debt of $14,405.73[1] and that the debt arose under circumstances exhibiting a fraudulent intent not to repay the

[1] The account statements would support a debt on the accounts (less the balance as of July 14, 2006) in a slightly greater amount when finance charges are added to the charges, but this is the amount demanded in the complaint.

charges incurred so that it may be excepted from Defendant's discharge under § 523(a)(2)(A) and *Rembert.*

The amount of the debt is liquidated as shown by statements on the two open accounts and no further evidentiary hearing was necessary either to establish nondischargeability or the amount of the underlying debt. The Sixth Circuit authorizes bankruptcy courts to enter money judgments in actions seeking to except debts from discharge, *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 966 (6th Cir. 1993), and Plaintiff has requested entry of both a money judgment and a judgment excepting the debt owed from Defendant's discharge.

The problematic aspect of Plaintiff's request for entry of a money judgment is that it also seeks to include attorney's fees of $1250.00 in the judgment amount. The request for attorney's fees suffers from both procedural and substantive proof problems. From a procedural standpoint, Rule 7008(b) of the Federal Rules of Bankruptcy Procedure provides: "A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." Thus, attorney's fees must be sought in a bankruptcy adversary proceeding by a separate count of the complaint or other pleading and not merely in the prayer for relief. *E.g.*, *Leonard v. Onyx Acceptance Corp.*, Nos. 02-8125, Civ. 03-1117 ADM, 2003 WL 1873283, at *2 (D. Minn. Apr. 11, 2003); *Citibank USA, N.A. v. Spring (In re Spring)*, Nos. 03-35552 (LMW), 04-3007 (LMW), 2005 WL 588776, at *6 (Bankr. D. Conn. Mr. 7, 2005); *Garcia v. Odom (In re Odom)*, 113 B.R. 623, 625 (Bankr. C.D. Cal. 1990); *see V.M. v. S.S. (In re S.S.)*, 271 B.R. 240, 244 (Bankr. D.N.J. 2002). Plaintiff's complaint is divided into two counts, neither of which sets forth a claim for attorney's fees; rather, that request is included only in the prayer for relief. Where a proceeding is being decided only on the pleadings, that pleading shortcoming is particularly problematical. The lack of a separate claim for attorney's fees in the complaint is alone a sufficient basis for denial of attorney's fees as part of the money judgment in this case.

From a substantive standpoint, in the Sixth Circuit a debt held to be nondischargeable under § 523(a)(2) includes reasonable attorney's fees where those fees are recoverable by the creditor in the debt collection process under applicable state law. *Martin v. Germantown (In re Martin)*, 761 F.2d 1163, 1168

(6th Cir. 1985). The state law may be a contractual provision enforceable by the bankruptcy court, as in *Martin*, or a state court judgment that allows fees. The fees incurred by Plaintiff in this case were not, however, incurred in the state court collection process and did not involve any contractual issues. Rather they were incurred in prosecuting a federal § 523(a)(2) claim that did not involve any state law issues. Other circuits, most prominently the Ninth Circuit, have determined in several contexts that an otherwise enforceable contract provision authorizing attorney's fees does not extend to fees for pursuing a federal cause of action in bankruptcy. *See American Express Travel Related Services Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1127 (9th Cir.1997). Other bankruptcy courts in this circuit have agreed with the Ninth Circuit and held that a fee award only includes fees to the extent of basic state law contract enforcement issues and not to the extent of litigating federal bankruptcy issues. *See, e.g., Helsel v. Marsh (In re Marsh)*, 257 B.R. 879, 883 (Bankr. W.D. Tenn. 2000). Albeit in the context of claims allowance, the Sixth Circuit just explicitly and sweepingly rejected the Ninth and other Circuits' distinctions between litigating federal issues and state law issues in bankruptcy cases where there is an otherwise enforceable contractual provision allowing attorney's fees. *See In re Dow Corning*, – F.3d –, 2006 U.S. App. LEXIS 18665 (6th Cir., July 26, 2006). *Martin* and *Dow Corning* together now make it clear in this circuit that a contractual fee shifting provision enforceable under state law is not limited in extent by federal bankruptcy law or policy to fees incurred in litigating state law enforceability issues. Plaintiff's request for fees is thus not substantively defective on the legal basis that the only fees incurred were in litigating a federal bankruptcy law cause of action under § 523(a)(2).

The legal underpinnings of Plaintiff's claim for attorneys fees do not, however, relieve Plaintiff from establishing the factual basis for its request. In connection with it motion for default judgment, Plaintiff submitted an affidavit from its trial counsel with documents attached that purport to be the underlying account agreements. Fed. R. Bankr. P. 9017; Fed. R. Civ. P. 43(e). Plaintiff's counsel lacks personal knowledge of the account and the affidavit offers no other foundation for counsel's testimony purporting to authenticate the contracts. Fed. R. Bankr. P. 9017; Fed. R. Evid. 602. Moreover, the form

documents are largely illegible, they lack any dates, they lack any signature of Defendant and there is no evidence showing how or when these documents otherwise came to form the agreement governing Defendant's open accounts with Plaintiff. To the extent the court can make out what the documents say, there appear to be choice of law provisions specifying the applicability of Utah law. Even if a fee shifting provision in a consumer credit agreement is enforceable under Utah law, there is no factual record in the complaint[2] or in the affidavit from which it can be determined whether this choice of law should be honored through application of appropriate choice of law principles. *Compare In re Revco D.S. Inc.*, 118 B.R. 468 (Bankr. N.D. Ohio 1990) and *In re Wallace's Bookstores, Inc.*, 317 B.R. 709 (Bankr. E.D. Ky. 2004) (both look to forum state's conflict of law rules as in diversity cases) *with Limor v. Weinstein & Sutton (In re SMEC, Inc.)*, 160 B.R. 86 (M.D. Tenn. 1993)(bankruptcy courts should look first to federal law and then most significant contacts test to determine choice of law issues).[3] For these reasons, the record does not establish as a matter of fact that there is an enforceable contract provision which would support an award of attorney's fees otherwise allowable under the legal authority of *Martin* and now *Dow Corning*.

Conclusion:

Based on the foregoing reasons and authorities, Plaintiff's Motion for Default Judgment [Doc. # 10] is hereby **GRANTED**. A separate final judgment in accordance with this Memorandum of Decision will be entered by the Clerk.

---

[2] The lack of averments in this regard demonstrate both the wisdom of Rule 7008(b) in requiring the factual basis for attorney's fees claims to be asserted in a separate claim and the practical problems in a default context when that rule of pleading is overlooked.

[3] If, instead, Ohio law applies, a fee shifting provision in a preprinted consumer credit card agreement appears unenforceable. *See Miller v. Kyle*, 85 Ohio St. 186 (1911); *Worth v. Aetna Casualty & Surety*, 32 Ohio St. 3d 238 (1987); *Nottingdale Homeowners' Assoc. v. Darby*, 33 Ohio St. 3d 32 (1987); *Colonel's Inc. v. Cincinnati Milacron Mktg. Co.*, 1998 U.S. App. LEXIS 11756 at *11-*14(6th Cir.1998)(fee shifting clause in preprinted contract and lacking specific free and understanding negotiation unenforceable under Ohio law); *cf. In re Tudor*, 342 B.R. 540, 552-63 (Bankr. S. D. Ohio 2005)(surveying and analyzing Ohio law in on contractual fee shifting provisions).

IT IS SO ORDERED.