

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:	)	Case No. 05-91962
	)	
PAUL W. LEONARD,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
CITIBANK (SOUTH DAKOTA) N.A.,	)	Adversary Proceeding No. 06-1129
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	<b><u>REGARDING CROSS-MOTIONS</u></b>
PAUL W. LEONARD,	)	<b><u>FOR SUMMARY JUDGMENT</u></b>
	)	<b><u>AND MOTION TO DISMISS</u></b>
Defendant.	)	

The complaint filed by Citibank (South Dakota) N.A. requests a determination that the defendant-debtor’s credit card debt is not dischargeable under bankruptcy code § 523(a)(2)(C) and § 523(a)(2)(A).<sup>1</sup> The debtor disputes the relief requested and counterclaims for an award of his costs and attorney fees under § 523(d). This opinion addresses the parties’ cross-motions for summary judgment on the complaint and Citibank’s motion to dismiss the counterclaim for failure to state a claim upon which relief can be granted.<sup>2</sup> For the reasons stated below, the three

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<sup>1</sup> Although the complaint does not cite § 523(a)(2)(A) as a basis for relief, the facts alleged support such a claim and Citibank’s brief in opposition to the debtor’s motion for summary judgment states as much. *See* docket 29.

<sup>2</sup> Docket 25, 26, 27.

motions are denied.

## **JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

### **I. THE MOTIONS FOR SUMMARY JUDGMENT**

#### **A. Standard**

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.*

The non-moving party may oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . .” *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)). The court must

evaluate each summary judgment motion on its merits and “draw all reasonable inferences against the party whose motion is under consideration.” *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (quoting *Taft Broad Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991)).

**B. 11 U.S.C. §§ 523(a)(2)(A) and (C)<sup>3</sup>**

Citibank’s complaint seeks relief under §§ 523(a)(2)(A) and (C). Those sections provide for the nondischargeability of a 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;

\* \* \*

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than \$1,225 for “luxury goods or services” incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than \$1,225 that are extensions of consumer credit under an open ended credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable: “luxury goods or services” do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act[.]

11 U.S.C. §§ 523(a)(2)(A) and (C).

To have a debt declared nondischargeable under § 523(a)(2)(A), a creditor must prove that (1) the debtor obtained property through a material misrepresentation known to the debtor to

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<sup>3</sup> As the debtor filed his chapter 7 case on October 13, 2005, the version of the bankruptcy code cited in this opinion is the one that was in effect on that date.

be false when made or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the misrepresentation; and (4) the reliance was the proximate cause of the loss. *See Rembert v. AT&T Universal Card Servs. Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998); *Providian Bancorp v. Shartz (In re Shartz)*, 221 B.R. 397, 399 (B.A.P. 6th Cir. 1998). A creditor must prove these elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

An individual who uses a credit card is representing that he intends to repay the debt incurred. A debtor's intent to defraud through the use of a credit card under § 523(a)(2)(A) is measured subjectively. *Rembert*, 141 F.3d at 281. A number of factors are relevant in determining whether a debtor intended to repay the debt. They include:

- (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.

*Rembert*, 141 F.3d at 282 at n. 3.

If the debt at issue is for cash advances (or luxury goods and services) obtained within 60 days of the bankruptcy filing, there is a statutory presumption that the debt is nondischargeable. *See* 11 U.S.C. § 523(a)(2)(C). The creditor bears the burden of proving that the presumption applies. *See Nat'l City Bank v. Manning (In re Manning)*, 280 B.R. 171, 179 (Bankr. S.D. Ohio

2002). If the creditor establishes the presumption, the burden shifts to the debtor to come forward with evidence to rebut it. *See Bank One Columbus, N.A. v. Fulginiti (In re Fulginiti)*, 201 B.R. 730, 733-34 (Bankr. E.D. Pa. 1996). *See also* Barry Russell, *Bankruptcy Evid. Manual* § 301.5 at 721 (2006 ed.). The presumption shifts the burden of going forward, but it does not shift the ultimate burden of proof. *Sears, Roebuck and Co. v. Green (In re Green)*, 296 B.R. 173, 179 (Bankr. C.D. Ill. 2003). *See also* FED. R. EVID. 301. If the debtor overcomes the presumption, therefore, the creditor must meet its burden of proof under § 523(a)(2)(A).

### **C. The Positions of the Parties**

Citibank argues that the debtor's credit card debt comes within the scope of the § 523(a)(2)(C) presumption of nondischargeability and it requests summary judgment based on having established that presumption. In opposition, the debtor counters that his deposition testimony rebuts the presumption and prevents entry of summary judgment in Citibank's favor.<sup>4</sup> The debtor also moves for summary judgment, arguing that his deposition testimony shows that he intended to pay the debt, did not contemplate filing bankruptcy until after he incurred the debt, and had a plan to repay his debts. He contends that this evidence overcomes the presumption and returns the burden to Citibank to prove intent to defraud, which it has not done. Citibank opposes summary judgment for the debtor, arguing that he has not overcome the § 523(a)(2)(C) presumption of fraud.

### **D. Discussion**

These facts are undisputed: The debtor filed his chapter 7 case on October 13, 2005. In

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<sup>4</sup> Although the debtor did not submit evidentiary material in his opposition to Citibank's motion, it is provided in connection with his own motion.

the 60 days before filing, the debtor took credit card cash advances totaling \$11,000.00 and made other charges totaling \$1,466.61. The debtor is liable to Citibank for the total debt of \$12,466.61. Bearing in mind that the evidence must be construed in a light most favorable to the non-moving party, summary judgment is not appropriate for either party.

Citibank relies on the § 523(a)(2)(C) presumption as the basis for its summary judgment request. The debtor concedes that Citibank enjoys this presumption.<sup>5</sup> He goes on, however, to offer evidence that he did not incur the debt in contemplation of his bankruptcy or with a fraudulent intent. The evidence includes his deposition testimony that, after losing his job, he lived on his savings for several years while he looked for other work. He took the cash advances at issue in anticipation of relocating to Indiana for a job that did not materialize. In addition to looking for work, he also planned to surrender his house to the lender and use the equity to repay his creditors. Ultimately, when he could not improve his financial situation, he consulted an attorney and filed for bankruptcy. Viewed in the light most favorable to the debtor, this evidence shows that there is a genuine issue of material fact as to whether the debtor can rebut the § 523(a)(2)(A) presumption.

The debtor, in turn, requests summary judgment that this debt is dischargeable under § 523(a)(2)(A). Citibank correctly states that it is not required to make a case under § 523(a)(2)(A) as a prerequisite to proving the § 523(a)(2)(C) presumption. However, if the debtor rebuts the presumption, the dischargeability of the debt under § 523(a)(2)(A) is at issue and Citibank must prove that the debtor intended to deceive it. *See Rembert*, 141 F.3d at 280-81.

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<sup>5</sup> See docket 26 at 6. (“The Debtor has reasonably explained the use of the credit cards prior to his bankruptcy and, in doing so, has met his burden of overcoming the presumption against discharge.”)

As discussed above, there is a genuine issue of material fact as to whether the debtor intended to repay this debt and that issue precludes summary judgment for the debtor just as it precluded summary judgment for Citibank.

## **II. THE MOTION TO DISMISS THE COUNTERCLAIM**

### **A. Standard**

Citibank moves to dismiss the debtor's counterclaim under federal civil rule 12(b)(6), which provides for dismissal "for failure to state a claim upon which relief can be granted[]." FED. R. CIV. P. 12(b)(6) (made applicable by FED. R. BANKR. P. 7012(b)). The debtor did not file a response to this motion. To decide the motion, this court "must 'construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief.'" *Power & Telephone Supply Co., Inc. v. SunTrust Banks, Inc.* 447 F.3d 923, 929-30 (6th Cir. 2006) (quoting *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001)).

### **B. Discussion**

The debtor's counterclaim is stated in paragraphs 18 through 22 of his answer. There, he alleges that Citibank: (1) did not make a reasonable investigation prior to filing the complaint; (2) did not allege fraud with particularity; (3) failed to state a claim; (4) makes unsupported claims that are scandalous; and (5) assumes the risk that its cardholders will file bankruptcy. The debtor asks that he be awarded attorney fees and costs if the court finds that Citibank has failed to meet its burden. The counterclaim is based on § 523(d):

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the


debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d). The debtor's factual allegations put in issue whether Citibank's position in the complaint is substantially justified and his counterclaim, therefore, states a claim under § 523(d). Citibank's motion to dismiss must be denied.

**CONCLUSION**

For the reasons stated above, the parties' cross-motions for summary judgment and Citibank's motion to dismiss the counterclaim for failure to state a claim are denied.

A separate order will be entered regarding this decision.



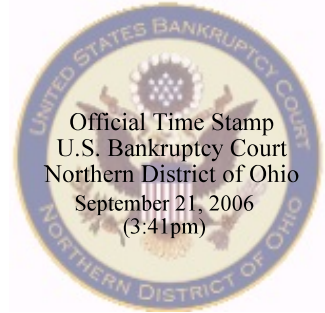
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge



THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:	)	Case No. 05-91962
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PAUL W. LEONARD,	)	Chapter 7
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Debtor.	)	Judge Pat E. Morgenstern-Clarren
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_____	)	
CITIBANK (SOUTH DAKOTA) N.A.,	)	Adversary Proceeding No. 06-1129
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>ORDER</u></b>
	)	
PAUL W. LEONARD,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion entered this same date,

IT IS, THEREFORE, ORDERED that the parties' cross- motions for summary judgment and the motion of Citibank (South Dakota) N.A. to dismiss are denied. (Docket 25, 26, 27).

A handwritten signature in black ink that reads "Pat E. Morgenstern-Clarren". The signature is written in a cursive style.

Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge