The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on May 14, 2008, which may be different from its entry on the record.

IT IS SO ORDERED.

Arthur I. Harris
United States Bankruptcy Judge

Dated: May 14, 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 07-17697
	)	
SHADIA JABER,	)	Chapter 7
Debtor.	)	
	)	
FIA CARD SERVICES, NA,	)	Adversary Proceeding No. 07-1669
Plaintiff,	)	
	)	Judge Arthur I. Harris
v.	)	
	)	
SHADIA JABER,	)	
Defendant.	)	

MEMORANDUM OF OPINION[1]

Before the Court is the debtor-defendant's unopposed motion for summary judgment. At issue is whether the debt owed to plaintiff FIA Card Services, NA (f.k.a. MBNA America Bank, NA)("FIA"), is nondischargeable under

[1] This opinion is not intended for official publication.

11 U.S.C. § 523(a)(2). For the reasons that follow, the debtor-defendant's motion is granted.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio.

FACTUAL AND PROCEDURAL BACKGROUND

On October 10, 2007, Shadia Jaber, the debtor-defendant, filed her Chapter 7 bankruptcy petition. At the time of her filing her charge account with FIA had a balance in excess of $7,900.00.

On December 27, 2007, FIA filed this adversary proceeding seeking nondischargeability of the debt pursuant to § 523(a)(2) of the bankruptcy code, and stating that the debtor "obtained credit . . . by false pretenses, false representations and/or actual fraud."[2] Complaint at ¶ 13. In its prayer, FIA also seeks a "monetary judgment in the amount of $7,950.00, plus accrued interest at the contractual rate

[2] Although FIA does not indicate what subsection of 11 U.S.C.§ 523(a)(2) it is relying upon, the Court presumes that FIA is relying on § 523(a)(2)(A) and (C) based on both the language of the complaint and the fact that there is no allegation that there was "use of a statement in writing" which would trigger § 523(a)(2)(B).

from and after 10/10/2007, plus additional interest at the contractual rate, which will continue to accrue until the date of judgment herein." Complaint Prayer at ¶ 1. The debtor filed her answer on January 14, 2008.

An initial pretrial was held on February 19, 2008, following which a trial scheduling order was issued. The Court ordered that any dispositive motions be filed by March 21, 2008, and briefs in opposition, if any, were to be filed by April 4, 2008.

On March 14, 2008, Jaber filed a Motion for Summary Judgment (Docket #14) and a "Support Document" consisting of an exhibit and an affidavit. (Docket #15). FIA did not file any opposition. In her motion Jaber stated that the last charge made on her FIA account was on July 7, 2007, and that, after the last charge, she made four payments totaling $975.00 on the account. She filed a copy of her "Account Holder Information" statement, dated November 19, 2007, as Exhibit A to her Support Document.[3] The statement indicates that the debtor made a payment of $100.00 on July 8, 2007, a payment of $300.00 on August 4, 2007, a payment of $275.00 on September 2, 2007, and a payment of $300.00 which was

[3] This billing statement was included with FIA's Complaint as well.

listed as "posted"[4] on October 3, 2007.

In her affidavit, also filed as part of her Support Document, she stated that she had been working two jobs when she entered into the credit arrangement with FIA, and had "every intention to repay all extensions of credit." Affidavit at ¶¶ 2, 3. She further stated that she had to reduce her work load to one job when she and her husband developed health problems. Affidavit at ¶¶ 4, 5.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c), as made applicable to bankruptcy proceedings by Bankruptcy Rule 7056, provides that a court shall render summary judgment:

> 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.

The party moving the court for summary judgment bears the burden of showing 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." *Jones v. Union County*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322

[4] The first three payments were listed as having "transaction dates" as stated above. The last payment had a "transaction date" of "January 1, 1901," so the Court has listed the posting date instead.

(1986). Once the moving party meets that burden, the nonmoving party "must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997); *see, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."). In determining the existence or nonexistence of a material fact, a court will view the evidence in a light most favorable to the nonmoving party. *Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996).

Absent such evidence from the nonmoving party in a motion for summary judgment, the Court need not excavate the entire record to determine if any of the available evidence could be construed in such a light. *See In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001) (holding that the "trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact"); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993)(same).

DISCUSSION

The plaintiff seeks a finding of nondischargeability under 11 U.S.C. § 523(a)(2)(A) and (C). A general discharge under 11 U.S.C. § 727(a) excepts from discharge those debts of the kind specified under section 523(a)(2). *See* 11 U.S.C. § 727(b). Section 523(a) provides in pertinent part:

> A discharge under section 727 . . . 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 . . . . ;
>
> . . . .
>
> (C)(i) For the purposes of subparagraph (A) –
>
> (I) consumer debts owed to a single creditor and aggregating more than $550 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
>
> . . . .
>
> (ii) for purposes of this subparagraph –
>
> (I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and
>
> (II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support and maintenance of the debtor or a dependent of the

debtor.

A. *11 U.S.C. § 523(a)(2)(A)*

Absent the special presumption that arises under § 523(a)(2)(C), a debt is excepted from discharge under § 523(a)(2)(A) when the creditor proves:

> (1) the debtor obtained money through a material misrepresentation 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 the loss.

Rembert v. AT&T Universal Card Services, Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998). The intent to deceive or defraud the creditor is "measured by a subjective standard." *Id.* at 281. While the "use of a credit card represents either an actual or implied intent to repay the debt incurred," the mere inability to pay the debt at the time it is incurred does not establish fraud. *Id.* The creditor must show that the debtor "maliciously and in bad faith incurred credit card debt with the intention of petitioning for bankruptcy and avoiding the debt." *Id.*

In determining whether a debtor intended to deceive a creditor, a "bankruptcy court is to consider all the relevant facts and circumstances of the case, as it is highly unlikely that a debtor will ever actually admit he knowingly intended to deceive a creditor." *In re Orsine*, 254 B.R. 184, 188 (Bankr. N.D. Ohio 2000)(*quoting In re Grause*, 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000)). By

reviewing the relevant facts and circumstances, the court must determine whether it is "more probable than not" that the debtor had the requisite fraudulent intent. *In re Grause,* 245 B.R. at 102.

In this case, the debtor continued to make payments to FIA until shortly before filing her petition. FIA has not made any showing that the debtor incurred the debts "maliciously and in bad faith." FIA has filed nothing more than its complaint and has provided no specific facts, by means of affidavits, interrogatories or otherwise, as required by *Hall*, 128 F.3d at 422, concerning any actions of the debtor that would give rise to a determination of a genuine issue of fact. From the facts as pleaded, it is not "more probable than not," *Grause,* 245 B.R. at 102, that the debtor had the requisite intent to deceive. The Court need not excavate the entire record to establish "that it is bereft of a genuine issue of material fact." *Barnhart,* 12 F.3d at 1389. Viewing the facts in the light most favorable to the nonmoving party, the debts are not nondischargeable under § 523(a)(2)(A).

B. *11 U.S.C. § 523(a)(2)(C)*

Section 523(a)(2)(C) "creates a presumption of fraud in favor of the creditor and is to be used to prevent 'the perceived practice of loading up by certain debtors.' " *Lorain County Bank v. Triplett (In re Triplett),* 139 B.R. 687, 689-90

(Bankr. N.D. Ohio 1992).

Subparagraph (C) creates two separate ways for a creditor to establish the presumption of nondischargeability: (1) that consumer debts owed to a single creditor and aggregating more than $550 for luxury goods or services were incurred by an individual debtor 90 days before the bankruptcy; or, (2) that the debtor obtained more than $825 in cash advances 70 days before bankruptcy. There is no claim by FIA that the debtor took any cash advances so (2) does not apply in this case.

In addition (1) also does not apply in this case. Included with its Complaint, FIA provided a billing statement which show amounts of the purchases and the names of the merchants, as well as payments made by the debtor.[5] Other than payments made by the debtor, none of the transaction dates falls within the 90 days prior to the filing as set forth in the statute. The bankruptcy petition was filed on October 10, 2007. Ninety days prior to that filing date is July 12, 2007. The last purchase listed on the statement was July 7, 2007. FIA has not met its burden under the provisions of 11. U.S.C. § 523 (a)(2)(C), and the debts are not nondischargeable pursuant to that section of the Code.

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[5] This same billing statement was also a part of the defendant's Supplement to her Motion for Summary Judgment, *supra* at 3.

CONCLUSION

For the foregoing reasons, the debtor-defendant Shadia Jaber's motion for summary judgment is granted.

IT IS SO ORDERED.