

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
MARK EDWARD LEWINSKI,	)	CASE NO. 05-34537 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
RIH ACQUISITIONS IN, LLC d/b/a	)	
RESORTS EAST CHICAGO,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 05-3096
	)	
MARK EDWARD LEWINSKI,	)	
DEFENDANT.	)	

Appearances:

Brooks J. Grainger, Esq., attorney for plaintiff, Krisor & Associates, P.O. Box 6200, South Bend, Indiana 46660-6200;

Gregory L. Taylor, Esq., and Leanne Garbers McAnulty, Esq., attorneys for plaintiff, Lloyd & McDaniel, PLC, 11405 Park Road, Suite 200, Post Office Box 23200, Louisville, Kentucky 40223-0200; and

Jeffery A. Johnson, Esq., and Michael W. Arnold, Esq., attorneys for defendant, May Oberfell Lorber, 4100 Edison Lakes Parkway, Suite 100, Mishawaka, Indiana 46545.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 29, 2007.

Before the court is the Motion for Summary Judgment filed by the defendant Mark Edward Lewinski (“defendant” or “Lewinski”). The plaintiff RIH Acquisitions IN, LLC, doing business as Resorts East Chicago (“plaintiff” or “RIH”), filed Plaintiff’s Reply to Defendant’s Motion for Summary Judgment, and the defendant filed a reply brief. The defendant seeks summary judgment on the plaintiff’s Complaint and Amended Complaint pursuant to 11 U.S.C. § 523(a)(2)(A) and (B). For the reasons that follow, the court grants the defendant’s summary judgment motion.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

This adversary proceeding was initiated by the complaint of the plaintiff RIH as a result of the defendant's inability to pay his gambling debt of \$100,000 to RIH. The court previously considered a summary judgment motion brought by the plaintiff. The undisputed background facts upon which the court based its Memorandum of Decision of May 15, 2006, were the ones presented by RIH in its pleadings.

On July 15, 2005, the plaintiff advanced the defendant funds for gambling at its casino. The defendant took out three markers, totaling \$100,000, to be used in the casino. Several days before he was given the markers, the defendant executed a Confidential Credit Inquiry, which gave the plaintiff authorization to run a credit bureau report and to review his banking information. The defendant also filled out a Credit Application and a Casino Credit Check Cashing Application, in which he represented that his annual income was \$175,000. However, when he filed a chapter 7 bankruptcy petition on August 16, 2005, the defendant reported in his Statement of Financial Affairs that his monthly income was \$100. The markers were returned to the casino by the bank in September 2005 for insufficient funds.

R. 30 at 2 (exhibit references omitted).

In its Complaint initiating this adversary proceeding, the plaintiff had alleged that the \$100,000 advance for gambling was a nondischargeable luxury purchase under 11 U.S.C. § 523(a)(2)(C). *See* R. 1. It contended that the debt was nondischargeable under § 523(a)(2)(A), as well, because the defendant had incurred

that debt by representing, with reckless disregard for the truth, that he intended and was able to repay the plaintiff. The plaintiff said it relied upon those representations to its detriment. It asked the court to find that the \$100,000 in indebtedness, with interest, was excepted from the defendant's discharge.

The plaintiff amended its Complaint to add an allegation under § 523(a)(2)(B), on the ground that the defendant made specific statements in writing that were materially false and made with intent to deceive. *See* R. 13. It pointed specifically to the defendant's claimed annual income of \$175,000 on his Casino Credit Check Cashing Application of April 11, 2005, and compared it with his claimed monthly income of only \$100 on his bankruptcy petition filed four months later, on August 16, 2005.<sup>1</sup> When it noted Lewinski's reported income in 2003, 2004, and 2005, the plaintiff concluded that the defendant had not made \$175,000 in any recent year. It asked that the \$100,000 debt be excepted from discharge under § 523(a)(2)(A), (B), and/or (C). In its summary judgment motion, however, RIH argued only that the debt was nondischargeable under § 523(a)(2)(C).

The court denied the plaintiff's summary judgment motion. In its Memorandum of Decision issued on May 15, 2006, the court found that RIH did not demonstrate that the gambling debt was, as a matter of law, a consumer debt for luxury goods or services or was a cash advance. It determined that RIH did not meet its burden of demonstrating that the § 523(a)(2)(C) presumption applied and therefore that summary judgment was not proper. *See* R. 30 at 8.

Now before the court is the Motion for Summary Judgment filed by the defendant Mr. Lewinski under § 523(a)(2)(A) and (B). *See* R. 45. He proffered a Statement of Facts that was not contested by the plaintiff. The court therefore presents a synthesis of those facts, which begins with background information about events prior to the crucial date of July 15, 2005, the day on which the defendant received the markers he could not repay and thus accrued the \$100,000 debt which is the focus of this proceeding. *See id.*, Mem. at 1-7.

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<sup>1</sup> Because the defendant filed his chapter 7 petition prior to October 17, 2005, his case is not governed by the amendments to the Bankruptcy Code presented in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which went into effect on October 17, 2005.

Before the debtor filed his chapter 7 petition on August 16, 2005, he had a gambling compulsion and was suffering from depression, a sleep disorder, vitamin deficiencies, and other physical and psychological problems. During the months between April and August, 2005, the debtor's deterioration became so severe that hospitalization ultimately was necessary. His gambling problems began in early 2005, when he traveled to Las Vegas and won \$250,000. Upon his return to South Bend, Indiana, he began frequenting several casinos in northwestern Indiana, including Harrah's East Chicago. On April 11, 2005, the defendant filled out a Harrah's casino credit check cashing application and signed its "Confidential Credit Inquiry" authorization form. On April 12, 2005, with \$50,000 in approved credit, he went to Harrah's and received markers of \$20,000, \$20,000 and \$30,000. He repaid the three markers on the same day. On April 13, 2005, the defendant received markers for \$30,000, \$20,000, and \$50,000. He repaid them the same day. On April 14, 2005, he received markers of \$50,000, \$25,000, \$50,000, \$25,000, \$25,000, and \$20,000. He repaid the first two (\$50,000 and \$25,000) on the same day. He repaid the \$50,000 marker on April 22, 2005. The remaining three markers (\$25,000, \$25,000, and \$20,000) were labeled "deposit to bank." As the defendant explained, if the markers were not paid in a certain number of days (up to 28), the casino would withdraw the amount of the markers from the bank account of the person who had taken out the markers. *See* R. 45 at 3, ¶ 5.

On April 25, 2005, Harrah's was acquired by RIH, a completely independent entity from Harrah's. Even though the defendant's three markers were labeled "deposit to bank" on April 14, 2005, and payment would have been due in 28 days, RIH wrongfully withdrew the funds from the defendant's bank account on May 5, 2005, a week early. RIH was able to obtain \$45,000 from that account; however, it did not receive full payment, and it caused other outstanding checks not to be honored. At that time, the defendant's credit was revoked.

Nevertheless, after repeated telephone calls from RIH, urging him to come gamble, the defendant filled out a Credit Approval form at RIH on July 12, 2005. Tami Vance, credit supervisor for RIH, conceded in her deposition that RIH was aware of no misrepresentations on the credit approval form. *See id.* at 4, ¶ 12. The RIH form contained a consent to allow it to obtain credit reports on the defendant, and the casino did review his

outstanding obligations with other casinos and his bank balance. Despite the fact that he was overdrawn at two other casinos (with outstanding indebtedness of \$140,625) and had less than \$10,000 in his bank account, RIH approved the defendant for charges up to \$75,000.

On July 12, 2005, Lewinski took out seven markers totaling \$287,500; he repaid five of them that day and two of them on July 13, 2005. On July 15, 2005, he took out four markers, for \$50,000, \$50,000, \$12,500, and \$37,500. On August 4, 2006, the defendant repaid a \$50,000 marker from July 15 but also lost \$27,200 in cash gambling at RIH. At that time, therefore, he owed \$100,000 for the three other July 15 markers. Shortly thereafter, he was hospitalized.

In his Motion for Summary Judgment, the defendant contended that the plaintiff could not succeed on its complaint under § 523(a)(2)(A) or (B). With respect to § 523(a)(2)(B), Lewinski asserted that there was no false information on the defendant's credit check cashing application to RIH and that the plaintiff did not rely on that application. With regard to § 523(a)(2)(A), the defendant claimed that the plaintiff "alleged no false pretense, false representation or fraud except a bare allegation that Mr. Lewinski 'intended to deceive the Plaintiff in that he either had no intention to repay said debt to the Plaintiff pursuant to the terms of the credit application or the Defendant knew or should have known that he had no ability to repay said debt to the Plaintiff pursuant to the terms of the credit application.'" R. 45 at 10. The defendant insisted that his repayments of all the markers received on July 12, 2005, and of one of the July 15, 2005 markers is clear proof of his intent to repay. He then concluded that the plaintiff did not establish the elements required for a claim under § 523(a)(2)(A) or (B).

#### Discussion

Because the court is presented with a summary judgment motion filed by the defendant this time, he must meet the statutory criteria of Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56(c), which is made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper "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. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. *See Anderson*, 477 U.S. at 248. “To avoid summary judgment . . . the nonmoving party [is] required to set forth ‘specific facts showing that there is a genuine issue for trial,’ Fed. R. Civ. P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position.” *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). The nonmovant demonstrates that real factual disputes exist by producing evidence of the disputes rather than by relying solely on the allegations or denials in its pleadings. *See Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L.B.R. B-7056-1. Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. The court’s role, therefore, is “to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial.” *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (quoting *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994)).

The defendant seeks summary judgment pursuant to § 523(a)(2), which provides that a “discharge . . . 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;

(B) use of a statement in writing –

(I) that is materially false;

(ii) respecting the debtor’s or an insider’s financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(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 end 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 to be defined for purposes of this subparagraph as it is define in the Consumer Credit Protection Act.

11 U.S.C. § 523(a)(2). Exceptions to discharge are to be narrowly construed in favor of the debtor. *See Berkson v. Gulevsky (In re Gulevsky)*, 362 F.3d 961, 963 (7th Cir. 2004). Normally, the burden is on the creditor to prove each of the elements by a preponderance of the evidence. *See Grogan v. Gardner*, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991). “However, the creditor can gain the benefit of a rebuttable presumption and shift the burden to the debtor to prove these elements have not been satisfied if it can satisfy the provisions of 11 U.S.C. § 523(a)(2)(C).” *Boyd Gaming Corp. v. Hall (In re Hall)*, 228 B.R. 483, 488 (Bankr. M.D. Ga. 1998). The court therefore turns first to the parties’ positions concerning § 523(a)(2)(C) to determine which party has the burden of proof under subsection (A).

A. *11 U.S.C. § 523(a)(2)(C)*

Before considering the positions that the parties have enunciated concerning subsection (C) in their summary judgment briefs now before it, the court reminds the parties of its determination in its Memorandum of Decision of May 15, 2006, in which the court reviewed the plaintiff’s motion for summary judgment under § 523(a)(2)(C). *See* R. 30. The court found that the defendant clearly was an individual who owed the plaintiff, a single creditor, more than \$1,225 within 60 days before he filed his chapter 7 petition. Nevertheless, because there was a genuine issue as to whether the gambling debts were consumer debts for luxury goods or services or cash advances, it concluded that the plaintiff had not met its burden of demonstrating that the § 523(a)(2)(C)

presumption applied. *See id.* at 8. The court further indicated to the parties that, because the presumption was inapplicable, the plaintiff had the burden of proving subsections (A) and/or (B). *See id.* at 8 n.3.

The plaintiff now takes the position that the § 523(a)(2)(C) claim is still pending before the court and that the defendant erred in not addressing subsection (C) in his summary judgment motion. The plaintiff also argues that, because the defendant did not show that there was no genuine issue of material fact in dispute concerning the elements of subsection (C), RIH should be granted summary judgment on the claim. The court reminds the plaintiff that it denied the plaintiff's summary judgment motion under § 523(a)(2)(C) on the ground that the plaintiff failed to prove that the \$100,000 advance for the defendant's gambling was a luxury purchase, as it had claimed in its Complaint. The plaintiff could invoke the subsection (C) presumption "only by showing all of its essential elements." *FDS Nat'l Bank v. Alam (In re Alam)*, 314 B.R. 834, 843 (Bankr. N.D. Ga. 2004). After failing to satisfy the elements of § 523(a)(2)(C), the plaintiff did not seek reconsideration of the determination; nor did it appeal the decision. The court finds that RIH has waived its opportunity to revisit the issue now.

This court made clear in its earlier Memorandum of Decision that the plaintiff was not precluded from proceeding with its § 523(a)(2)(A) claim without the presumption. *See In re Alum*, 314 B.R. at 842-43 (finding § 523(a)(2)(C) presumption inapplicable, allowing plaintiff to continue under § 523(a)(2)(A)). Consequently, the plaintiff bears the burden of establishing that the \$100,000 debt is excepted from the defendant's discharge under § 523(a)(2)(A). *See, e.g., In re Hall*, 228 B.R. at 489 (placing burden of proof on plaintiff after § 523(a)(2)(C) elements were not satisfied).

#### B. *Parties' Contentions under § 523(a)(2)(A)*

To succeed under § 523(a)(2)(A), therefore, the plaintiff has the burden of proving by a preponderance of the evidence that the debt owed to him by the defendant was obtained by actual fraud, false pretenses, or misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890, 893-94 (7th Cir. 2000) (stating that

fraud is not limited to misrepresentations and misleading omissions); *In re Bero*, 110 F.3d 462, 465 (7th Cir. 1997) (setting forth burden of proof). The plaintiff must establish that (1) the defendant obtained the plaintiff's loan through representations that the defendant either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendant acted with an intent to deceive the plaintiff; and (3) the plaintiff justifiably relied on the defendant's false representations to his detriment. See *In re Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995); *Mayer v. Spanel Int'l, Ltd. (In re Mayer)*, 51 F.3d 670, 673 (7th Cir.), cert. denied, 516 U.S. 1008 (1995); *In re Maurice*, 21 F.3d 767, 774 (7th Cir. 1994); see also *Field v. Mans*, 516 U.S. 59, 74-75, 116 S. Ct. 437, 446, 133 L.Ed.2d 351 (1995) (holding that a creditor's reliance need only be justifiable, not reasonable).

The element of intent is found in the § 523(a)(2)(A) exception to discharge. Intent usually is a question of fact and is "often not susceptible to summary judgment." *In re Kontrick*, 295 F.3d 724, 737 (7th Cir. 2002), *aff'd*, 540 U.S. 443, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004). In addition, the plaintiff has alleged fraud, and the seriousness of such an allegation requires a plaintiff to plead more than general, conclusory allegations of fraudulent conduct. See *In re Halversen*, 330 B.R. 291, 301 (Bankr. M.D. Fla. 2005) (citing cases). Rule 9(b) of the Federal Rules of Civil Procedure, made applicable in adversary proceedings by Rule 7009 of the Federal Rules of Bankruptcy Procedure, requires that "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009. The defendant, in his summary judgment motion, claims that RIH failed to establish that the \$100,000 debt was nondischargeable under § 523(a)(2)(A).

In order to establish that the debt to RIH was nondischargeable under subsection (A), the plaintiff argued that the defendant made a representation to RIH each time he signed a marker to take an advance on his line of credit. RIH insisted that, when Lewinski signed the markers, he knew his representation was false or made with such reckless disregard for the truth as to constitute willful misrepresentation. Because there was no direct

evidence of the defendant's state of mind, the plaintiff urged the court to consider the totality of the circumstances. It presented certain factors that are indicative of the defendant's intent:<sup>2</sup>

- (a) The defendant signed for the markers on July 15, 2005, and filed bankruptcy only 31 days later.
- (b) He appears to have consulted an attorney about filing bankruptcy in April or May of 2005.
- (c) On July 15 and earlier, the defendant made several charges and repaid only some of them; three markers were not repaid, and the aggregate value of those markers is \$100,000.
- (d) At the time the defendant filed bankruptcy, he had an income of only \$100 a month; in addition, substantially all of the assets of Lebo Corporation, his main source of income, were seized by the bank in March or April of 2005. By July 2005, he testified, his income was zero. Based upon this information, the plaintiff asserted, the debtor should have known that he could not continue to gamble and to make the payments required by the markers.
- (e) On July 15, 2005, the defendant was granted several temporary credit increases, from \$75,000 to \$150,000. He made four charges on July 15 and repaid only one of them.
- (f) Although he was unemployed and Lebo Corporation's assets were seized by July 2005, he was trained as an accountant and could be considered a financially sophisticated debtor.

R. 46 at 3-8.

The plaintiff also focused on the defendant's mental state. It pointed out that Lewinski stated, in his Affidavit, that he had never been adjudicated insane or incompetent and was not now insane or incompetent. However, before he was hospitalized in mid-August 2005, he testified, his physical and psychological condition deteriorated and he was not in control of his actions at the time. RIH then argued that the defendant should be required to answer questions under oath regarding his mental state. *See id.* at 9. Lewinski also should testify about whether he planned to file bankruptcy when he took out the markers in July 2005. These are genuine issues of material fact that must be resolved, the plaintiff stated.

RIH insisted that it properly relied on Lewinski's signed credit application and markers, which contained an agreement to repay the debt and to pay "attorney fees and the cost of collection in the event that the

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<sup>2</sup> The factors utilized by the plaintiff were set forth in *MBNA America Bank v. Hostetter (In re Hostetter)*, 320 B.R. 674, 685 (Bankr. N.D. Ind. 2005), to weigh a debtor's intention to deceive or to not repay the debt.

funds advanced from this line of credit are not repaid.” It argued that its reliance was reasonable and justifiable because the debtor had a history of repaying his markers.

The defendant, in his summary judgment motion, asserted first that RIH acknowledged that there was no misrepresentation on the July 12, 2005 credit application filled out by Lewinski. He also contended that he repaid most of the markers on the day he received them or before they came due, and clearly intended to pay the three outstanding markers. According to the defendant, there was no genuine issue of material fact and he was entitled to judgment as a matter of law.

The evidence indicates that the defendant obtained the plaintiff’s loans by completing a credit application. RIH’s credit supervisor, Tami Vance, testified in her deposition that, to her knowledge, there was nothing on Lewinski’s credit application that was inaccurate or untruthful.<sup>3</sup> *See* R. 45, attach., Vance Dep. at 110. She also testified that Lewinski had no credit with RIH between May 18 and July 12, 2005, and that he was trying to renew his credit. *Id.* at 117-18. To re-establish his credit on July 12, 2005, RIH obtained a Central Credit bank report (which stated that Lewinski had less than \$10,000 in the bank) and reports of his outstanding obligations in other casinos (which stated that he was overdrawn at two casinos, with outstanding indebtedness of \$140,625). *Id.* at 117-23. It then approved his credit for \$75,000, and increased his credit to \$112,500 on the same day. On July 12, then, Lewinski took out seven markers totaling \$287,500; he repaid five that same day and two the following day. On July 15, 2005, the defendant took out four markers totaling \$150,000; he repaid one marker, in the amount of \$50,000, on August 4, 2005. The remaining three markers were not repaid.

The abovementioned facts are undisputed. Based on them, the court finds no evidence that the defendant made a false representation with the purpose and intention of deceiving the plaintiff. The plaintiff’s credit supervisor, upon whom RIH relied for evaluating credit applications, testified that Lewinski’s application was neither inaccurate nor untruthful. The markers he executed apparently contained a statement or promise of

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<sup>3</sup> On April 11, 2005, Lewinski filed a credit check cashing application with Harrah’s East Chicago, a casino not affiliated in any way with RIH. He stated on that application that his annual income was \$175,000. However, he did not submit that application to RIH and did not declare to RIH that his annual income was \$175,000.

intent to pay, and the defendant signed each one. However, it appears that he was successful enough in his gambling to repay many of the markers the same day. The undisputed facts show that Lewinski repaid in full \$287,500 of the obligations and repaid an additional \$50,000 on August 4, before the marker became due. In all, Lewinski took out \$437,500 in markers on July 12 and 15, 2005, and he repaid \$337,500 of the markers. Instead of pocketing the winnings, Lewinski repaid the markers. In the view of the court, such conduct is evidence of an intent to repay his debts rather than an intent not to repay them.<sup>4</sup> See *In re Mercer*, 246 F.3d 391, 410 (5th Cir. 2001) (en banc) (determining debtor's subjective intent to pay back gambling loans by asking what the debtor intended to do with the winnings); *Advanta Nat'l Bank v. Kong (In re Kong)*, 239 B.R. 815, 824-25 (9th Cir. B.A.P. 1999) (affirming bankruptcy court's finding of no fraudulent representation of intent to repay debt, based on debtor's longstanding pattern of repaying all his advances, win or lose); *In re Hall*, 228 B.R. at 489-91 (finding that debtor's honest though unreasonable belief that he would win did not allow a finding of malevolent intent to defraud plaintiff). The plaintiff did not suggest that the defendant's conduct constituted "deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another," as the Seventh Circuit Court of Appeals described "actual fraud" in *McClellan v. Cantrell*, 217 F.3d at 893. Accordingly, the court finds that the plaintiff has failed to produce evidence of the defendant's false representation, false pretense, or actual fraud which was intended to deceive the plaintiff.

The court also finds that the plaintiff failed to satisfy its burden of proving justifiable reliance. After RIH investigated the defendant's financial circumstances, it learned that Lewinski owed over \$140,000 to other casinos and that his bank account contained less than \$10,000. Despite its taking the necessary steps to determine the defendant's credit-worthiness, it still extended credit of \$75,000 to him initially and increased it again and

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<sup>4</sup> The plaintiff suggested that there were material issues of fact concerning some of the factors that indicate intent. However, the factors are nonexclusive and none is dispositive in determining intent. See *In re Mercer*, 246 F.3d 391, 408 (5th Cir. 2001) (en banc); *American Express Travel Related Servs. Co., Inc., v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir.), cert. denied, 520 U.S. 1230 (1997). The court finds that Lewinski's mental state and his consultations about filing bankruptcy are not material issues of fact in its determination. It is able to base its resolution on genuine issues of material fact that are not in dispute.

again. *See In re Hall*, 228 B.R. at 491 (“Yet, despite these negative indications, [the casino] extended credit to Debtor without conducting any further investigation.”). The court finds that RIH paid no heed to the defendant’s application or financial records. It determines that the plaintiff’s conduct in extending credit to the defendant, in light of the uncontested evidence before it, “hardly constitutes reliance, much less justifiable reliance.” *Id.*; *see also Goldberg Sec., Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 526 (7th Cir. 1992) (affirming finding that plaintiff did not satisfy affirmative burden of proving reliance); *Mirage-Casino Hotel & Treasure Island Corp. v. Simpson (In re Simpson)*, 319 B.R. 256, 261 (Bankr. M.D. Fla. 2003) (finding that the plaintiffs did not rely on the defendant’s representations, but instead relied on his “Pay and Play” history).

The court determines, therefore, that the plaintiff has failed to establish that its claim is nondischargeable under § 523(a)(2)(A). It finds that the plaintiff failed in its burden of proving that the defendant made a misrepresentation with the intent to deceive RIH; it failed in its burden of showing any reliance on the defendant’s representations in his credit application or on his financial records; and it failed to prove that its loss of \$100,000 occurred because of a false representation by the defendant.

### *C. The Parties’ Contentions under § 523(a)(2)(B)*

Under this subsection, “a creditor must prove that a debtor made, with an intent to deceive, a materially false written statement regarding his financial condition and that the creditor reasonably relied on that statement.” *In re Morris*, 223 F.3d 548, 552 (7th Cir. 2000).

As the court found above, on July 12, 2005, the defendant provided RIH with a credit application, one that RIH’s credit supervisor said contained no misrepresentations. That form was the only written statement regarding Lewinski’s financial condition that was given to RIH.<sup>5</sup> The plaintiff presented no evidence to show that it was materially false. Moreover, it is clear that the plaintiff did not rely on that application or on any other

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<sup>5</sup> The defendant argued that the plaintiff’s attempt to rely upon a credit application filed months earlier with Harrah’s East Chicago, an entirely different entity unrelated to RIH, was improper. The defendant noted that credit was granted and then revoked by Harrah’s months before the defendant ever applied with Resorts.

financial information about the defendant. After learning of Lewinski's large outstanding debts at Blue Chip and Horseshoe casinos and his meager bank account balance, RIH nevertheless approved a \$75,000 credit for him, and then increased it to \$112,500 and to \$150,000.

By not addressing § 523(a)(2)(B) in its Reply to the Defendant's Motion for Summary Judgment, RIH presented no evidence on which it bore the burden of proof. The court finds that the plaintiff waived this claim. Accordingly, the court concludes that there is no genuine issue of material fact and that the defendant is entitled to judgment on its § 523(a)(2)(B) claim as a matter of law.

#### Conclusion

For the foregoing reasons, the court grants the Motion for Summary Judgment filed by the defendant Mark Edward Lewinski against the plaintiff RIH Acquisitions IN, LLC, pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(B).

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT