

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF INDIANA
 HAMMOND DIVISION

IN RE:)	
)	CASE NO. 03-62727 JPK
SICLESIA HARO)	Chapter 7
)	
Debtor.)	

SEARS ROEBUCK AND COMPANY)	
)	
Plaintiff,)	ADVERSARY NO. 03-6246
)	
vs.)	
)	
SICLESIA HARO)	
)	
Defendant)	

ORDER ON PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding was commenced by a Complaint, based upon 11 U.S.C. §§ 523(1)(2)(A)¹, (B), and (a)(6)² of the United States Bankruptcy Code (“Code”) filed on September 3, 2003 by Sears Roebuck and Company (“Sears”). The defendant Siclesia Haro (“Haro”) filed her answer on September 25, 2003. By an order of July 23, 2004, Haro’s attorney David Dabertin was permitted to withdraw as her counsel and Haro was advised that she is proceeding *pro se*.

Plaintiff’s Motion for Summary Judgment was filed on February 17, 2005. Made part of Sears’ motion was an Affidavit of Alan Miglionico, a unit manager for Sears, Sears’ Requests

¹ Section 523(1)(2)(A) does not exist, the Court assumes that the Plaintiff intended to state its claim under §523(a)(2)(A).

² During a status conference held on October 29, 2003, Plaintiff’s counsel acknowledged that the complaint’s reference to § 523(a)(6) was erroneous, and that the Plaintiff does not seek to pursue nondischargeability on that ground. See Court’s order of November 12, 2003.

for Admission³, and a Proof of Service Affidavit of Joy M. Loveland.

On March 7, 2005, the Court issued a *Timms v. Frank*⁴ notice informing Haro of consequences of the failure to respond to a Motion for Summary Judgment. Haro did not file a response to the Motion. This adversary proceeding is now before the Court for consideration of the plaintiff's motion for summary judgment.

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157 (a) and N.D.Ind.L.R. 200.1. Further, this matter constitutes a "core" proceeding as defined by 28 U.S.C. § 157 (b)(2)(I).

Standards for Review of Motions for Summary Judgment

The procedural mechanism of summary judgment is provided by Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Fed.R.Bankr.P. 7056. The principal standard to be followed by the Court in determining a motion for summary judgment is stated as follows in Fed.R.Civ.P. Rule 56(c):

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.

The inquiry that the court must make is whether the evidence presents a sufficient disagreement to require trial or whether one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2509-10 (1986). In deciding a Motion for Summary Judgment, the Court should not "weigh the evidence." *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510-11;

³ Proof of Service Affidavit filed by Sears states that the Requests for Admission was sent to the Defendant *via* certified mail to two different addresses; one listed on defendant's petition, and the other address is the forwarding address obtained by the post office's return of the first mailing. The second mailing was signed for by the Defendant. (See Proof of Service Affidavit, and attached exhibit thereto).

⁴ *Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1992).

Illinois Bell Telephone Co. v. Haines and Co., Inc., 905 F.2d 1081, 1087 (7th Cir. 1990).

However, “if evidence opposing a summary judgment is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson*, 106 S. Ct. at 2511; *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990).

The moving party bears the burden of showing that there is an absence of evidence to support the non-movant’s case; *Celotex Corp. v. Catrett*, 106 S. Ct. at 2548, 2554 (1986), i.e., the lack of a genuine issue of material fact. *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984).

When ruling on a motion for summary judgment, inferences to be drawn from underlying facts contained in such materials as attached exhibits and depositions must be viewed in a light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 82 S. Ct. 993, 994 (1962); *See also, Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356, (1986) (All inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984); *Marine Bank Nat. Ass’n. v. Meat Counter, Inc.*, 826 F.2d 1577, 1579 (7th Cir. 1987).

When a motion for summary judgment is made and supported by the movant, Fed.R.Civ.P. 56(e) requires the nonmoving party to set forth specific facts, which demonstrate that genuine issues of fact remain for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. at 1355; the opposing party may not defeat the motion by merely relying on the allegations or denials in its pleadings.

The ultimate burden of proof at the trial of this Adversary Proceeding is on the party seeking an exception to discharge, and that party bears the burden of proof as to each element. *Matter of Scarlata*, 979 F.2d 521, 524 (7th Cir. 1992); *In re Kreps*, 700 F.2d 372, 376 (7th Cir.

1987). See also, *In re Martin*, 698 F.2d 883, 887 (7th Cir. 1983), (§ 727 general discharge). In bankruptcy exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the Debtor. *In re Scarlata*, 979 F.2d at 524, *supra*, quoting, *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985).

As to the standard of proof, it should be noted that the Supreme Court in the case of *Anderson, et. al. v. Liberty Lobby, Inc. and Willis A. Carto*, 106 S. Ct. 2505 (1986) held that in determining whether a factual dispute exists on a motion for summary judgment, the court must be guided by the substantive evidentiary standards of the case that are applicable at trial. The standard of proof in a § 523(a) nondischargeability adversary proceeding is by a preponderance-of-evidence, rather than the more stringent standard of clear and convincing evidence. See, *Grogan v. Garner*, 111 S. Ct. 654 (1991).

Underscoring the requirement of Rule 56(e) that a nonmoving party present some evidence to demonstrate that there are triable issues before the court, Rule B-7056-1 of the Local Rules of the United States Bankruptcy Court for the Northern District of Indiana requires a nonmovant's response.

. . . Any party opposing the motion [for summary judgment] shall, within thirty (30) days of the date the motion is served upon it, serve and file a "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue, supported with appropriate citations to discovery responses, affidavits, depositions or other admissible evidence, together with any affidavits or other documentary material controverting the movant's position. The "Statement of Genuine Issues" may either be filed separately or as a part of the responsive brief. . . .

N.D. Ind. L.B.R. B-7056-1; see *In re Barber*, 236 B.R. 655, 663 (Bankr. N.D.Ind. 1998) (citing earlier local rule and Seventh Circuit case law supporting trial court's discretion concerning strictness of the rule). Under this local rule, "if a summary judgment respondent fails to file a timely statement of disputed material facts, uncontroverted statements in the moving party's statement in support of summary judgment are deemed admitted." *Barber*, 236 B.R. at 663

(citing *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 412 (7th Cir. 1997)).

Indeed, courts generally treat all material facts as admitted when no response is filed and the facts are thereby uncontroverted. See, e.g., *West v. Grindstaff (In re Grindstaff)*, 254 B.R. 706, 708 (Bankr. S.D. Ohio 2000); *Novartis Corp. v. Luppino (In re Luppino)* 221 B.R. 693, 696 (Bankr. S.D. N.Y. 1998).

Materials to be Considered by the Court

Fed.R.Civ.P. Rule 56(c) provides that the Court is to consider “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” in determining whether or not a genuine issue/genuine issues of material fact exist. In this case, Sears’ Motion for Summary Judgment was filed on February 17, 2005. Made part of Sears’ motion was an Affidavit of Alan Miglionico, a unit manager for Sears, Sears’ Requests for Admission, and a Proof of Service Affidavit of Joy M. Loveland. Also made part of Sears’ motion is a Sears Itemization Report, an itemized statement illustrating all charges made between October 29, 2002 and June 11, 2003. In addition to the above, Sears also filed an Affidavit in Support of Attorney’s Fees.

The material facts established of record for purposes of Sears’ motion for summary judgment, on which there is no genuine issue, are the following:

1. Sears filed its complaint to determine dischargeability on September 3, 2003. [Miglionico affidavit, ¶ 7].
2. Haro caused a Sears account to be opened. [complaint ¶ 3, answer ¶ 3].
3. At the time of Haro’s bankruptcy filing, Sears’ account balance was Fourteen Thousand Five Hundred Ninety-two dollars and Fifty cents (\$14,562.50). [Requests for Admission ¶ 4, Miglionico affidavit, ¶ 6].
4. Haro was not working because of disability at the time the charges were

incurred. [Requests for Admission ¶ 4, Miglionico affidavit, ¶ 8].

5. The contract between the parties allows for attorney fees. [complaint ¶ 9, Miglionico affidavit, ¶ 10].
6. Haro failed to answer Plaintiff's Requests for Admission. [Miglionico affidavit ¶ 9].

Legal Analysis

The instance case is premised upon § 523(a)(2)(A) and (B)⁵ of the Bankruptcy Code. It provides that an individual debtor is not discharged from any debt –

(2) for money, property, services, or extension, renewal or refinancing of credit, to the extent obtained by –

(A) false pretenses, false representation, or actual fraud. . . .⁶

⁵ 523(a)(2)(A) is the only viable section applicable in this adversary proceeding and the Court will not burden this decision by addressing the reasons the allegations of Sears' complaint don't raise issues under 523(a)(2)(B). See, *Hostetter*, 320 B.R. 674; *Shiel*, 206 B.R. 490.

⁶ As stated in *Shiel v. AT&T Universal Card Services, Corp.*, 206 B.R. 490, 493 (Bankr. N.D.Ill. 1997), this sub-section is not well-suited to credit card debts, but unless the charges come under § 523(a)(2)(C), and due to the lack of any special credit card exception to discharge, it is the only discharge exception generally available to challenge credit card debts. The same can be said for actions based upon "bad" checks, i.e., checks simultaneously exchanged for the acquisition of goods or services: § 523(a)(2)(A) provides essentially the sole ground for nondischargeability.

11 U.S.C. § 523(a) provides no clear mechanism for precluding the dischargeability of several forms of what is in essence theft by deception. Primary among these are the obtaining of services, property or credit by means of a form of promise which the promissor has no intention of honoring at the time the promise is made, in the absence of which the promisee, not aware of the promissor's guile, would not have provided the property, service or credit to the promissor. Many adversary proceedings in this genre pursue nondischargeability based on alleged fraudulent use of a credit card or the issuance of a "bad" check. Other cases assert nondischargeability based upon the alleged fraudulent intent of the promise itself, without the intermediary mechanism of a swiped credit card or of a given check, in essence contending that what may appear to be simply a contractual breach is in actuality a fraudulent artifice because at the time of entering into the contract the promissor never intended to honor his/her obligations under the contract.

The most common approach to seek nondischargeability of these forms of theft by deception is to pursue an action under 11 U.S.C. § 523(a)(2)(A). This is as it should be. This

Recently, this Court analyzed the requirements of § 523(a)(2)(A). In *Hostetter* the court was confronted with a default judgment situation, but its analysis there is fully applicable here.

In *Hostetter*, the court wrote:

Although the precise formulation and specification of the number of elements varies from decision to decision, in order to sustain a prima facie case of fraud under § 523(a)(2)(A), courts have traditionally required a creditor to establish that: (1) the debtor made a representation to the creditor; (2) at the time of the representation, the debtor knew it to be false or the representation was made with such reckless disregard for the truth as to constitute willful misrepresentation; (3) the debtor made the representation with the intent and purpose of deceiving the creditor; (4) the creditor relied on the representation resulting in a loss to the creditor; and (5) the creditor's reliance was justifiable;

form of fraudulent conduct clearly doesn't fall within the ambit of 11 U.S.C. § 523(a)(4), requiring as that section does that the conduct arise in a fiduciary capacity, or involve embezzlement or larceny. Some actions attempt to fit the fraudulent conduct into 11 U.S.C. § 523(a)(6), a very difficult proposition unless the concept of "property" in that section is expanded to include the right to receive payment for the goods or services provided or the credit extended. This is simply too much of a stretch: § 523(a)(6) was meant to deal with more corporeal torts, actions which affect a body or a tangible thing, or a pecuniary relationship. A "willful and malicious injury" connotes an act of aggression, not an act of deception. The simple failure to pay for something obtained from another – the failure to keep a promise to pay – even if the failure was intended from the start, does not give rise to the form of injury intended by Congress to be brought within the ambit of § 523(a)(6). This conclusion is more than buttressed by the legislative intent evidenced by the enactment of 11 U.S.C. § 523(a)(2)(c), which provides a presumption of nondischargeability for the obtaining of certain types of goods, services and extensions of credit by the use of a mere promise to pay for them. This Court deems this insertion by Congress of a form of theft by deception into § 523(a)(2) to conclusively evidence that this form of tortious conduct – obtaining of property, services or an extension of credit by a fraudulently made promise to pay for the item obtained – is covered exclusively by 11 U.S.C. § 523(a)(2)(A), or it escapes the net of nondischargeability entirely.

As explained by the Seventh Circuit Court of Appeals in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), § 523(a)(2)(A) has three *distinct* forms of conduct which can lead to nondischargeability: false pretenses, false representation, or actual fraud. A representation is not necessary if actual fraud can be established; because actual fraud is broader than misrepresentation, it can be defined as "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another." *McClellan*, 217 F.3d at 893 citing 4 *Collier on Bankruptcy* ¶ 523.08[1][e], o. 523-45 (15th ed., Lawrence P. King Ed., 2000). As this Court construes §523(a)(2)(A), most garden variety credit card and bad check cases will rise or fall under the " false representation" portion of the statute. There may be cases, however, in which a plaintiff with this type of case may not be able to establish a false representation but can still establish actual fraud: the deviations of the human mind are myriad and clever, and the circumstances of each case can only be judged against the applicable legal standards.

[FN5] 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, 676 (7th Cir.), cert. denied, 516 U.S. 1008, 116 S.Ct. 563, 133 L.Ed.2d 488 (1995); In re Maurice, 21 F.3d 767, 774 (7th Cir.1994). The creditor must prove each element by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991); In re Bero, 110 F.3d 462, 465 (7th Cir.1997). Finally, "exceptions to discharge are to be construed strictly against a creditor and in favor of the debtor." In re Scarlata, 979 F.2d 521, 524 (7th Cir.1992), reh. en banc den.1993; In re Zarzyski, 771 F.2d 304, 306 (7th Cir.1985).

FN5. In *Field v. Mans*, 516 U.S. 59, 70, 116 S.Ct. 437, 446, 133 L.Ed.2d 351 (1995), the Supreme Court held that a creditor's reliance need only be justifiable, not reasonable.

Under the foregoing standards, the Court deems that a representation is made by the user of a credit card each time the card is used to obtain an advance of credit or a cash advance. Similarly, a representation is made when a check is given in simultaneous exchange for the acquisition of goods or a service. The use of the credit card or the delivery of the check constitutes a promise to pay: In re Murphy, 190 B.R. 327 (Bankr.N.D.Ill.1995); In re Faulk, 69 B.R. 743, 755 (Bankr.N.D.Ind.1986) ["the use of the credit card is a statement of a present intention to pay at the time of purchase rather than an unwritten representation of the ability to pay or financial condition"]. As stated by Chief Judge Harry C. Dees, Jr. in *Citibank (South Dakota), NA v. Ziegert*, Proc. No. 03-3090, at pg. 6 (Bankr.N.D.Ind. August 3, 2004) [unpublished decision]:

(S)ome courts adhere to the position that "whenever a credit holder uses a credit card, he impliedly represents that he has the ability and the intention to pay for the charges incurred. The most comprehensive analysis of this matter has been presented by the Fifth Circuit Court of Appeals in *AT & T v. Mercer* (In re Mercer), 246 F.3d 391 (5th Cir.2001) (en bank), which reversed the bankruptcy court's post-trial finding that the credit card debt was dischargeable . . . [t]he majority held that, for each use of the credit card, as a matter of law, the debtor 'represented her intent to pay the loan; if her representation was knowingly false, she intended to deceive [the creditor]; it actually relied on the representation by authorizing the requested loan; and its loss was proximately caused by such reliance.' "

The representation is that the cardholder will pay for the advance of credit/cash advance according to the terms of his/her contract

with the card issuer, or that when presented for payment, the check will be honored. But the use of the card/the delivery of the check is nothing more than this promise: it is not a representation that at the time of use or delivery, the user/payor has the then-present ability to pay when the card statement arrives or the check is presented. This holding is in conformity with, and is compelled by, the cases of *Williams v. United States*, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982) and *In re Scarlata*, 979 F.2d 521, 525 (7th Cir.1992). *Williams* involved a criminal statute [18 U.S.C. § 1014] and determined that knowingly passing a bad check is not a "false statement", as required for conviction under that statute. The Court reasoned that "a check is not a factual assertion at all"; a check "serve[s] only to direct the drawee bank to pay the face amounts to the bearer ...". *Williams*, 458 U.S. at 284, 102 S.Ct. 3088. The *Scarlata* court found no difference between the construction of the criminal statute in *Williams* and the construction of 11 U.S.C. § 523(a)(2)(A) in the context of the element of "false pretense" in the passing of a bad check, and thus held that a "creditor cannot rely solely on the existence of an NSF check ... to establish a misrepresentation for § 523(a)(2) purposes" [citing *In re Hunt*, 30 B.R. 425, 438 (M.D.Tenn.1983)]; *Scarlata*, 979 F.2d at 525. Thus, the fact of nonpayment of a credit card statement or of dishonor of a check is not evidence of scienter, i.e., the knowledge and intent of the user/drawer, at the time of use or delivery, that payment will not be made for whatever was acquired by the use of the card or delivery of the check. Thus, the presentment of a credit card for charge, or the delivery of a check in payment, is not a factual assertion that the presenter/deliverer has the present ability to repay the debt: those acts constitute only a promise to repay a debt in the future.

What then is the type of conduct evidenced by the delivery of a "bad" check, the failure to pay a credit card statement, or the failure to honor a contractual promise to pay which § 523(a)(2)(A) is intended to cover? It is the most egregious of conduct, an intent from the inception of the transactional relationship to obtain something of value and to never pay for it. The intent to commit theft, if you will, must exist at the inception of each transaction with the creditor. An intervening event which inhibits or even precludes the promissor's ability to pay, absent the promissor's intent not to pay from the inception of the transactional relationship with the promisee, will not give rise to a nondischargeable debt.

The mere fact that the promisee subsequently failed to make good on his promise has no probative value in establishing the necessary element of scienter, which under the five-element test stated on page 7 requires both knowledge of the falsity of, or

reckless disregard for, the truth of the promise, and the intent that the promisee would part with a good, a service or an extension of credit based upon the promise known to be false, or recklessly made. In nearly all cases, establishing the knowledge/reckless disregard element (element 2 on page 7) will establish the intent element (element 3 on page 7). But perhaps not always. When asked by a literary critic to explain the basis of the sometimes incredible circumstantial plot elements of his novels, the great Russian writer Fyodor Dostoevsky responded that he collected newspaper clippings reporting odd human behaviors, and that he could never duplicate in fiction the sometimes extreme manifestations of actual human conduct or thought. While knowledge of falsity/reckless disregard of truth, and intent to deceive, are usually hand-in-glove due to the circumstantial convolutions of the human mind, there may be instances in which these elements do not coalesce. In a default context, a prima facie case of knowledge/reckless disregard will in this Court's view, ipso facto establish intent to deceive. However, in a non-default context, that may not be true depending on the evidence submitted by the debtor/defendant. Very few smoking guns, or even smoking witnesses, are found by the discovery of a bar confidant to whom the debtor confided that he used his credit card to get his plasma TV and the sucker credit card issuer never knew he was never going to pay a dime to it. Because most creditors have no smoking bar mate to offer as a witness, establishing this element will almost always require the extensive use of circumstantial evidence: evidence which can lead to the conclusion that the promisee never intended to pay, or had no objective ability to pay, as he had promised. In the context of theft by deception, reliance by the promisor is almost a presumption, unless the debtor can offer proof to the contrary: in the realm of the real world, absent a gift or devise, hardly anyone ever parts with a thing of value for which he has been promised payment without expecting payment. Damage arises from the fact that the promise has been breached: the damage is the value ascribed to the good, service, or credit extension for which payment has not been received.

The element of scienter is most difficult to establish in a default context. Be that as it may, the burden of proof required of a creditor to sort out a "bad actor" from a mere contract breacher doesn't change. Fed.R.Bankr.P. 9011 states that the filing of a complaint is a representation/certification that the claims asserted "are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and a representation/certification that the claims asserted "have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Likewise, the

filing of a motion for judgment by default constitutes the movant's certification that the plaintiff can at that time present admissible evidence that establishes a prima facie case of nondischargeability. Developing a prima facie case of circumstantial scienter prior to the filing of an adversary proceeding can be undertaken in many ways: analysis of the Schedules and Statement of Affairs in the debtor's main case; examination of the debtor at the § 341 meeting; a Rule 2004 examination, coupled with a motion to extend the time for filing an adversary complaint pursuant to B.R. 4007(c). After the complaint is filed, all of the discovery devices of Part VII of the Federal Rules of Bankruptcy Procedure are available to the creditor to develop its case, whether or not the debtor ever appears or answers in response to the complaint.

What evidence will be probative to establish a prima facie case? In the circumstance of a credit card case, it is evidence that the debtor--based on his/her income, fixed expenses and debt structure at the time of the obtaining of a credit advance -- either could not possibly have made even the minimum payments on the card while keeping current with other obligations, or should have reasonably known that he/she could not do so. Bunched credit transactions, or multiple unpaid transactions with several or more creditors, shortly before the filing of the case may be probative of intent when coupled with "financial feasibility" evidence. In the circumstance of a check, evidence of the manner of the debtor's handling of the account on which the check was drawn is sometimes illuminating, again coupled with "financial feasibility" evidence. In the context of a dishonored check, Indiana law is instructive, although not binding on this Court. I.C. 26-2-7-3, et seq. provides penalties upon the drawer for the knowing nonpayment of a check by the drawee. The trigger for these penalties is the provision of written notice of dishonor by the payee to the drawer by certified mail [I.C. 26-2-7-6(b); See, I.C. 26-2-7-8] coupled with the drawer's failure to respond or to pay the amount of the check within a stated period of time. [FN6] In the Court's view, this form of notification coupled with the complete failure of the debtor to respond either by any payment or any communication, has some probative value with respect to intent. However, again, the mere fact that a check is not paid when presented will not prima facie establish the scienter element. [FN7]

FN6. The provision that dishonor of a check constitutes prima facie evidence that the drawer knew that a check would be dishonored, as stated in I.C. 35-43-5-5(c), is inconsistent with this Court's interpretation of 11 U.S.C. § 523(a)(2)(A).

FN7. There are all kinds of reasons why a check is dishonored upon presentment, and many of them have nothing to do with fraudulent intent: math errors, garnishments, set-offs by the bank, freezes imposed on accounts, dishonoring or late payment of checks deposited into the account to cover the checks written on the account, or even the assumption of the receipt of funds which were not received due to no fault of the account holder – to name a few. The same can be said for a failure to pay current credit card statements, given that most people pay their bills from a demand deposit account.

The bottom line is that the defendant must have made the representation of the promise to pay with the intent and purpose of deceiving the creditor; i.e., intentional/actual fraud. As eloquently stated by the Honorable Kent Lindquist:

This finding of fact as to intention will obviously have to be determined by circumstantial evidence in most cases as direct evidence of the Defendant's state of mind at the time of purchase is seldom expressly indicated. Although this is certainly a difficult task, it is no greater a task than any other cause of action that includes intent or state of mind as a necessary element. And the existence of fraud may be inferred if the totality of the circumstances present a picture of deceptive conduct by the Debtor which indicates he intended to deceive or cheat the creditor. In re Fenninger, 49 B.R. 307, 310, supra; In re Taylor, 49 B.R. 849, 851, supra. The Court may logically infer this intent not to pay from the relevant facts surrounding each particular case. See, In re Kimzey, 761 F.2d 421, 424, supra. And a person's intent, his state of mind, has been long recognized as capable of ascertainment and a statement of present intention is deemed a statement of a material existing fact sufficient to support a fraud action. In re Pannell, 27 B.R. 298, 302 (Bankr.E.D.N.Y.1983).

In re Faulk, 69 B.R. 743, 755 (Bankr.N.D.Ind.1986).

Courts must consider objective evidence that is probative of the debtor's intent to repay in addition to considering the debtor's demeanor (in a case determined by trial), but the ultimate inquiry still seeks to determine the debtor's subjective intent. Citibank (South Dakota), N.A. v. Michel, 220 B.R. 603, 606 (N.D.Ill.1998), In re Faulk, 69 B.R. 743 (Bankr.N.D.Ind.1986). In determining

whether debts were incurred with no intention to repay them, many courts look at the totality of circumstances. A non-exclusive list of factors has been promulgated by various courts to aid in the determination of debtor's intention to deceive. Those 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. The 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. Michel, 220 B.R. at 606, Faulk, 69 B.R. at 757. See also Sears, Roebuck & Co. v. Green (In re Green), 296 B.R. 173, 180 (Bankr.C.D.Ill.2003) (evaluating debtor's intent by considering factors to determine whether "it is more probable than not that the debtor had the requisite fraudulent intent"); In re Jacobs, 196 B.R. 429, 434 (Bankr.N.D.Ind.1996) ("a determination of whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent"). The Jacobs court found that the eight cash advances taken by the debtors in the six months prior to bankruptcy were used to make purchases of in excess of \$6,000.00. Because the debtors knew or should have known that they could not pay for those charges, the court found that the debtors "perpetrated a fraud upon" the creditor. Id. at 434.

In re Hostetter, 320 B.R. 674, 681-86 (Bankr. N.D.Ind. 2005).

The record of this case shows that Haro has failed to respond to the Plaintiff's Requests for Admission. The failure to respond to requests for admission was addressed in *In re Zigert*, Proc. No. 03-3090, pg. 5-6 (Bankr. N.D.Ind. August 3, 2004)(Dees, Jr. J.). There, the court wrote:

The court also finds that the debtor, by failing to answer the creditor's requests for admission, has not complied with Federal Rule of Bankruptcy Procedure 7036(a), the bankruptcy rule governing requests for admission. "If the opponent fails to consider the request, the factual issue is deemed admitted." *Household Credit Servs., Inc. v. Jacobs (In re Jacobs)*, 196 B.R. 429, 431 (Bankr. N.D. Ind. 1996), *quoted in Hasbrook v. Citibank*

and Educ. Credit Mgmt. Corp. (In re Hasbrook), 289 B.R. 375, 378 (Bankr. N.D. Ind. 2002). The information in the requests for admission, if admitted by failure to respond, can serve as a factual predicate for a summary judgment motion in an adversary proceeding. See *In re Vianese*, 192 B.R. 61, 66 (Bankr. N.D.N.Y. 1996). If the facts admitted by default are dispositive of the issue, then under Bankruptcy Rule 7036 summary judgment based on those unanswered requests for admission properly may be granted. See *In re Hasbrook*, 289 B.R. at 378.

Based on that, to the extent admissible, the Court will deem admitted all facts stated in the Plaintiff's Requests for Admission. See Fed.R.Bankr.P. 7036/Fed.R.Civ.P. 36(a).

The Court thus finds that Haro specifically admitted that at the time the charges were made, she was not working due to her disability. Because other purported admissions in Sears' Requests for Admission are more problematic, the Court determines that Sears has failed to uphold its burden of proof. More specifically, the scintilla of evidence submitted with the Sears' motion fails to establish that there is no genuine issue as to any material fact and that Sears is entitled to a judgment as a matter of law.

The record before the Court is devoid of admissible facts to sustain the second and third prongs of 523(a)(2)(A), mainly that: (2) at the time of the representation, the debtor knew it to be false or the representation was made with such reckless disregard for the truth as to constitute willful misrepresentation; (3) the debtor made the representation with the intent and purpose of deceiving the creditor. The type of admissible evidence which in the Court's view would sustain Sears' burden of proof was addressed in *Hostetter, supra*, and the Court will not burden this decision with those requirements. The Court will specifically note, however, that a simple act such as making sure that the debtor's Schedules and Statement of Financial Affairs are made part of the record in an adversary proceeding would alleviate some of the

deficiencies.⁷

A statement such as the one made in paragraph 6 of Sears' Requests for Admission is not admissible, as it is more of a conclusion than an assertion of fact. Mainly, whether the defendant had inadequate income depends upon factual inquiries. Also, paragraph 3 of the requests for admission states that Haro incurred certain amount of "luxury expense." The term "luxury expense" is also not a factual assertion, but a legal conclusion. See *Faulk*, 69 B.R. 743. See also *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn*, 130 F.R.D. 92, 96 (N.D.Ind.1990).

In addition, there are more aspects of Sears' record that troubles the Court. In paragraph 2 of the Requests for Admission, Sears states:

That within 60 days prior to filing bankruptcy the Defendant charged Six Thousand Four Hundred Eight Dollars, and Thirty-three Cents (\$6,408.33) to said account.

In paragraph 3, Sears states:

That Six Thousand Eighty-eight Dollars and Thirty Cents (\$,6088.30) of said charges were the result of gambling expenses at the Horseshoe Casino, a luxury expense.

In attempting to establish that at least a part of the debt in question is nondischargeable, Sears relies on §523(a)(2)(C). That section requires the court to make an evidentiary determination as to whether Haro purchased goods and services, or obtained extension of credit, (such as a cash advance), within the framework stated therein. The Court cannot invoke the presumption of nondischargeability under §523(a)(2)(C) and Fed.R.Evid. 301 if the record is contradictory.

⁷ These documents cannot be considered as part of the record in this adversary proceeding - an action entirely separate from the record in the debtor's Chapter 7 case - unless the portions of them which the proponent of the motion for summary judgment desires to be included in the Rule 56(c) record are specifically delineated in the proponent's Statement of Material Facts; N.D. Ind. L.B.R. B - 7056-1.

The contradiction is evidenced in the Sears' Requests for Admission, its complaint, its memorandum of law, and the affidavit of Mr. Miglionico. Unlike the Requests for Admission, all other documents state that within sixty days of Haro's bankruptcy, she incurred \$5,302.79 of charges. Thus, the Plaintiff itself has created a material issue of fact.

To further illustrate the lack of coherent evidence in this record, the Sears Itemization Report, a report which was made part of this record, fails to show what charges were incurred within that 60 day period. Although Haro commenced her bankruptcy case on September 3, 2003, the Itemization Report ends as of June 11, 2003. Based on the lack of evidence, the Court cannot make the necessary findings to avail Sears of the presumption of nondischargeability.

In addition to the above, Sears states that account balance as of the date of the petition was \$14,592.50. Once again, as far as the Court can tell, that figure is derived from the Itemization Report, a report that ends almost three (3) months prior to Haro's bankruptcy.

Based on the above, the Court finds that Sears failed to carry out its burden of proof for purposes of this summary judgment.

IT IS ORDERED that Sears Roebuck and Company's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that a trial to the bench will be held on **July 28, 2005**, commencing at **10:30 a.m.** The Court has reserved one (1) hour for the trial.

Dated at Hammond, Indiana on June 2, 2005.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
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