

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
VICKIE LINA ZIEGERT,	)	CASE NO. 03-32285 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
CITIBANK (SOUTH DAKOTA), NA	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 03-3090
	)	
VICKIE LINA ZIEGERT,	)	
	)	
DEFENDANT.	)	

Appearances:

Timothy A. Hammons, Esq., attorney for plaintiff, Barnes & Thornburg, 11 South Meridian Street, Indianapolis, Indiana 46204; and

Vickie Lina Ziegert, pro se debtor, 3510 North Main Street, Apartment 12, Mishawaka, Indiana 46545.

MEMORANDUM OF DECISION

At South Bend, Indiana, on August 3, 2004.

Before the court are the Complaint to Determine Nondischargeability of Debt Pursuant to 11 U.S.C. § 523 and Plaintiff's Motion for Summary Judgment, both filed by the plaintiff Citibank (South Dakota), NA ("Citibank" or "creditor"), on July 7, 2003. The creditor alleges that the debtor, Vickie Lina Ziegert ("defendant" or "debtor") is indebted to Citibank for unpaid credit card charges in the amount of \$3,442.47. It requests that the court enter summary judgment in Citibank's favor, finding that the obligation of the defendant is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). For the reasons that follow, the court grants the plaintiff's summary judgment motion and determines that the debt at issue is excepted from the defendant's discharge.

### 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

The debtor filed a no-asset chapter 7 case on April 22, 2003. The court's orders discharging the debtor and closing the case were issued on July 31, 2003. On July 7, 2003, however, Citibank filed its dischargeability complaint, alleging that the debtor falsely represented that she intended to repay the open-end credit plan with which she purchased goods and services. The creditor requested that the indebtedness be found nondischargeable under § 523(a)(2)(A). The defendant was represented by counsel in the main bankruptcy case but appeared pro se in this adversary proceeding.<sup>1</sup> Although the court gave the parties additional response time prior to trial, the defendant never replied to Citibank's discovery requests and to its proposed pre-trial order. After the creditor submitted its own pre-trial order, trial was scheduled for March 16, 2004. However, on

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<sup>1</sup> In compliance with the court's scheduling deadlines, the debtor's bankruptcy attorney answered the complaint on the debtor's behalf by generally denying the allegations. He also filed cursory disclosure statements and a mediation report. However, in his Verified Application for Withdrawal of Appearance in Adversarial [sic] Proceeding, counsel for the debtor stated that he had not been in contact with the debtor since the date the complaint was filed, July 7, 2003. The attorney stated that he wrote eight letters to the debtor, who had changed her telephone number, and that she had failed and refused to contact him. On the ground that he could not respond to discovery requests without communication from the debtor, the attorney requested that he be allowed to withdraw his appearance as her attorney. The court found his request moot because he never filed an appearance in the adversary case as counsel for the debtor. *See* Order of November 26, 2003.

February 19, 2004, Citibank filed Plaintiff's Motion for Summary Judgment. Again the defendant declined or failed to make any response. On June 15, 2004, the court took the matter under advisement.

The uncontested facts reflect that the defendant maintained with Citibank an open-end credit account governed by a written agreement. She accepted the terms of the agreement by using the credit card. Among those terms is the promise to repay all extensions of credit as they became due. From November 18, 2002, through December 13, 2002, the defendant used the credit card to make purchases of luxury goods and services totaling \$3,442.47. According to Citibank, each time the defendant made purchases or obtained funds by using the card, she represented that she had the present intent to repay. However, at the time she incurred those charges, her monthly expenses exceeded her regular monthly income and she therefore did not have the ability to repay those charges. The defendant did not deny that, under the circumstances, she would not be able to repay them. Nor did she deny that she did not intend to repay them. Indeed, she has not paid Citibank for the charges. The creditor actually and justifiably relied on the defendant's representations that she would repay each extension of credit as it became due. This reliance caused Citibank to extend credit that it would not otherwise have extended, had it been aware of the defendant's intent not to repay. As a result, the creditor has incurred financial loss and damage. Based on these unchallenged facts, Citibank asks for summary judgment.

### Discussion

The issue in this case is whether the defendant's obligation to the creditor Citibank is excepted from her discharge under § 523(a)(2)(A) of the Bankruptcy Code. That section provides that an individual debtor is not discharged 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 . . . .

11 U.S.C. § 523(a)(2)(A). In order to succeed on a claim under § 523(a)(2)(A), a creditor must establish the following elements: (1) the debtor obtained the money or goods through representations that the debtor either

knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the debtor acted with an intent to deceive the creditor; and (3) the creditor justifiably relied on the debtor's false representations to its 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, 676 (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, 70, 116 S. Ct. 437, 446, 133 L.Ed.2d 351 (1995) (holding that a creditor's reliance need only be justifiable, not reasonable). The creditor must prove each element by a preponderance of the evidence. See *In re Bero*, 110 F.3d 462, 465 (7th Cir.1997).

Citibank seeks summary judgment on the dischargeability issue raised in the complaint on the ground that the defendant had failed to respond to its proof of the elements of § 523(a)(2)(A). Under Rule 56(c) of the Federal Rules of Civil Procedure, 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). In order to demonstrate that real factual disputes exist, the nonmovant must produce evidence of the disputes rather than 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.

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 Barber*, 236 B.R. at 663 (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). In this case, the court finds, the defendant, by not responding to the creditor's motion for summary judgment, failed to comply with the local bankruptcy rule and federal rules and thereby admitted all the material facts in the creditor's motion.

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.

The court determines that the facts set forth by the creditor in its request for admission and its summary judgment motion, being uncontroverted by the defendant, are admitted. The defendant specifically admitted that, each time she made purchases under the credit account, she promised to repay that particular extension of credit made by Citibank. She admitted that she did not repay the charges and knew, at the time she made the charges, that she was insolvent and had no present ability to repay them. She also admitted that she did not expect or intend to be able to repay the charges in the future. It thus is settled, through those admissions, that the debtor incurred the charges at issue at a time when she had neither the ability nor the intention to pay them. Citibank states, and the defendant does not dispute, that it actually and justifiably relied on the defendant's representations to repay and, as a result, suffered financial loss and damage. The creditor urges the court to conclude, from those admitted facts, that the defendant made false representations with the intent to deceive Citibank.

Some courts have validated Citibank's position that, whenever a credit card 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 the 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 banc), which reversed the bankruptcy court's post-trial finding that the credit card debt was dischargeable. With six judges dissenting, the 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." *Id.* at 425. A few courts have entered summary judgment for a creditor under § 523(a)(2)(A) on the ground that the debtor's admissions left no material questions of fact remaining. *See, e.g., American Express Travel Related Services Co., Inc. v. Rusu* (*In re Rusu*), 188 B.R. 325 (Bankr. N.D. Ga. 1995) (granting summary judgment; finding it clear, from the facts admitted by

default, that the debtor fraudulently incurred charges and that the debt was nondischargeable). The Seventh Circuit Court of Appeals has not ruled on the matter.

However, this court firmly believes that summary judgment is a drastic measure, and it gives special scrutiny to the motion when it is based upon admitted facts that are established by a debtor's default — particularly when the debtor is pro se. *See, e.g., Cadlerock Jt. Venture II, L.P. v. Salinardi (In re Salinardi)*, 304 B.R. 54, 58 (Bankr. D. Conn. 2004); *Citibank (S.D.), N.A. v. Savage (In re Savage)*, 303 B.R. 766, 774 (Bankr. D. Md. 2003); *In re Harden*, 282 B.R. 543, 545 (Bankr. M.D. Ga. 2002). Accordingly, it has reviewed the cases that have determined that a failure to respond to a request for admission need not necessarily be deemed an admission. *See, e.g., In re Savage*, 303 B.R. at 773 (deciding, under the circumstances, not to deem admitted the requests for admissions that were unanswered by the pro se defendant); *In re Harden*, 282 B.R. at 545 (finding that the defendant was not deemed to have admitted any facts, despite her failure to answer requests for admissions, because the request was not properly served); *In re Vianese*, 192 B.R. at 66-67 (finding that, because no formal request for admission was sought, the debtors' failure to respond to the Trustee's questions was not deemed an admission). In each of those cases, however, the defendant participated in the adversary proceeding, by answering the complaint or by filing other responses, but failed to respond to the requests for admission. In this case, in contrast, the defendant has failed or refused to respond in any way.<sup>2</sup>

One case that is quite similar in its facts to the one now before this court is *In re Jacobs*, 196 B.R. 429 (Bankr. N.D. Ind. 1996), a decision by the esteemed colleague of this court, the late Bankruptcy Judge Robert K. Rodibaugh. In *Jacobs*, the court found that debtors who stop communicating with their attorney, fail to respond to communications from the court and opposing parties, and fail to attend court hearings “cannot avoid the potentially harsh consequences of the application of Rule 7036.” *Id.* at 431. It determined that the debtors' lack of response to the creditor's pretrial request for admissions, in combination with their other nonresponses,

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<sup>2</sup> In addition, the court points out from the record in this case that the defendant was properly served and no mailings were returned to the court.

conclusively established the key facts under § 523(a)(2)(A). So too, this court finds, after considering the circumstances surrounding this debtor's complete nonresponses, that the defendant is deemed to have admitted by default all the facts in the requests for admission.

However, one other concern causes this court to pause before determining that the admitted facts established by the debtor's default prove fraudulent intent. It is clear that 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*, 124 S. Ct. 906 (2004). In the view of this court, the admitted facts before it are not dispositive of the creditor's contention that the defendant acted with an intent to deceive it. This court agrees with *Jacobs* that it "must make a further finding that, given the undisputed facts," the defendant obtained credit from Citibank under false pretenses, a false representation, or actual fraud. *Jacobs*, 196 B.R. at 432.

*Jacobs* required 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" under § 523(a)(2)(A). *Id.* at 434. After presenting various analytical approaches taken by courts in interpreting § 523(a)(2)(A) — the assumption of risk theory, implied representation theory, totality of the circumstances theory, and common law test — the court reviewed the circumstances of the case before it and determined that the established facts demonstrated that the debt was nondischargeable. *Id.*; *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 particular, it found that the eight cash advances taken by the debtors in the six months prior to bankruptcy were used for purchases in excess of \$6,000. 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. *Jacobs*, 196 B.R. at 434. It therefore granted the creditor's complaint and excepted the debt from the debtors' discharge.

In this case, the court looked at the totality of the circumstances to determine whether the debts were incurred with no intention of paying them. Without the benefit of a response from the defendant, the court must

glean its information from the record before it. It finds that this chapter 7 debtor has been employed as a QA supervisor for seven years. On her schedules she claimed assets of real and personal property. She sought to be released from more than \$61,000 of secured debt and more than \$29,000 of unsecured debt, and she received her discharge in bankruptcy. The charges she made on the Citibank credit card were incurred less than six months before she filed bankruptcy. Among her expenditures were a charge of \$117.85 on adult entertainment at the Pleasureland Museum and \$169.60 at the Piercing Pagoda, presumably for merchandise or body piercing. The creditor designates the defendant's charges as expenditures for "luxury goods"; the court finds that the debtor certainly has not shown that her charges in those establishments were made for necessities.<sup>3</sup> The defendant also made three balance transfers, in the amount of \$2,154.00, and cash advances of \$652.00.

By failing to deny the requests for admission, the defendant admitted that she used the credit card to make purchases of luxury goods and services totaling \$3,442.47. She admitted that she was insolvent when the charges were incurred, that she did not have the ability to repay them and in fact did not intend to repay them. The court, having examined this evidence of record, in addition to the admitted facts, determines that the total evidence establishes that the debtor falsely represented that she would pay Citibank and intended to deceive the creditor when she used her credit card. Accordingly, the court finds that the defendant is not discharged from her credit card debt to Citibank under § 523(a)(2)(A) because the debt was obtained by false pretenses, a false representation, or actual fraud.

The court further determines that, because the defendant did not produce evidence that real factual disputes exist, there is no genuine issue as to any material fact concerning the exception to discharge pursuant to § 523(a)(2)(A). It therefore grants summary judgment to Citibank.

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<sup>3</sup> Although the creditor labels the defendant's purchases "luxury goods," it cannot and does not claim a presumption of nondischargeability for such consumer debts under § 523(a)(2)(C), because the charges were not made on the creditor's account within sixty days prior to bankruptcy, as that subsection requires.

Conclusion

For the reasons set forth above, the court grants the Motion for Summary Judgment filed by the plaintiff Citibank (South Dakota), NA. The court finds that, as a result of the debtor's admissions by default, and in light of the other undisputed facts of record in this case, there is no remaining material fact regarding the applicability of 11 U.S.C. § 523(a)(2)(A) to the defendant-debtor Vickie Lina Ziegert. It is resolved that the debtor incurred the charges in question by false pretenses, a false representation or actual fraud. Accordingly, the debt of Vickie Lina Ziegert to Citibank is excepted from her discharge pursuant to § 523(a)(2)(A). The court grants the motion for summary judgment of Citibank. Judgment is entered for Citibank and against the defendant in this adversary proceeding.

SO ORDERED.

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HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT