

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:

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 May 15, 2006.

Before the court are the Motion for Summary Judgment filed by the plaintiff RIH Acquisitions IN, LLC, doing business as Resorts East Chicago (“plaintiff” or “RIH”), and the Response filed by the defendant Mark Edward Lewinski (“defendant” or “Lewinski”), a chapter 7 debtor. In its Complaint and Amended Complaint, the plaintiff asked the court to find that the defendant’s gambling debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), (B), and/or (C). The Motion for Summary Judgment sought a determination that the debt was excepted from the debtor’s discharge specifically under § 523(a)(2)(C). For the reasons that follow, the court denies the plaintiff’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

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. *See* R. 1, Ex. A, B, C. 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. *See id.*, Ex. I. The defendant also filled out a Credit Application, *see id.*, Ex. G, and a Casino Credit Check Cashing Application, *see id.*, Ex. H, 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. *See id.*, Ex. D, E, F.

In its Complaint, the plaintiff alleged that the \$100,000 advance for gambling was a nondischargeable luxury purchase under 11 U.S.C. § 523(a)(2)(C). *See id.* at 2. 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 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. *See id.* at 3.

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 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. He also listed his 2005 income, as of the date of his petition, as \$15,000; his 2003 income as \$50,000; and his 2004 income as \$75,000. The plaintiff concluded that the defendant had not made \$175,000 in any recent year. *See id.* at 2. It asked that the \$100,000 debt be excepted from discharge under § 523(a)(2)(A), (B), and/or (C). *See id.*

In his Answers to the Complaint and Amended Complaint, the defendant stated that the documents spoke for themselves. He then denied the material allegations in the complaints. *See R. 4, 16.*

The plaintiff then filed its Motion for Summary Judgment. In it, the plaintiff pointed out that the defendant admitted executing the credit documents, receiving the markers on July 15, 2005, and using the \$100,000 for gambling at the plaintiff's casino. He also admitted that the markers were not necessary for his support and that he has not paid back the debt. Based on those admissions, the plaintiff argued that the \$100,000 used by the defendant for gambling within 31 days of his filing bankruptcy is presumed to be a nondischargeable debt under § 523(a)(2)(C). It urged the court to follow *In re Simpson*, 319 B.R. 256 (Bankr. M.D. Fla. 2003), a case with similar facts in which the court determined that the gambling debt was excepted from discharge.

The defendant, in his Response to plaintiff's motion, presented genuine issues of material fact which, in his view, overcome the presumption of dischargeability under § 523(a)(2)(C). *See R. 27* at 1. The defendant explained that he won approximately \$250,000 at a casino in Las Vegas in early 2005, but then lost \$562,000 in Indiana casinos afterwards. All but \$100,000 was paid or credited to his account, he stated in his affidavit. The personnel at the plaintiff's casino telephoned, pressuring him to gamble there. When he executed the markers,

he stated that he was not considering filing bankruptcy. He admitted that he had a gambling compulsion which became worse as his company, Lebo Corporation, went through a bankruptcy and the bank seized its assets. He “was desperate and sick and hoped that a good day at the casino would save him and his family from financial ruin.” *Id.* at 4. The defendant’s physical and psychological conditions deteriorated, and in mid-August 2005 he was hospitalized. Now, with medical treatment, however, he is improved and can start over. *See id.* at 3. Relying on the analysis in *In re Hall*, 228 B.R. 483 (Bankr. M.D. Ga. 1998), the defendant asserted that his financial desperation and illness controlled his actions at the time the plaintiff extended credit to him. In that way, he distinguished his circumstances from those in *In re Simpson*, cited by the plaintiff. He insisted that the debt was not incurred as a “luxury good or service” and that there should be no presumption that the debt is nondischargeable. *See id.* at 5.

In his Statement of Genuine Issues, the defendant listed the material facts that, according to him, precluded the entry of summary judgment because they established genuine issues as to whether the extensions of credit by the plaintiff constituted a “luxury” purchase. *See* R. 29. The facts included his intense gambling compulsion; the deterioration of his physiological and psychological condition to the point of hospitalization; the successful medical treatment; and the fact that he was not “loading up” in contemplation of bankruptcy. The defendant claimed that the debt was not a “luxury” and, even if it was, that the evidence he introduced would overcome the presumption that the debt was nondischargeable.

#### Discussion

The plaintiff is able to prevail on its motion for summary judgment against the defendant only if it meets 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. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994)).

The plaintiff’s Complaint and Amended Complaint sought to except the \$100,000 gambling debt from discharge under § 523(a)(2)(A), (B), and/or (C), but the Motion for Summary Judgment was based solely on subsection (C). The version in effect when the defendant filed his chapter 7 petition provides:

(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 dependant 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 defined in the Consumer Credit Protection Act.

11 U.S.C. § 523(a)(2)(C).

Section 523(a)(2)(C) “eases the creditor’s burden of proof by creating a rebuttable presumption of nondischargeability.” *Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1092 (9th Cir. 1996). “The creditor, to benefit from this presumption, must prove the debt is: 1) a consumer debt for luxury goods or services, 2) of an individual, 3) owed to a single creditor, 4) totaling more than [\$1,225], and 5) incurred within 60 days before the order for relief, i.e. the date of filing the Chapter 7 petition.”<sup>1</sup> *John Deere Cmty. Credit Union v. Feddersen (In re Feddersen)*, 270 B.R. 733, 736 (Bankr. N.D. Iowa 2001); *see also Carroll & Sain v. Vernon (In re Vernon)*, 192 B.R. 165, 170-71 (Bankr. N.D. Ill 1996) (listing elements); *Montgomery Ward & Co. v. Blackburn (In re Blackburn)*, 68 B.R. 870, 873 (Bankr. N.D. Ind. 1987) (same). If the plaintiff is able to show that the defendant’s debt falls within subsection (C), then it is presumed to be nondischargeable. *See Notre Dame Federal Credit Union v. Tondreau (In re Tondreau)*, 117 B.R. 397, 400 (Bankr. N.D. Ind. 1989). However, the presumption is rebuttable; the burden of proving that the debt is dischargeable shifts to the debtor. *See In re Eashai*, 87 F.3d at 1092. Nevertheless, the ultimate burden of proof remains on the plaintiff creditor. *See Sears, Roebuck & Co. v. Green (In re Green)*, 296 B.R. 173, 179 (Bankr. C.D. Ill. 2003); *In re Vernon*, 192 B.R. at 171.

There is no dispute that the defendant in this case is an individual who owed the plaintiff, a single creditor, more than \$1,225 within 60 days before he filed his chapter 7 petition. However, the parties debated whether the gambling debts were consumer debts for luxury goods or services, which are described in the statute as not “goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the

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<sup>1</sup> The legislative intent of § 523(a)(2)(C) was described in the Senate Report:

Excessive debts incurred within a short period prior to the filing of the petition present a special problem: that of “loading up” in contemplation of bankruptcy. A debtor planning [to] file a petition with the bankruptcy court has a strong economic incentive to incur dischargeable debts for either consumable goods or exempt property. In many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent. Not only does this result in direct losses for the creditors that are the victims of the spree, but it also creates a higher absolute level of debt so that all creditors receive less in liquidation. During this period of insolvency preceding the filing of the petition, creditors would not extend credit if they knew the true facts.

S.Rep. No. 65, 98th Cong., 1st Sess. 9 (1983) (*quoted in In re Eashai*, 87 F.3d at 1092).

debtor.” In previous cases this court has found that the presumption applied only to consumer items that qualified as luxury goods, such as cigarettes, lighter, candy, greeting cards, and 4 pairs of dress shoes bought within 5 days. See *In re Tondreau*, 117 B.R. at 401. However, replacement household furniture was not considered a luxury good, and thus no presumption attached to that purchase. See *In re Blackburn*, 68 B.R. at 875.

This court has not had occasion to consider whether gambling debts may be treated as consumer debts for luxury goods or services.<sup>2</sup> The courts that have addressed the question have made fact-specific determinations. Some have found that gambling debts are in the nature of luxury goods and services. See, e.g., *Mirage-Casino Hotel v. Simpson (In re Simpson)*, 319 B.R. 256, 262 (Bankr. M.D. Fla. 2003); *Trump Plaza Assocs. v. Poskanzer (In re Poskanzer)*, 143 B.R. 991, 1000 (Bankr. D.N.J. 1992). Others have found that gambling does not meet the definition of a luxury. See, e.g., *Boyd Gaming Corp. v. Hall (In re Hall)*, 228 B.R. 483, 489 (Bankr. M.D. Ga. 1998). One court, which examined credit card cash advances used for gambling, found that the plaintiff established the § 523(a)(2)(C) presumption but the defendant rebutted the presumption and the debt was dischargeable. See *Novus Servs., Inc. v. Cron (In re Cron)*, 241 B.R. 1, 10 (Bankr. S.D. Iowa 1999).

In this case, the plaintiff argued that the defendant admitted that the casino markers were not necessary for the defendant’s support. The defendant responded that, in his deteriorating physical and mental condition, he gambled to save himself and his family from financial ruin. The court must view the facts in the light most favorable to the nonmovant defendant and must draw reasonable inferences in his favor. See *Brown v. Pitzer*, 249 B.R. 303, 306 (S.D. Ind. 2000); *Chase Manhattan Bank USA, N.A., v. Poor (In re Poor)*, 219 B.R. 332, 334 (Bankr. D. Me. 1998). The court thus finds that there is a genuine issue of material fact concerning the nature of the gambling debt. Because the plaintiff has not demonstrated that the gambling debt, as a matter of

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<sup>2</sup> It is noteworthy that neither party discussed whether the gambling debts were “consumer debts” or “cash advances.” The parties focused only on whether the debts were “in the nature of luxury goods and services” and on whether gambling itself was a necessity or a luxury. The cases and law review articles recognize that courts reviewing the dischargeability of gambling debts now take into consideration the legalization of gambling and the increase in gambling debt along with bankruptcy reform. See, e.g., Alexander Edgar & Ellen L. Triebold, *High Stakes: Gambling on Dischargeability*, 17-May Am. Bankr. Inst. J. 8 (1998); Richard I. Aaron, *Collection of Gambling Debts and the Bankruptcy Reform Act of 2005*,” Gaming L.Rev. 299 (Aug. 2005).

