

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
BRET LEE SWANEY,)	Case No. 01-12810
CAROL LEA SWANEY,)	Chapter 7
)	
Debtors.)	
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)	
AMERICAN EXPRESS CENTURION BANK,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 01-5245
)	
CAROL L. SWANEY a/k/a)	
CAROL LEA SWANEY,)	
)	
Defendant.)	
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**ORDER TEMPORARILY DENYING AMERICAN EXPRESS CENTURION BANK'S
MOTION FOR SUMMARY JUDGMENT AND REQUEST
FOR ATTORNEY'S FEES AND EXPENSES**

This matter comes before the Court on American Express Centurion Bank's ("AECB") motion for summary judgment on its complaint to determine dischargeability under 11 U.S.C. § 523(a)(2)(A).¹ Debtor and defendant Carol L. Swaney is not represented by counsel and neither responded to extensive requests for admission propounded by AECB nor responded to the present motion for summary judgment.² AECB asserts that the matters referenced in the requests for

¹All code references are to the Bankruptcy Code, Title 11, United States Code, unless otherwise noted.

²Ms. Swaney was initially represented by counsel and filed an answer to the complaint. Before American Express' filed its motion for summary judgment, the Court entered an order

admission must be deemed admitted, see Fed. R. Bankr. P. 7036, Fed. R. Civ. P. 36, and that the admissions leave no doubt that defendant's debt to AECB should be excepted from discharge. In light of the circumstances surrounding the defaulted admissions, defendant should be granted an opportunity to be heard before the Court determines that there remain no disputed issues of fact and that AECB is entitled to judgment as a matter of law. AECB's motion for summary judgment is therefore temporarily DENIED. For the reasons stated below, AECB's request for attorney's fees and costs is also temporarily DENIED.

JURISDICTION

This Court has jurisdiction over the matter. See 28 U.S.C. § 1334. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(I).

UNCONTROVERTED FACTS

Debtors had an American Express account upon which both Brett and Carol Swaney could make charges. Between January 4, 2001, and February 5, 2001, defendant charged \$9,920.53 to the account. Debtors filed their Chapter 7 petition on June 12, 2001. Apparently no payments were made on the account after these charges were made. As is commonly known, American Express accounts are payable in full at the end of each billing period. Included among the unpaid charges were two (2) charges to Superior Products for \$4840.76 for "commercial equipment" and one (1) charge to Netmetals.Com for \$4470.03 for "all other direct market."

AECB timely filed its Complaint Objecting to Discharge on September 6, 2001, naming Carol L. Swaney as the only defendant. Defendant, represented by counsel at the time, filed her answer on October 5, 2001. On October 18, 2001, AECB served defendant with

allowing Ms. Swaney's counsel to withdraw as debtors' attorney and Ms. Swaney is now proceeding *pro se*.

interrogatories, requests for admissions, and a request for production of documents. To date, defendant has not answered any of AECB's discovery requests, nor requested the Court for an extension to answer, object to, or otherwise respond to the discovery requests. On October 25, 2001, after the requests for admission were submitted, defendant's counsel, Jeffrey Willis, moved for leave to withdraw as defense counsel in this proceeding, asserting that the defendant had ceased communicating with him and that his fees had not been paid. In his motion, attorney Willis asserted that he had, pursuant to D. Kan. R 83.5.5, made defendant aware of all pending dates and deadlines in the case. Defendant did not respond to the motion to withdraw and, on December 21, 2001, this Court entered an order allowing Willis to withdraw. AECB then filed this motion for summary judgment, relying in large part upon the unanswered requests for admission as a factual and legal predicate for its position.

AECB made some 18 requests for admission, including requests that the defendant admit:

- (1) That defendant was unemployed and that debtors only had disability income at the time of filing, R. Adm. 6;
- (2) That defendant's schedules reflected insufficient income from which to pay AECB and that her monthly expenses exceeded her income, and that defendant therefore "did not intend to honor your obligation to American Express to satisfy the account," R. Adm. 7 and 8;
- (3) That \$9,920.53 (the sum of the three charges noted above) was incurred "through representations that you knew were false or you made with such reckless disregard for the truth as to constitute willful misrepresentations," R. Adm. 9;
- (4) That defendant incurred this debt with knowledge of her inability to repay and without intent to repay, R. Adm. 10 and 11;
- (5) That defendant incurred the balance through "false pretenses, false representation or actual fraud," R. Adm. 13; and
- (6) That AECB "justifiably relied on your false representations," R. Adm. 12.

Defendant's answer to AECB's complaint, filed on October 5, 2001, is the only statement

in the record of her position in this case. In essence, defendant asserts that she was in fact employed at the time of the commencement of the case, that her husband Brett made these charges in her name, and that debtors' having paid AECB some \$4,500 on the previous month's statement rebuts AECB's assertion that the charges were made with knowledge of an inability to repay. She further asserts that her inability to repay came as a result of unspecified unforeseen circumstances.

ANALYSIS

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. Rule 56, in articulating the standard of review for summary judgment motions, provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted). An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the substantive law it is essential to the proper disposition of the claim." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548 (1986). Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, the party opposing the motion must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. Celotex, 477

U.S. at 324.

AECB seeks to have its debt excepted from discharge under § 523(a)(2)(A). Section 523(a)(2)(A) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

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

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

To prevail at trial, AECB would have to prove by a preponderance of the evidence that defendant made false representations or committed actual fraud – that she made representations knowing they were false; that the representations were made with the intent to deceive; that AECB justifiably relied on the representations; and that it suffered a loss and damages as a result of the representations being made. See Field v. Mans, 516 U.S. 59, 116 S. Ct. 437 (1995); Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654 (1991); Fowler Bros. v. Young (In re Young), 91 F.3d 1367, 1373 (10th Cir. 1996).

Because defendant did not respond to AECB' request for admissions, the admissions contained therein are deemed admitted and are conclusively established. Federal Rule of Civil Procedure 36(a) states,

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter...

Fed. R. Civ. P. 36(a) (applicable in bankruptcy pursuant to Fed. R. Bankr. P. 7036). Requests made are appropriately within the scope of discoverable information when they relate either to

propositions of fact or propositions relating to the application of law to fact. In re Adelman, 90 B.R. 1012 (Bankr. D. S.D. 1988). Such requests, if not responded to, are deemed admitted as required by Rule 36 unless they pertain only to propositions of law, in which case, they should be stricken. 90 B.R. at 1014. In general, even default admissions may serve as the basis for the granting of summary judgment under Rule 56 because Rule 36 provides that a matter admitted is conclusively established. In re Niswonger, 116 B.R. 562, 565 (Bankr. S. D. Ohio 1990) (citations omitted). Therefore, in this case, the Court may rely on defendant's "admissions" in determining whether summary judgment lies for AECB.

AECB must demonstrate that defendant made knowingly made representations which were false and that AECB justifiably relied on those representations to its detriment. AECB argues that those representations are embodied in defendant's uses of the credit card. AECB argues that, by use of a credit card, cardholders impliedly represent not only that they intend to pay for the goods and services charged, but also that they have the financial ability to repay. When either of those representations are false, they form the basis for the "actual fraud" exception to discharge. Mem. pp. 5 and 6. See In re Anastas, 94 F.3d 1280 (9th Cir. 1996); In re Melancon, 223 B.R. 300 (Bankr. M. D. La. 1998). Controlling Tenth Circuit authority is not referenced in AECB's papers. In In re Kukuk, 225 B.R. 778, 785 (10th Cir. B.A.P. 1998), the Tenth Circuit Bankruptcy Appellate Panel concluded that the use of a credit card creates an implied representation that the debtor intends to repay, but does *not* create such a representation concerning the debtor's ability to repay. Courts in this Circuit should then determine the subjective intent of the debtor on a case-by-case basis based on the surrounding circumstances and may use *as a guideline* the 12 factor analysis referenced in AECB's brief. 225 B.R. at 786. The B.A.P. points out that mere insolvency is not a substitute for a finding of fraudulent intent. 225 B.R. at 787.

Were this matter before the Court in an evidentiary setting, a review of the 12 steps would be useful. As articulated by the Kukuk court, the 12 factors to be considered include:

- (1) the length of time between the charges made and the filing of bankruptcy;
- (2) whether the debtor consulted an attorney regarding bankruptcy prior to the charges being 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 were made;
- (6) whether the charges were above the credit limit of the account;
- (7) whether the debtor made multiple charges on any given day;
- (8) whether or not the debtor was employed;
- (9) the debtor's employment prospects;
- (10) the debtor's financial sophistication;
- (11) whether there was a sudden change in the debtor's buying habits; and
- (12) whether the purchases were made for luxuries or necessities.

225 B.R. at 786 (citations omitted). The B.A.P. hastens to add, however, that “the non-exclusive list of factors stated above should serve as mere guidelines, with no one factor being determinative. Focusing on the circumstances of a particular case, and not a laundry list of factors, is required if the rule that the creditor has the burden to prove each element of fraudulent misrepresentation and nondischargeability under § 523(a)(2)(A) is to be heeded. (citations omitted).” 225 B.R. at 787.

In this case, the defendant’s failure to respond to the requests for admissions render the matters referred to in the requests conclusive. Defendant has therefore “admitted” that the three

card uses were fraudulent representations that she intended to repay the \$9,920.53 in charges. As a consequence of defendant's inaction, it may be viewed as settled that defendant incurred these charges at a time when she was unemployed and without the intent to repay the debt. By not responding to Admission #12, defendant admitted that AECB was justified in relying on her representations that she would repay the debt. Defendant also admitted to committing actual fraud. Admission # 13 requested defendant to admit that she "incurred \$9,920.53 of the balance of your AECB account through false pretenses, false representation, or actual fraud." By not responding, defendant admitted that statement as well.

Here, resort to the unanswered admissions essentially sidesteps the subjective analysis required by the Tenth Circuit authority. Absent these admissions, applying the subjective test to the record currently before the Court might yield a different result either at trial or on summary judgment. For instance, the charges AECB complains of were made some four months prior to bankruptcy. There is no evidence whatever concerning when an attorney was first consulted by defendant concerning the bankruptcy filing. Only three charges were made, albeit in large amounts. While the debtor's pre-petition financial condition appeared shaky, debtors did manage to pay the preceding month's bill of almost \$4,600. There is some dispute in the non-admissions record about defendant's employment status at the time the charges were made. There is no evidence in the record concerning defendant's financial sophistication, whether there was a sudden change in defendant's buying habits or whether the purchases made were luxuries or necessities. In short, were this Court presented with that record on summary judgment, without the admissions, all doubts and inferences would be resolved in favor of the defendant and AECB's motion would be denied. Only when the admissions are considered does summary judgment lie.

The Court is concerned that the contemporaneous service of the requests for admission and

withdrawal of defendant's counsel may have left defendant without a fair opportunity to respond to AECB's written discovery. It appears, for instance, that AECB served the requests for admission on defendant's attorney and the trustee, not on the defendant herself. In making this observation, the Court intends no criticism of AECB because, at the time of service, October 22, 2001, defendant was still represented. Moreover, requests for admission are typically served on counsel, not on litigants. However, only three days later defendant's counsel moved to withdraw. The objection deadline on the withdrawal motion was set for November 15, 2001 and no one objected.

Rule 36(a) provides for a thirty-day response period to for requests for admission. The rule also appears to permit the Court wide latitude in shortening or lengthening that time period. Under the circumstances in this case, the Court believes that justice requires the defendant be given one opportunity to appear, represented or pro se, and be heard concerning why these admissions were not answered and whether defendant indeed admits the substance of the requests for admission. If defendant fails to appear, or if defendant affirmatively admits the substance of the requests for admission, the Court will consider the admissions conclusive and summary judgment will be entered for AECB accordingly, except as set out below.

AECB also requests an award of attorney's fees of \$1,488.08 and costs of \$150.00, based on the account agreement which allegedly provides for payment of attorney's fees in the amount of 15% of the unpaid balance of the account as well as all costs expended in the collection of the account balance. While AECB is correct that a prevailing creditor in a nondischargeability action may recover attorney's fees as part of the nondischargeable debt if provided for in the credit card contract, see Transouth Financial Corp. of Florida v. Johnson, 931 F.2d 1505 (11th Cir. 1991), AECB has not provided the Court with a copy of Ms. Swaney's AECB contract providing for such

fees and costs. Because there is not a sufficient record before the Court concerning attorney's fees and costs, the Court denies AECB's motion for summary judgment as to its request that attorney's fees and costs to be excepted from discharge. AECB may supplement the record with respect to attorneys fees and expenses.

IT IS THEREFORE ORDERED that American Express Centurion Bank's Motion For Summary Judgment is TEMPORARILY DENIED pending defendant Carol Swaney's appearing before this Court to explain her lack of response to the AECB requests for admission.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT Carol Swaney shall appear before this Court on the 20th day of June, 2002 at 9:00 a.m. in Room 150, United States Courthouse, 401 North Market, Wichita, Kansas for further hearing in this case. The Clerk will give Ms. Swaney notice of this hearing forthwith. Should Ms. Swaney fail to appear, the Court will enter an order GRANTING summary judgment on AECB's motion without further notice and defendant's debt to American Express Centurion Bank in the amount of \$9,920.53 will be excepted from her Chapter 7 discharge pursuant to 11 U.S.C. § 523(a)(2)(A).

Dated this 30th day of April, 2002.

ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS