The relief described hereinbelow is SO ORDERED.

SIGNED this 27th day of April, 2022.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

JAMES ROBERT HOLMES and
STACY ANN HOLMES,

Debtors.

Case No. 18-20578
Chapter 13

AMERI BEST, LLC,
d/b/a AMERIBEST PAYDAY LOANS,

Plaintiff,

v.

JAMES ROBERT HOLMES and
STACY ANN HOLMES,

Defendants.

Adv. No. 18-6044

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS

This is an adversary proceeding brought by creditor/plaintiff Ameribest Payday Loans to determine whether two loans are excepted from discharge under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6).[1] This matter comes before the Court on (1) Ameribest's response to the Court's order to show cause why summary judgment should not be entered in Debtors' favor and (2) Debtors' motion for summary judgment.[2] The Court will enter summary judgment for Debtors: (1) as to the § 523(a)(2)(A) claim because there is no evidence that the transactions at issue caused Ameribest to sustain a loss, and (2) as to the § 523(a)(6) claim because § 523(a)(6) does not except debts from discharge under § 1328(a). Debtors will also be entitled to costs and a reasonable attorney's fee under § 523(d) upon discharge of the debts at issue because Ameribest has not met its burden of demonstrating either substantial justification for its § 523(a)(2) claim or special circumstances that would make such an award unjust.

I. UNDISPUTED FACTS

In December 2017, Debtors each borrowed $500 from plaintiff Ameribest Payday Loans. Each $500 loan charged $75 in interest over a two-week term.[3] Two weeks later, and periodically thereafter until they filed for bankruptcy, each debtor paid Ameribest $575 and borrowed $500 back on the same terms as the previous

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[1] ECF 1 (also containing claims for fraud and breach of contract).

[2] ECF 27 (show-cause order); ECF 29 (Ameribest's response); ECF 30 (Debtors' summary-judgment motion).

[3] This amounts to an annual percentage rate of 391.07%. *See* Claim 3-1 at 3, 4.

loan. The last of these transactions occurred on March 24, 2018, as of which Debtors had paid Ameribest a total of $1,125 in interest. Three days later, on March 27, 2018, Debtors filed for bankruptcy under Chapter 13, scheduling Ameribest as a creditor with an undisputed, unsecured claim for $1,150. Ameribest then brought this adversary proceeding to determine the dischargeability of the March 24, 2018 loans under §§ 523(a)(2)(A) and (a)(6).

II. PROCEDURAL HISTORY

After filing its complaint, Ameribest moved for summary judgment. This Court denied the motion and—noting that Ameribest was $150 *better off* as a result of the March 24, 2018 transactions—ordered Ameribest to show cause why the Court should not (1) enter summary judgment in Debtors' favor and (2) award costs and attorney fees to Debtors under § 523(d).[4] Ameribest responded that summary judgment should not be entered for Debtors because (1) Debtors did not request such relief and (2) "[t]he fact remains that [Debtors] took out new loans three days before filing their case (and likely knew filing was imminent)."[5] As to costs and

[4] ECF 27 at 5-6 (citing Fed. R. Bankr. P. 7056 and Fed. R. Civ. P. 56(f)). Rule 56(f) permits a court, after giving notice and a reasonable time to respond, to (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute. Fed. R. Civ. P. 56(f).

[5] ECF 29 at 1-2.

attorney fees, Ameribest "ask[ed] the Court not to . . . award" them,[6] but did not discuss § 523(d) in particular.

Debtors then filed their own motion for summary judgment, arguing that (1) the record contains no evidence of false representation, intent, or reliance for purposes of Ameribest's § 523(a)(2)(A) claim; and (2) the record contains no evidence that Debtors' conduct was willful or malicious for purposes of Ameribest's § 523(a)(6) claim.[7] Ameribest responded that Debtors' motion "essentially admit[s] the existence of genuine issues of material facts in the case."[8] As to attorney fees, Debtors' motion requested them under § 523(d); Ameribest responded that such request is "premature and/or not proper" because "[Ameribest] has not unsuccessfully prosecuted this adversary proceeding."[9]

III. ANALYSIS

Summary judgment is appropriate where the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A dispute of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The burden of establishing the nonexistence of a genuine dispute is on the movant. *Celotex Corp.*

[6] ECF 29 at 3.

[7] ECF 30 at 3-6.

[8] ECF 33 at 1.

[9] ECF 30 at 7; ECF 33 at 13.

v. Catrett, 477 U.S. 317, 330 (1986). In ruling on a motion for summary judgment, the court must draw all reasonable inferences from the record in favor of the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A. Debtors are entitled to summary judgment on Ameribest's § 523(a)(2)(A) claim because the record contains no evidence that Ameribest sustained a loss.

To establish that a debt is nondischargeable under § 523(a)(2)(A), a creditor must prove by a preponderance of the evidence that:

(1) the debtor made a false representation;

(2) the debtor made the representation with the intent to deceive the creditor;

(3) the creditor relied on the representation;

(4) the creditor's reliance was reasonable; and

(5) the debtor's misrepresentation caused the creditor to sustain a loss.

In re Young, 91 F.3d 1367, 1373 (10th Cir. 1996) (citing *Grogan v. Garner*, 498 U.S. 279, 287 (1991)). Exceptions to discharge are construed narrowly, with doubt resolved in the debtor's favor.[10] *See In re Kaspar*, 125 F.3d 1358, 1361 (10th Cir. 1997). This Court has already observed that there is no evidence that Ameribest sustained a loss from the transactions at issue; Debtors argue that the record

[10] Although there are exceptions to this principle of statutory interpretation, *see, e.g.*, 4 Richard Levin & Henry J. Sommer, *Collier on Bankruptcy* ¶ 523.05 (16th ed. 2019) (discussing § 523(a)(5) and the "congressional policy that favors enforcement of obligations for spousal and child support"), those exceptions do not apply to the present case.

contains insufficient evidence as to false representation, intent to deceive, and reliance.

1. False representation

In *Total Petroleum, Inc. v. Turner (In re Turner)*, Bankr. No. 11-13053, Adv. No. 11-5241, 2012 WL 6680363 (Bankr. D. Kan. Dec. 21, 2012), the bankruptcy court stated:

> A debtor does not make a false representation under § 523(a)(2)(A) merely by presenting a check for payment which later bounces. There must be other acts, other evidence, supporting a claim for fraud or false representations in addition to the 'bad check' to declare a debt on a 'bad check' non-dischargeable under § 523(a)(2).

Id. at *2 (quoting *Groetken v. Davis (In re Davis)*, 246 B.R. 646 (B.A.P. 10th Cir. 2000), *rev'd in part on other grounds*, 35 F. App'x 826 (10th Cir. 2002) (unpublished); and *In re Strecker*, 251 B.R. 878, 882 (Bankr. D. Colo. 2000)). Quoting *In re Turner*, Debtors argue that "[Ameribest] has not alleged any acts to support a claim for fraud or false representations other than the suggestion that filing bankruptcy in and of itself is a false representation to [Ameribest]."[11] However, as Ameribest points out, Debtors did file for bankruptcy only three days after engaging in the transactions at issue here.[12]

In *In re Davis*, the Tenth Circuit B.A.P. stated that "[a] false representation can be established if the debtor did not intend to pay the creditor when the check was issued and knew that the check would bounce." 246 B.R. at 653. While such

[11] ECF 30 at 5.

[12] ECF 33 at 7.

knowledge and intent cannot be inferred from a one-month gap between a payday loan and a bankruptcy petition, *see EZ Loans of Shawnee, Inc. v. Hodges (In re Hodges)*, 407 B.R. 415, 419-20 (Bankr. D. Kan. 2009), Debtors' motion does not explain why knowledge and intent cannot be inferred where, as here, only three days separated the payday loan transactions and the bankruptcy petition. For this reason, Debtors' motion does not demonstrate the lack of a genuine dispute as to false representation, and Debtors have not met their burden as movants on that element of Ameribest's § 523(a)(2)(A) claim.

2. Intent to deceive the creditor

Debtors argue that Ameribest has not demonstrated the lack of a genuine dispute as to their intent to deceive, and that "the Tenth Circuit disfavors granting summary judgment" under such circumstances.[13] However, to say that *Ameribest* is not entitled to summary judgment does not mean that *Debtors* are therefore entitled to summary judgment. Debtors' motion, particularly in light of the three-day gap between the loans at issue and Debtors' Chapter 13 filing, does not establish the lack of a genuine dispute as to intent. Therefore, Debtors have not met their burden as movants on that element of Ameribest's § 523(a)(2)(A) claim.

3. Reliance

Debtors argue that there was no reliance because Debtors made no false representation.[14] However, as stated above, Debtors' motion does not demonstrate

[13] ECF 30 at 5-6 (citing *Country Club Bank v. Polese (In re Polese)*, Bankr. No. 09-20816, Adv. No. 09-6108, 2011 WL 1299252, at *1 (Bankr. D. Kan. Mar. 31, 2011)).

[14] ECF 30 at 6.

the lack of a genuine dispute as to false representation. Because Debtors' motion contains no additional argument as to reliance, and because Ameribest's owner has submitted an affidavit stating, among other things, that he "relied on [Debtors'] actions and promises,"[15] Debtors' motion does not establish the lack of a genuine dispute as to Ameribest's reliance. Therefore, Debtors have not met their burden as movants on that element of Ameribest's § 523(a)(2)(A) claim.

4. Loss

In denying Ameribest's prior motion for summary judgment, the Court ordered Ameribest to show cause why summary judgment should not be entered for Debtors as to its § 523(a)(2)(A) claim on the ground that Ameribest—which was $150 better off as a result of the March 24, 2018 transactions—had sustained no loss.[16] Ameribest responded that (1) Debtors "did not file a summary judgment

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[15] Power Aff. ¶ 20, ECF 33-1.

[16] ECF 27 at 4-5. The Court explained:

> As a result of the December 2017 loans, Debtors owed Ameribest $1,150. Had Debtors engaged in no other business with Ameribest before filing for bankruptcy, Ameribest would have an unsecured claim for $1,150 (plus the contract rate of 3% interest per month from loan maturity through the petition date) and, presumably, that would be that. Instead, between December 2017 and March 24, 2018, each debtor periodically returned to Ameribest to engage in a repayment-followed-by-new-loan transaction, the net effect of which was a $75 interest payment to Ameribest. While Ameribest still has an unsecured claim for $1,150, Ameribest is better off—*by a total of $1,125 in interest payments*—than it would have been had Debtors simply borrowed money three months before filing for bankruptcy. By arguing that the March 24, 2018 transactions render Debtors' loans nondischargeable because they occurred three days before

motion so granting such a motion would be extreme and inappropriate" and (2) "[t]he Court did not state that there is no set of facts Plaintiff may present at trial that could sustain their position at trial."[17] However, as to (1), Rule 56 allows the court to grant summary judgment for a nonmovant and/or to consider summary judgment on its own. *See supra* note 4. And as to (2), the "no-set-of-facts" standard—which applied to motions to dismiss under Rule 12(b)(6) prior to 2007, *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957))—does not apply here. Because Ameribest points to no evidence that it sustained a loss from the transactions at issue, and because loss is a necessary element of a claim for nondischargeability under § 523(a)(2)(A), the Court will enter summary judgment for Debtors on Ameribest's § 523(a)(2)(A) claim.

B. Debtors are entitled to costs and a reasonable attorney's fee under § 523(d) because Ameribest has not demonstrated that its position under § 523(a)(2) was substantially justified.

In its prior order, the Court ordered Ameribest to show cause why it should not award costs and attorney fees to Debtors under § 523(d), which provides:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a

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> the filing of the bankruptcy petition, Ameribest is essentially arguing that regular interest payments from an honest debtor can render a payday loan nondischargeable under § 523(a)(2)(A). This Court categorically refuses to accept that position.

Id. at 5 n.5.

[17] ECF 29 at 1.

> reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Under § 523(d), if the debtor shows that (1) the creditor filed a dischargeability action under § 523(a)(2); (2) the debt sought to be discharged is a consumer debt; and (3) the debt was discharged,[18] then the burden shifts to the creditor to show that its position was substantially justified or, if not, that special circumstances would make an award of costs and fees unjust. *Com. Fed. Bank v. Pappan (In re Pappan)*, 334 B.R. 678, 682 (B.A.P. 10th Cir. 2005) (quoting *Household Bank, N.A. v. Sales (In re Sales)*, 228 B.R. 748, 752 (B.A.P. 10th Cir. 1999)). To determine whether a creditor's position was substantially justified, the court should consider whether the plaintiff has shown (1) a reasonable basis for the facts asserted; (2) a reasonable basis in the law for the legal theory proposed; and (3) support for the legal theory by the facts alleged. *Id.* at 683; *Farmway Credit Union v. Eilert (In re Eilert)*, Case No. 13-41298, Adv. No. 13-7037, 2014 WL 932127, at *2 (Bankr. D. Kan. Mar. 10, 2014). If the court does not find substantial justification or special circumstances, it must award fees and costs to the debtor. *In re Eilert*, 2014 WL 932127, at *2.

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[18] "Where, as here, the debt has not yet been discharged because Debtors are in a Chapter 13 repayment plan, a court may nonetheless determine whether attorney fees shall be awarded, and then stay entry of the judgment to meet the 'debt was discharged' element." *Farmway Credit Union v. Eilert (In re Eilert)*, Case No. 13-41298, Adv. No. 13-7037, 2014 WL 932127, at *1 n.8 (Bankr. D. Kan. Mar. 10, 2014) (citing *Alliant Credit Union v. Baptiste (In re Baptiste)*, Case No. 09 B 07338, 2010 WL 3834607, at *1 (Bankr. N.D. Ill. Sept. 24, 2010)).

Here, Ameribest filed a dischargeability action under § 523(a)(2), the payday loans at issue are consumer debts, and the debts are dischargeable. Therefore, the burden has shifted to Ameribest to show either substantial justification or special circumstances. In its response to the Court's show-cause order, Ameribest argued:

> In Plaintiff's years of experience during its years of operation, most borrowers do not pay off their loans three days before filing their bankruptcy petition. Most close their checking account and cease contact with the Plaintiff. And because there is no contact, Plaintiff deposits the check that is returned to the lender dishonored. Given the Defendants' unusual procedure, Plaintiff felt filing the adversary procedure was appropriate.[19]

Ameribest appears to argue that because *most* borrowers do not pay off loans three days before filing for bankruptcy, it was reasonable for Ameribest to assume that *Debtors* had not done so, and therefore reasonable for Ameribest to file a complaint against Debtors under § 523(a)(2). However, Debtors *did* pay off their previous loans three days before filing for bankruptcy—and a creditor's failure to investigate its own records does not constitute substantial justification for a § 523(a)(2) action. *See In re Pappan*, 334 B.R. at 684. And while Ameribest has offered to voluntarily dismiss its action with prejudice, dismissal would neither serve as a substitute for fees and costs under § 523(d) nor constitute "special circumstances." *See Household Bank, N.A. (Nevada) v. Sales (In re Sales)*, 228 B.R. 748, 753-54 (B.A.P. 10th Cir. 1999). For these reasons, the Court holds that Debtors will be entitled to costs and

[19] ECF 29 at 4.

a reasonable attorney's fee from Ameribest under § 523(d) upon discharge of the loans at issue.[20]

C. Debtors are entitled to summary judgment on Ameribest's § 523(a)(6) claim because § 523(a)(6) does not except debts from a non-hardship Chapter 13 discharge.

Debtors argue that they are entitled to summary judgment on Ameribest's § 523(a)(6) claim because the record contains no evidence that their conduct was willful or malicious; Ameribest responds that questions of intent ought not be resolved on summary judgment.[21] Both arguments are beside the point. As the Court previously explained to Ameribest's counsel in a published decision: section 523(a)(6) does not except debts from a non-hardship Chapter 13 discharge. *See In re Hodges*, 407 B.R. 415, 418-19 & n.6 (Bankr. D. Kan. 2009).[22] Put differently: section 523(a)(6) *does not apply* in Chapter 13 *unless and until* the debtor moves for a *hardship* discharge under § 1328(b).[23] Because Debtors have not moved for a hardship discharge under § 1328(b), Ameribest's § 523(a)(6) claim is *prima facie* frivolous. The Court will therefore enter summary judgment for Debtors on

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[20] The Court notes that Debtors' counsel filed a fee application in Debtors' main bankruptcy case on April 6, 2022. *See In re Holmes*, Case No. 18-20578, ECF 50.

[21] ECF 30 at 6; ECF 33 at 12.

[22] As the Court explained in *In re Hodges*: "Debts excepted from discharge under § 523(a) may be discharged under Chapter 13 unless expressly excluded from discharge in § 1328(a)(2). *Section 523(a)(6) is not incorporated into § 1328(a)(2).*" 407 B.R. at 418 (emphasis added).

[23] The time for filing a § 523(a)(6) complaint when a Chapter 13 debtor moves for hardship discharge under § 1328(b) is governed by Fed. R. Bankr. P. 4007(d). Thus, there has never been a deadline to file a § 523(a)(6) complaint in this case—nor will there be if Debtors receive a full-payment discharge under § 1328(a).

Ameribest's § 523(a)(6) claim. The Court cautions Ameribest and its counsel that the Court may, going forward, sanction such claims as frivolous under Fed. R. Bankr. P. 9011(b) and (c).

D. Debtors are entitled to summary judgment on Ameribest's remaining claims because Ameribest already has an undisputed $1,150 claim against Debtors.

In its prior order, the Court ordered Ameribest to show cause why it should not enter summary judgment for Debtors as to Ameribest's remaining claims for fraud and breach of contract (*see supra* note 1) on the ground that such claims "serve only to reiterate that Debtors owe Ameribest $1,150—the same amount that Debtors listed as undisputed on their Schedule E/F."[24] Because Ameribest pointed to no evidence and provided no argument in response, the Court will enter summary judgment for Debtors as to Ameribest's remaining claims.

III. CONCLUSION

The Court will enter summary judgment for Debtors as to each claim in Ameribest's adversary complaint. Debtors will be entitled to costs and a reasonable attorney's fee under § 523(d) upon motion within 14 days of discharge, pursuant to Fed. R. Civ. P. 54(d) and this order, with such motion to include an itemized statement of the fees and costs incurred in defending this proceeding.

IT IS SO ORDERED.

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[24] ECF 27 at 5.