In the United States Bankruptcy Court

for the Northern District of Iowa

CAROL S. DIETZ Debtor.	Bankruptcy No. 95-21286KD Chapter 7
FCC NATIONAL BANK, dba FIRST CARD Plaintiff vs. CAROL S. DIETZ Defendant.	Adversary No. 95-2158KD

ORDER RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The above-captioned matter came on for hearing before the undersigned on February 6, 1996 on Plaintiff's Motion for Summary Judgment by telephone conference call. Plaintiff FCC National Bank was represented by Chad Leitch. Debtor Carol S. Dietz was represented by Brian Peters. After hearing the arguments of counsel, the Court took the matter under advisement and subsequently requested that Plaintiff file a copy of its Requests for Admissions for the Court's perusal. Plaintiff complied with this request on February 27, 1996 and the matter is now ready for resolution. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(I).

Plaintiff's complaint asserts that its claim arising from Debtor's credit card purchases and cash advances is nondischargeable under 523(a)(2)(A) and(C). In the Motion for Summary Judgment, Plaintiff argues that the elements of 523(a)(2)(C) are established by Debtor's Answer and her failure to respond to Requests for Admissions. Debtor resists summary judgment. She states that factual questions exist which preclude summary judgment. She requests permission to withdraw the prior deemed admissions to Requests for Admission Nos. 9, 13, 15-17 and 20-22. Debtor asserts that these deemed admissions are either untrue or inappropriately represent legal conclusions.

Plaintiff must show the absence of any genuine issue of material fact in order to succeed in its motion for summary judgment. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56; In re Earhart, 68 B.R. 14, 15 (Bankr. N.D. Iowa 1986). In considering a motion for summary judgment, the Court must view the facts in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from the facts. United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1176 (8th Cir. 1992). Where mental state or intent is at issue, summary judgment must be granted with caution, as usually such issues raise questions for determination by a factfinder. Id.

Under Fed. R. Civ. P. 36, applicable to adversary proceedings pursuant to Bankruptcy Rule 7036, each matter of which an admission is requested is deemed admitted unless denied within 30 days after service of the request. Fed. R. Civ. P. 36(a). "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Fed. R. Civ. P. 36(b). The Court may permit such withdrawal or amendment "when the presentation of the merits of the action will be subserved thereby" and the party requesting the admission is not prejudiced thereby. Id. Thus, the court exercises its discretion under Rule 36(b) by considering the effect upon the litigation and prejudice to the resisting party. F.D.I.C. v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994). Permitting amendment of responses is in the interests of justice if the record demonstrates that the "admitted" facts are contrary to the actual facts. Id. at 641.

It is well established that a failure to respond to a request to admit will permit a court to enter summary judgment if the

facts deemed admitted are dispositive. In re Lucas, 124 B.R. 57, 58 (Bankr. N.D. Ohio 1991). A court, however, is not required to do so. Id.; Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1312 (8th Cir. 1983) (stating that "the failure to respond in a timely fashion does not require the court automatically to deem all matters admitted").

It is within the court's discretion to allow untimely answers to requests for admissions, when such an amendment will not prejudice the other party. Furthermore, courts are particularly responsive to allowing late answers to requests for admission when summary judgment is involved.

Lucas, 124 B.R. at 58.

Plaintiff argues that Debtor's deemed admissions prove the elements of its 523(a)(2)(C) action. This section states that for purposes of 523(a)(2)(A), which excepts from discharge debts obtained by false representation or actual fraud, consumer debts owed to a single creditor and aggregating more than $1,000 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 $1,000 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.

11 U.S.C. 523(a)(2)(C). This creates a presumption of fraudulent intent which has three elements: 1) the debt is a consumer debt for luxury goods or cash advances, 2) either of which totals more than $1,000, 3) within 60 days before the order for relief, i.e. the date of filing the Chapter 7 petition (11 U.S.C. 301). In re Smith, 54 B.R. 299, 301 (Bankr. S.D. Iowa 1985). The legislative history indicates that the presumption was meant to prevent "loading up" or credit buying sprees in contemplation of filing bankruptcy. In re Larisey, 185 B.R. 877, 881 (Bankr. M.D. Fla. 1995); Smith, 54 B.R. at 303.

The 523(a)(2)(C) presumption is a rebuttable presumption which, once invoked, places the burden on the debtor to demonstrate that the debt was not incurred in contemplation of bankruptcy. Larisey, 185 B.R. at 881. Evidence of the debtor's intent to repay, or nonfraudulent intent, which raises substantial doubt regarding the existence of the presumed intent can be sufficient to rebut the presumption. Id.; In re Ford, 186 B.R. 312, 321 n.14 (Bankr. N.D. Ga. 1995); In re Leaird, 106 B.R. 177, 180 (Bankr. W.D. Wis. 1989).

In In re Orndorff, 162 B.R. 886, 888 n.2 (Bankr. N.D. Okla. 1994), the court concluded that the presumption was not applicable to a credit card debt arising from the debtor's use of an access check to pay the balance due on another credit card. It held that this did not constitute a cash advance under 523(a)(2)(C). Id. Another court failed to find sufficient evidence that credit card charges were for "luxury goods and services" where many of the sales receipts did not indicate the type of merchandise purchased. In re Barger, 85 B.R. 756, 760 (Bankr. S.D. Ohio 1988). In In re Stewart, 91 B.R. 489, 492 (Bankr. S.D. Iowa 1988), Judge Jackwig denied the plaintiff's motion for summary judgment on its 523(a)(2)(A) claim which was based on the debtor's deemed admissions, warning the debtors that they would be assessed expenses if they failed to admit the truth of any matter which the plaintiff subsequently proved. After trial, the court concluded that the credit card debt was dischargeable. Id. at 493.

Based upon the foregoing, this Court concludes that summary judgment is not supportable on this record. Exhibit A to Plaintiff's Complaint shows two cash advances on 05/30 and 05/31 for a total of $600.00. Other entries of charges have one of two descriptions: "PREMR CASHLK*DIAMOND J" and "COMCHEK*GALENA SILVER". Although these entries appear to be charges for cash at two gambling establishments in Dubuque, Iowa and East Dubuque, Illinois, the Court cannot conclude on this record that they constitute "cash advances" or debts for "luxury goods or services" under 523(a)(2)(C). Plaintiff has not established by undisputable fact that these charges are cash advances or luxury purchases. Plaintiff has not established a clear explanation for the listed descriptions of the charges. Furthermore, Plaintiff's requests for admissions ambiguously and interchangeably refer to these charges as "purchases" and/or "cash advances". See Plaintiff's Request for Admissions, Nos. 10-14.

Debtor denies that the debt is nondischargeable. This can be construed as an assertion that she wishes to rebut the 523(a)(2)(C) presumption. Rebuttal evidence would necessarily involve issues of intent which are generally not susceptible to summary judgment.

Debtor requests permission to withdraw her deemed admissions. Plaintiff has not shown that allowing withdrawal of the

admissions would negatively affect the litigation or prejudice Plaintiff. The Court concludes that Debtor should be allowed to withdraw prior deemed admissions as requested in her resistance to the Motion for Summary Judgment. In summary, the Court concludes that genuine issues of material fact exist concerning whether the charges on Debtor's credit card constitute cash advances or debt for luxury goods or services under 523(a)(2)(C). Therefore, summary judgment is not appropriate. Debtor is allowed to withdraw prior deemed admissions as requested.

WHEREFORE, Plaintiff's Motion for Summary Judgment is DENIED.

FURTHER, Debtor's Request to Withdraw Prior Admissions is GRANTED. Debtor is allowed to withdraw the prior deemed admissions to Requests for Admission Nos. 9, 13, 15-17 and 20-22.

SO ORDERED this 4th day of March, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge